

Commerce Commission

Decision No. 416

Determination pursuant to the Commerce Act 1986 in the matter of an application involving:

MILBURN NEW ZEALAND LIMITED

and

ISAAC CONCRETE LIMITED

The Commission: M N Berry
E C A Harrison
P R Rebstock

Summary of Application: The acquisition by Milburn New Zealand Limited of 100% of the shares of Isaac Concrete Limited.

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

Date of Determination: 26 January 2001

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TABLE OF CONTENTS

THE PROPOSAL	4
THE PROCEDURES.....	4
THE PARTIES.....	4
MILBURN NEW ZEALAND LIMITED	4
ISAAC CONCRETE LIMITED	5
OTHER PARTIES.....	5
THE ASSOCIATION BETWEEN MILBURN, ALLIED CONCRETE AND ALLIED MILBURN	6
BACKGROUND.....	7
THE CEMENT INDUSTRY	7
THE READY-MIXED CONCRETE INDUSTRY.....	9
Process	9
Vertical Integration.....	9
The Cement Input in Ready-mixed Concrete Production.....	10
Pricing.....	10
MARKET DEFINITION.....	11
INTRODUCTION	11
RELEVANT MARKETS	12
Product Dimension	12
Geographic Extent	14
Functional level	17
CONCLUSION ON MARKETS	17
COMPETITION ANALYSIS.....	18
INTRODUCTION	18
The Dominance Test.....	18
THE MARKET FOR THE MANUFACTURE AND WHOLESALE SUPPLY OF CEMENT IN NEW ZEALAND.....	19
Market Concentration	19
Constraint from Existing Competitors	21
Constraint from Entry or Expansion	21
Countervailing Power of Purchasers.....	24
Conclusion on the Cement Market	24
THE MARKET FOR THE MANUFACTURE AND SUPPLY OF READY-MIXED CONCRETE IN DUNEDIN AND ENVIRONS	24
Market Concentration	24
Constraint from Existing Competitors/Expansion	25
Constraint from Entry	29
Countervailing Power of Purchasers.....	29
Conclusion on the Market for the Manufacture and Supply of Ready-mixed Concrete in Dunedin and Environs.....	30
THE MARKET FOR THE MANUFACTURE AND SUPPLY OF READY-MIXED CONCRETE IN NELSON AND ENVIRONS (EXCLUDING MOTUEKA).....	30
Market Concentration	30
Constraint from Existing Competitors/Expansion	31
Constraint from Entry	33
Countervailing Power of Purchasers.....	33
Conclusion on the Market for the Manufacture and Supply of Ready-mixed Concrete in Nelson and Environs (excluding Motueka)	33

THE MARKET FOR THE MANUFACTURE AND SUPPLY OF READY-MIXED CONCRETE IN GREATER CHRISTCHURCH (EXCLUDING ASHBURTON).....	33
Market Concentration	33
Constraint from Existing Competitors/Expansion	34
Constraint from Entry	35
Countervailing Power of Purchasers.....	35
Conclusion on the Market for the Manufacture and Supply of Ready-mixed Concrete in Greater Christchurch (excluding Ashburton)	35
THE MARKET FOR THE MANUFACTURE AND SUPPLY OF READY-MIXED CONCRETE IN TIMARU AND ENVIRONS	35
Market Concentration	35
Constraint from Existing Competitors/Expansion	36
Constraint from Entry	37
Conclusion on the Market for the Manufacture and Supply of Ready-mixed Concrete in Timaru and Environs	37
OVERALL CONCLUSION.....	37
DETERMINATION ON NOTICE OF CLEARANCE.....	38
APPENDIX A: RELATIONSHIP BETWEEN MILBURN, ALLIED MILBURN AND ALLIED CONCRETE.	39

THE PROPOSAL

1. In a notice to the Commission dated 29 November 2000, pursuant to section 66(1) of the Commerce Act 1986 (“the Act”), Milburn New Zealand Limited (Milburn) sought clearance to acquire 100% of the shares of Isaac Concrete Limited (Isaac Concrete).

THE PROCEDURES

2. The application was received on 29 November 2000. Section 66(3) of the Act requires the Commission either to clear or to decline to clear a notice given under section 66(1) within 10 working days, unless the Commission and the person who gave the notice agree to a longer period.
3. In the application, Milburn had sought confidentiality as to the fact of the proposed acquisition, and had requested confidentiality for specific information contained in or attached to the notice. It subsequently withdrew its application for fact confidentiality. It considers that disclosure of certain specific information could result in “material financial loss and prejudice to Milburn”. A confidentiality order was subsequently made in respect of that information for a period of 20 working days from the Commission’s determination of the notice. When that order expires, the provisions of the Official Information Act 1982 will apply to the information.
4. Two extensions of seven and ten working days were sought by the Commission and agreed to by the Applicant. The date of the decision is 26 January 2001.
5. The Commission’s decision is based on an investigation conducted by its staff, and their subsequent advice to the Commission. In the course of this investigation, Commission staff discussed the application with a number of parties including:
 - The Applicant;
 - Isaac Concrete Limited;
 - Firth Industries Limited;
 - The Golden Bay Cement Company Limited;
 - Independent ready-mixed concrete firms in Christchurch, Nelson, Timaru and Dunedin; and,
 - Building and construction firms in Dunedin.

THE PARTIES

Milburn New Zealand Limited

6. Milburn New Zealand Limited (Milburn) is one of New Zealand’s two cement manufacturers. It is a subsidiary of Zealoff Holdings Limited, a wholly-owned subsidiary of Swiss-owned “Holderbank” Financiere Glaris AG, a major international cement producer.

7. Milburn is involved in the manufacture, sale and transportation of cement throughout New Zealand. It owns quarries and sells aggregates in the Auckland area, and has interests in lime and related products. It also operates ready-mixed concrete plants through its own division, Ready Mixed Concrete (RMC Division). RMC Division operates in Auckland, Whangarei and the Waikato.
8. Milburn is interconnected with Allied Milburn Limited (Allied Milburn), owning 50.01% of the shares in this company. Allied Milburn produces and distributes ready-mixed concrete mainly in the North Island, excluding Auckland. It also owns two plants in the South Island, one in Nelson, trading as Transit Mix, and one in Christchurch, trading as Ashby Concrete. The remaining 49.99% of Allied Milburn is owned by Allied Concrete Limited (Allied Concrete). Each shareholding company appoints two directors to the board of Allied Milburn. Appendix A shows the links between these companies in diagrammatic form.
9. Allied Concrete is 100% owned by the H W Richardson Group, a privately-owned South Island company. Allied Concrete produces and distributes ready-mixed concrete in the South Island, and Auckland, and trades as “Allied Concrete”.
10. Peter Carnahan, who is one of the directors of both Allied Concrete and Allied Milburn, also manages both companies. Despite the fact that Allied Milburn operates mainly in the North Island and Allied Concrete operates mainly in the South Island (and Auckland), the two companies are run as one. Their 37 sites are advertised as a nationwide network covering both islands. Allied Milburn also trades under the “Allied Concrete” brand name in the North Island. Allied Concrete and Allied Milburn’s overall national share in ready-mixed concrete production is estimated to be around []¹. For the purposes of this decision, when the term Allied Concrete is used, this refers to Allied Concrete Limited and not to the trade name for Allied Milburn Limited/Allied Concrete Limited.

Isaac Concrete Limited

11. Isaac Concrete Limited (Isaac Concrete) is a wholly-owned subsidiary of The Isaac Construction Company Limited. The parent company has interests in quarrying, the salmon industry, and also has a shareholding in the Clearwater Golf Course development, on the outskirts of Christchurch.
12. The principal activity of Isaac Concrete is the manufacture and sale of ready-mixed concrete from its concrete plants in Christchurch, Timaru, Nelson and Dunedin. It also operates a ball mill from its Christchurch premises, which it uses to grind cement clinker into cement for its own use.

Other parties

13. Firth Industries Limited (Firth) is the other national company producing ready-mixed concrete. It produces and distributes ready-mixed concrete from about 52 fixed sites throughout New Zealand, and its national market share is estimated as []². The Golden Bay Cement Company (Golden Bay) is the other cement manufacturer in New Zealand. Prior to 15 August 2000, Firth owned Golden Bay, and both companies were owned by

¹ Industry source.

² Fletcher Challenge Limited Annual Review to 30 June 2000.

Fletcher Challenge Limited. Under an amalgamation proposal, Firth and Golden Bay have been amalgamated with a number of other companies previously owned by Fletcher Challenge Limited. These companies are now owned by Fletcher Concrete and Infrastructure Limited, with effect from 15 August 2000.

THE ASSOCIATION BETWEEN MILBURN, ALLIED CONCRETE AND ALLIED MILBURN

14. A preliminary question arises as to the status of the relationship between the Applicant, Allied Milburn and Allied Concrete, and whether any or all of these three companies should be treated as interconnected or associated persons for the purposes of section 47 of the Act.

15. Section 47(2) states:

For the purposes of this section and section 48, where two or more persons are interconnected or associated and together are in a dominant position in a market, each of them is deemed to be in a dominant position in that market.

16. Section 2(7) provides:

- (7) For the purposes of this Act, any 2 bodies corporate are to be treated as interconnected if—
- (a) one of them is a body corporate of which the other is a subsidiary (within the meaning of sections 158 and 158A of the Companies Act 1955 or sections 5 and 6 of the Companies Act 1993, as the case may be); or
 - (b) both of them are subsidiaries (within the meaning of those sections) of the same body corporate; or
 - (c) both of them are interconnected with bodies corporate that, in accordance with paragraph (a) or paragraph (b) of this subsection, are interconnected—

and “interconnected bodies corporate” has a corresponding meaning.

17. Section 5 of the Companies Act 1993, as relevant, provides:

5. Meaning of “holding company” and “subsidiary”—

- (1) For the purposes of this Act, a company is a subsidiary of another company if, but only if,
- (a) that other company
 - (i)
 - (ii) is in a position to exercise, or control the exercise of, more than one-half the maximum number of votes that can be exercised at a meeting of the company; or
 - (iii) holds more than one-half of the issued shares of the company, other than shares that carry no right to participate beyond a specified amount in a distribution of either profits or capital;

18. Allied Milburn is a subsidiary of Milburn, as Milburn owns 50.01 % of Allied Milburn's shares. Those two bodies are therefore interconnected.
19. Allied Concrete has the casting vote on the Allied Milburn board (see paragraph 18.5.3 of the Allied Milburn Constitution). As Allied Concrete is in a position to control the voting on the Allied Milburn Board, Allied Milburn is also a subsidiary of Allied Concrete. Those two bodies are therefore interconnected.
20. As Milburn and Allied Concrete are both interconnected with Allied Milburn, Milburn and Allied Concrete are treated as interconnected: section 2(7)(c).
21. Accordingly, for the purposes of section 47, Milburn, Allied Concrete and Allied Milburn are to be treated together for the purpose of assessing dominance. If together they are dominant, each of them is deemed to be dominant.
22. This is consistent with the section 66 application. At paragraph 8.4 the applicant states:

“Although Milburn and Allied Concrete Limited **are deemed to be interconnected**, there will be no change in the relationship between those two companies.” (*emphasis added*)

and at paragraph 9.2:

“Although Milburn and Allied Concrete Limited are deemed to be interconnected through their ownership of Allied Milburn Limited, there is no shareholding link between Milburn and Allied Concrete Limited nor are there any common directors or management. A major consideration for both Milburn and Allied Concrete Limited when Allied Milburn Limited was originally established was to enable both shareholders to be in a position to consolidate the accounts of Allied Milburn Limited. To achieve this end, Allied Milburn Limited needed to be a subsidiary of both Milburn and Allied Concrete Limited. A consequence of achieving subsidiary status with both shareholding companies is that Allied Milburn Limited is the interconnecting link between Milburn and Allied Concrete Limited.”

23. Therefore, the Applicant accepts that Milburn and Allied Concrete are deemed to be interconnected. In these circumstances, it is not necessary to go into the issue of association.
24. Accordingly, the Commission will proceed on the basis that, for the purposes of this application, the Applicant, Allied Milburn and Allied Concrete should be viewed as one head in the market in determining whether there will be, or will likely to be, the acquisition or strengthening of a dominant position in any of the relevant markets.

BACKGROUND

The Cement Industry

25. Ordinary Portland or grey cement is manufactured essentially by heating a mixture of finely ground raw materials—mainly limestone, together with silica, alumina and iron oxide—to a very high temperature in a rotary kiln, where it partially fuses into a material called “clinker”. The clinker is then cooled and ground (together with a small proportion of added gypsum) into a fine powder. The great bulk of cement used in this country is of the ordinary Portland type.
26. Cement is used primarily in construction, and hence its demand is very sensitive to the level of construction activity, which itself is influenced by interest rates and economic growth. Factors which enhance growth in the construction sector—low interest rates, economic growth in the economy as a whole, high immigration and large public sector

works—also tend to generate increased demand for cement and concrete, and vice versa. Construction activity, because it is linked to investment spending in the economy at large, tends to fluctuate more than national output as a whole, and hence so does the demand for cement. The product is essentially undifferentiated.

27. A cement producing plant has a number of important economic characteristics: it is highly capital-intensive, durable (economic life of at least 20 years), mostly specialised (having no alternative uses), and often located in remote areas where alternative uses are limited. Consequently, cement plants have high sunk costs and a low residual value. Significant annual expenditure is required to maintain technical life and efficiency. Capacity has to be large enough to meet demand at peak, which can vary substantially, unless there is recourse to international trade (to import production shortfalls or to export surpluses). Total production costs are claimed to be 30-40% fixed, so that unit cost and profitability are strongly influenced by capacity utilisation, which itself fluctuates strongly with economic activity. Cement plants are also subject to substantial economies of scale.
28. The cement industry in New Zealand is a long-established duopoly, which was completely deregulated in 1986. The Golden Bay Cement Company Limited (Golden Bay) produces cement at its Portland plant near Whangarei, and also from July 1996 has operated a very small plant in the Lee Valley in Nelson (Lee Cement). Milburn operates a single cement plant at Cape Foulwind, near Westport. Together, the two companies produced 915,000 tonnes of cement to the year ended June 1999, most of which was sold domestically, with small amounts being exported to the South Pacific countries by both companies. Production capacity of the combined plants is about one million tonnes per year. The two main plants are of only moderate size by modern world standards.
29. The two companies supply cement to the whole country in bulk by coastal shipping to storage silos in a number of ports, and thence by truck in bulk and bagged form to customers. Cement is a bulky product, and distribution costs are high. Golden Bay operates one ship out of Whangarei, and Milburn operates two ships out of Westport. In 1993, the two companies introduced some co-operative arrangements for the coastal shipping of cement, whereby only Milburn discharges cement into the Port of Taranaki and only Golden Bay discharges cement into Tauranga. In New Plymouth, Milburn then sells this cement to Golden Bay and in a similar way Golden Bay on-sells cement to Milburn in Tauranga.
30. The national cement market is split almost equally between the two companies, and these even shares have been relatively stable for some years.³ Milburn estimates that about [] of its cement sales are in the South Island and [] in the North Island. Demand is significantly larger in the North Island.
31. About 70% of domestically manufactured cement is used in the production of ready-mixed concrete, with the balance being used in precast and prestressed concrete products, together with concrete pipes, blocks, paving and masonry.
32. A feature of the cement industry, which has developed only in about the last 12 years, is the strong vertical integration with cement users. For example, Golden Bay sells about [] of its cement to Firth Industries Limited (Firth), which is by far its biggest customer, and

³In 1996, the (rounded) shares for cement were Golden Bay [], Milburn [], in 1997, [] and [] and in 1998 [] and [] respectively. Volumes of imports against both total domestic consumption and production were estimated as between 0.5 and 1.5 % for the 1997 year by the Ministry of Commerce in its Dumping Investigation report dated May 1998.

Firth is a major producer of concrete products. There is a similarly strong supply link between Milburn cement and the Allied group of companies (although Allied Concrete buys Golden Bay cement in Auckland). Prior to the mid-1980's there was no such vertical integration.

33. Independent concrete companies, including ready-mixed concrete companies, have always had to purchase their cement requirements from either Golden Bay or Milburn in the course of competing with those two companies' downstream affiliates. The advent of imported cement in 1998 and 1999 resulted in a number of ready-mixed concrete companies and other cement users purchasing this cement. However, the quantities being imported have remained small and have reduced significantly since the end of 1999.

The Ready-mixed Concrete Industry

Process

34. Ready-mixed concrete is produced in a batching plant, where the raw materials comprising sand and gravel (the latter is referred to as aggregate), cement, water and additives (if any), are measured and mixed. In the dry-mix process, the ingredients are added in sequence to the rotating drum of the delivery truck, where they are then mixed. In the central, or wet-mix process, the ingredients are mixed before being loaded into the truck. The ready-mixed concrete is then delivered to the site by truck, where it is placed and allowed to cure.
35. Ready-mixed concrete is a perishable product with a maximum life span of about 60-90 minutes from the time of mixing to placement. This can be extended with the use of additives, but these add to the cost. The strength of concrete is measured in MegaPascals or MPa, and is primarily determined by the proportion of cement per cubic metre. Concrete plants may produce concrete from strengths ranging from 10 MPa to 70 MPa, and even higher, but the bulk of sales appears to be made in the 17.5 MPa and 20 MPa grades.⁴ "Household grade" concrete, used by homeowners and builders in the foundations and flooring of houses, paths and driveways, is 17.5 MPa.
36. Apart from ready-mixed concrete of varying strengths, plants also produce concrete with a range of other properties, such as water-proofing, lightness, fast-setting, plasticity (when wet), and aggregate size. Taking into account these various characteristics, a plant may produce well over a hundred product varieties. The rounded river sourced aggregates available in Canterbury need smaller proportions of cement to produce a given MPa rating, and hence ready-mixed concrete is cheaper to produce than in many other parts of the country, where only crushed (angular) aggregates are available.

Vertical Integration

37. As already noted, the two national ready-mixed concrete firms, Firth and Allied, are vertically integrated with cement companies Golden Bay and Milburn respectively. These two firms account for about [] of national ready-mix concrete production, with

⁴ For example, an analysis of 1683 Allied Milburn invoices for New Plymouth covering a four month period in 1999 shows 28% of invoices were 17.5 MPa concrete, and 39% were 20 MPa concrete, together accounting for 67% of all concrete sold over that period. Another sample of Firth Hastings invoices showed a total of 70% of all invoices were made up of 17.5 and 20 MPa concrete.

Firth estimating its share as [], and Allied's share being estimated at []. These figures do not include the share attributable to Milburn's own division, RMC Division, which has an estimated share of national production of around []. This gives a total of [] to the Milburn/Allied Concrete/Allied Milburn group of companies. The large numbers of plants operated by the two major ready-mixed concrete companies reflects the local nature of the markets and of competition, caused by the perishability of the product and its high delivery cost stemming from its bulky nature.

38. Generally speaking, Firth and Allied Concrete/Allied Milburn compete against each other, and against a number of regional or relatively small local businesses operating one or a number of plants. In addition, Milburn's RMC Division competes against Allied Milburn in Hamilton and against Allied Concrete in Auckland. There are several large independent ready-mixed concrete companies operating regionally in Auckland, Wellington, Hawke's Bay and Christchurch.
39. Both industries have a high proportion of fixed costs, and therefore have an incentive to expand market share in order to spread those fixed costs more thinly over a bigger output. However, one experienced industry observer⁵ noted that, both in New Zealand and overseas, the battles for market shares in cement and aggregate occur only in ready-mixed concrete. As a result, there are slim margins in concrete, with the profits being taken in cement.
40. Nearly all the country's 170 batching plants are graded under the New Zealand Standard (NZS) 3104:199, and most have received a "special grading". They are required to be tested annually, to ensure that they comply with this Standard, and this function is primarily undertaken by the New Zealand Ready Mix Concrete Association.

The Cement Input in Ready-mixed Concrete Production

41. Cement is the most expensive ingredient used to produce concrete. The price of cement ranges from about \$190 to \$240 for domestic cement depending upon volume purchased. About 250 kilograms, or one-quarter of a tonne of cement, is required to produce one cubic metre of 17.5 MPa concrete. The cost of the cement input into one cubic metre of concrete is therefore about one-quarter of the price per tonne of cement giving a cement input cost of roughly \$50-60 per cubic metre. The cost of all the raw materials, including cement, required to make one cubic metre of concrete is about \$65-\$85 per cubic metre. The average total cost to produce and deliver a cubic metre of concrete, allowing for plant and truck inputs, brings the total cost to the region of \$110-130 per cubic metre. Therefore, the cement input is the single largest component of total costs and accounts for about one-half of the total cost.

Pricing

42. Ready-mixed concrete is priced by the cubic metre, delivery normally included, and the price varies according to the strength, additives used, and other characteristics of the mix required. However, it seems to be the accepted industry practice to use the price of one cubic metre of 17.5 MPa concrete, delivered, and excluding GST, as the benchmark for describing pricing levels. Price lists, and other pricing information, indicate that the price of 20 MPa concrete is usually about \$5 or \$6 more per cubic metre than 17.5 MPa

⁵ []

concrete, reflecting the extra cost of the slightly greater proportion of cement in the mix. The pricing for other higher grades of concrete usually follow on from the 17.5 and 20 MPa grades in pre-set, incremental steps.

43. Prices vary widely throughout the country depending upon various factors, including the competitive pressures operating in each discrete market. It has been suggested that where only the two major firms are represented in a local market, such as in Taupo, prices are significantly higher than where independent operators are also present. However, if this is the case, there may be a range of other underlying factors contributing to this, such as access to and cost of (including cartage) raw materials and whether the size of market could realistically sustain a third significant player, thus constraining prices. Using the price of 17.5 MPa concrete as a benchmark, currently average prices in Taupo are [], in Auckland [], and in Christchurch, [].

MARKET DEFINITION

Introduction

44. The purpose of defining a market is to provide a framework within which the competition implications of a business acquisition can be analysed. The relevant markets are those in which competition may be affected by the acquisition being considered. Identification of the relevant markets enables the Commission to examine whether the acquisition would result, or would be likely to result, in the acquisition or strengthening of a dominant position in any market in terms of section 47(1) of the Act.
45. Section 3(1A) of the Act provides that:
- “. . . the term ‘market’ is a reference to a market in New Zealand for goods and services as well as other goods and services that, as a matter of fact and commercial common sense, are substitutable for them.”
46. Relevant principles relating to market definition are set out in *Telecom Corporation of New Zealand Ltd v Commerce Commission*,⁶ *Commerce Commission v Carter Holt Harvey Building Products Limited*,⁷ and in the Commission’s *Business Acquisition Guidelines* (“the Guidelines”).⁸ A brief outline of the principles follow.
47. Markets are defined in relation to three dimensions, namely product type, geographical extent, and functional level. A market encompasses products that are close substitutes in the eyes of buyers, and excludes all other products. The boundaries of the product and geographical markets are identified by considering the extent to which buyers are able to substitute other products, or across geographical regions, when they are given the incentive to do so by a change in the relative prices of the products concerned. A market is the smallest area of product and geographic space in which all such substitution possibilities are encompassed. It is in this space that a hypothetical, profit maximising, monopoly supplier of the defined product could exert market power, because buyers, facing a rise in price, would have no close substitutes to which to turn.

⁶ (1991) 4 TCLR 473.

⁷ Williams J, 18 April 2000, HC, yet to be reported.

⁸ Commerce Commission, *Business Acquisition Guidelines*, 1999, pp. 11-16.

48. A properly defined market includes products which are regarded by buyers or sellers as being not too different ('product' dimension), and not too far away ('geographical' dimension), and are therefore products over which the hypothetical monopolist would need to exercise control in order for it to be able to exert market power. A market defined in these terms is one within which a hypothetical monopolist would be in a position to impose, at the least, a "small yet significant and non-transitory increase in price" (the "*ssnip*" test), assuming that other terms of sale remain unchanged.
49. Markets are also defined in relation to functional level. Typically, the production, distribution, and sale of products takes place through a series of stages, which may be visualised as being arranged vertically, with markets intervening between suppliers at one vertical stage and buyers at the next. Hence, the functional market level affected by the application has to be determined as part of the market definition. For example, that between manufacturers and wholesalers might be called the "manufacturing market", while that between wholesalers and retailers is usually known as the "wholesaling market".
50. Often the boundaries of a market are not clearly defined. The market definition exercise is nonetheless valuable because it is a logical way to organise information for the purpose of competition analyses. However, if no competition concerns are apparent in a market which may be regarded as artificially narrow, then it is unnecessary to become unduly concerned about the precise boundaries of that market. This is because where there are no dominance concerns within segments of markets, it should follow that no such concrete will arise in wider markets, however these may be defined.

Relevant Markets

Product Dimension

Cement

51. As indicated above, cement is a major ingredient in the production of ready-mixed concrete and of other concrete products generally used in the building and construction sector. Such products might be expected to compete to some degree with other materials used in construction, such as steel, timber, asphalt and glass, at least at the margin.
52. Commission staff have not come across any information that would allow the application of the *ssnip* test. Even if such information had been available, the value of the test could have been undermined by the possibility that generally, cement prices in New Zealand are above some measure of the 'competitive level', and this in turn underpins relatively high prices for ready-mixed concrete in many parts of the country. Industry observers have commented that New Zealand has amongst the highest priced cement in the world and that the cement industry duopoly enjoys very comfortable profits.
53. To provide some level of comparison to the prices for New Zealand-manufactured bulk cement of between \$190 - \$250 per tonne (depending on volumes), it is useful to consider the costs of importing small quantities of Asian manufactured cement into New Zealand in 1997, 1998 and 1999, as set out in Table 1. It is important to note that the exchange rate decreased by around \$0.17 cents to the \$US during this period.

Table 1
Costs of cement imports over 1997-1999

Month/ year	Exchange rate \$US/\$NZ	FOB \$US	FOB \$NZ	Shipping \$NZ	Other costs, including storage \$NZ	Total \$NZ
Aug 97	0.68	[]	[]	[]	[]	[]
Aug 98	0.51	[]	[]	[]	[]	[]
Dec 99	0.51	[]	[]	[]	[]	[]

54. It can be seen that during these years, Asian cement could be purchased for between US\$[] and US\$[] per tonne, or between NZ\$[] and NZ\$[] per tonne. Shipping and other costs brought the total landed costs to between \$[] and \$[] per tonne. Debagging costs of about [] per tonne and distribution costs need to be added to this, but distribution costs are not usually significant as the cement would be landed at the port nearest to the firm that is purchasing it.
55. In a 1998 survey of the Australia cement industry commissioned by the industry, the two forms of competition discussed are import competition and competition amongst the existing domestic firms. Competition from substitute products is not mentioned.⁹
56. A further consideration is that the demand for cement is likely to be very price inelastic—indicating a relative inability of any substitutes to impose much pricing constraint—because the cost of cement typically makes up a very small proportion of the construction cost of a new building. Because of this, the buyers of cement are likely to be less sensitive to variations in its price.
57. On the basis of the preceding discussion, the Commission has concluded that the relevant product market is one for cement.

Ready-mixed Concrete

58. About 70% of the cement produced in New Zealand is used in ready-mixed concrete production. It is predominantly in this form that cement emerges in its final product form, rather than as cement itself, which is an intermediate product. Hence, the discussion above in relation to the cement product market, and the potential substitutes for it, are also relevant to the consideration of ready-mixed concrete, except that the latter is not exposed to import competition. Since the price of ready-mixed concrete is likely to be inflated by the use of relatively high-priced domestic cement, the application of the *ssnip* test is again likely to be problematic, even if suitable data were available.
59. It is probably correct to say that the bulk of ready-mixed concrete is purchased by small and medium-sized users for laying floors in houses, industrial buildings and footpaths (but not for roads in this country). There are some large projects involving office buildings and various kinds of infrastructure (e.g., bridges, tunnels, dams, cold stores, etc.) which use large quantities of concrete. In New Zealand, there appear to be few close demand-side substitutes for concrete. While in many countries, concrete is used for roading and demand-side substitution would be possible, this does not apply to New Zealand where generally bitumen is used on roads. However, other products can be substituted for concrete in the building/construction sector, such as wooden flooring in houses.

⁹ Aquatech, *The Australian Cement Industry in 1998*, Canberra: Cement Industry Federation, 1998.

60. There are no substitutes on the supply-side, since ready-mixed concrete plants are highly specialised, apart from hand-mixing on a very small scale by home owners and the like. At the other extreme, only the larger ready-mixed concrete suppliers are usually able to compete for the large project work, which may involve hundreds or even thousands of cubic metres of concrete. Virtually all plants are graded, and therefore able to supply a full range of concrete specifications and strengths.
61. On the basis of these considerations, the Commission has concluded that the second relevant product market is that for ready-mixed concrete.

Geographic Extent

Cement

62. As described above, almost all cement used in New Zealand is manufactured at two major sites in the country—Whangarei (Golden Bay) and Westport (Milburn)—from where it is conveyed by specialised coastal shipping to silo depots at a number of ports around the country. From those depots it is distributed in bulk by special road tanker to users such as ready-mixed concrete makers, or bagged and distributed by ordinary trucks to retail outlets such as the various hardware chains.
63. Although both companies try to operate national distribution chains, the high distribution costs, together with the remoteness of the South Island, and especially the lower part of that Island, from Whangarei, means that Milburn supplies almost all of the demand in that region.
64. Cement prices do vary significantly between users, but this is likely to reflect the volume of purchases and the closeness of the association with the supplier at least as much as the customer's location. In addition, cement prices are said to vary according to delivery distances and costs, which is not surprising given the costs of delivering the bulky product.
65. A factor which may indicate that the market is a national one is the ability of imports to enter the country through any of the country's ports. Recent shipments of Asian cement were imported through one or more of Napier, New Plymouth and Tauranga in the North Island, and Lyttelton and Timaru in the South Island.
66. It is also noted that currently, Milburn supplies all or virtually all of the bulk cement used in the south of the South Island, including Timaru, Dunedin, Invercargill and Queenstown. An issue arises as to whether a separate geographic market exists for the supply of cement to the south of the South Island, over which Milburn has the ability to exert market power. The possibility that an alternative supplier might constrain Milburn in this region is discussed at paragraphs 115 to 125. On the basis of that discussion, it has been concluded that there is potential for an alternative supply to this region, and consequently, it is not considered that a separate southern geographic market exists.
67. On the basis of the above discussion the Commission has concluded that the relevant cement market is a New Zealand-wide one.

Ready-mixed Concrete

68. As ready-mixed concrete is a very perishable product, and its bulk renders the trucking costs quite high in relation to its value, it cannot be practicably or economically transported far from the site of the batching plant. A distance of roughly 40 kilometres

appears to be the maximum for ordinary ready-mixed concrete, and about 60 kilometres for concrete in which special life extenders (which add to the expense, and appear only to be used in the more expensive, higher strength concretes) have been added.

69. The distance concrete is transported tends to be less in urban areas, especially where roads are congested. In Auckland, for example, it has been suggested that distances typically do not exceed 20-25 kilometres, although loyalty to customers may mean that on occasions supply may be further. A representative of Allied's Dunedin branch stated that most of its jobs are within a 15 kilometre radius of its plant and the average trip is nine kilometres return. Another North Island operator states that its effective service delivery area is within a 30 kilometre radius of its plant.
70. A concrete firm also must consider the logistics of providing concrete to a big job requiring multiple pours that is situated further than its usual service delivery area. If the job is at a distance of say 60 kilometres, this will take one of its concrete trucks one hour to travel, half an hour to discharge its load, another hour to go back to the plant, and a further half an hour to reload, making a total 3 hour turnaround for each truck. If the client wants six loads of concrete, one every half hour, a firm would need to have six trucks available to service this job, and the whole fleet would be tied up for a good part of the day, limiting its ability to service its local market. It can be seen that even an out of town job requiring one or two pours could tie up one or two concrete trucks and drivers for at least three hours.
71. A further consideration is that the delivery charge is often included in the rate per metre. This means that the extra truck and labour costs of delivery are not usually recouped when servicing clients out of the plant's usual service area. Of course, if there is no local competing firm in the area to whom the client can turn, then a delivery charge may be added and the area that can be economically serviced will increase accordingly. Therefore the presence or absence of other competitors in neighbouring towns is a factor that will also influence the area that may be effectively serviced by a concrete plant.
72. As a consequence of the above factors, the geographic markets for ready-mixed concrete are local in extent. This is reflected in the fact that the two major producers each operate large numbers of plants in ready-mixed concrete scattered across the country in most sizeable population centres, whereas in cement manufacture, where the costs of distribution are also high, they each operate only one.
73. Because of the highly localised nature of ready-mixed concrete markets and the fact that the company to be acquired currently produces concrete in four centres in the South Island, it will be necessary to consider the impact of the proposed acquisition in each of the four geographic markets concerned, being:
 - Dunedin;
 - Nelson;
 - Christchurch; and,
 - Timaru.
74. Each of the firms interviewed in each area was asked to describe the extent of the area *usually* serviced by concrete firms in those centres, if this is defined as the area within which 90% of its deliveries are made. That is not to say that firms do not go outside these areas from time to time, for example, if there was a larger job on the outskirts of their area

or on the boundary of a sister plant's territory, in which case they may each contribute one or more truckloads of concrete to that job.

75. While the Department of Statistics gathers quarterly statistics for ready-mixed concrete production on a regional and metropolitan basis, these are of limited use as the catchment areas used are too wide for the purposes of this analysis.

Dunedin

76. The area generally serviced by the Dunedin ready-mixed concrete firms is Dunedin city, Mosgiel and environs, south to Milton, north to Waikouwaiti, and inland to Outram. Firth also has a satellite plant at Palmerston, but this is outside the geographic area serviced by the Dunedin city-based firms.
77. It is concluded that the Dunedin ready-mixed concrete market is Dunedin city, Mosgiel and environs, south to Milton, north to Waikouwaiti, and inland to Outram.

Nelson

78. The area generally serviced by the Nelson city based firms are the city itself, Richmond, south to Wakefield, west to Mapua and Ruby Bay, and north-east of Nelson city to Atawhai and Okiwi Bay in the Marlborough Sounds. Motueka, situated about 55 kilometres away from Nelson city, has several small firms already servicing its requirements. It has been estimated that it takes about three-quarters of an hour to travel this distance in a loaded concrete truck, and as such, is further than would usually be serviced. The [] said he keeps out of Motueka as there are already several plants servicing it. In the same way, the Motueka firms have reported that they generally do not service the Nelson area as it takes too long to get there and back. In addition, it is perceived as a very competitive market which is well covered by Isaac Concrete and the larger national firms.
79. However, it should be noted that there is an overlap area between the area serviced by the Motueka-based firms and those serviced by the Nelson-based firms, consisting of Mapua, Ruby Bay, and occasionally Tapawera (to the south). The Motueka firms commented that the entry of Isaac Concrete and consequent drop in Nelson prices has had an impact on pricing in Motueka as well. This influence on pricing suggests that these markets are not totally separate, perhaps due to the overlap in the areas that they service.
80. It is concluded, taking a conservative approach, that the Nelson ready-mixed concrete market includes Nelson city, Richmond, south to Wakefield, west to Mapua and Ruby Bay, and north-east of Nelson city to Atawhai and Okiwi Bay in the Marlborough Sounds, but excludes Motueka. If competition concerns do not become apparent in this narrowly defined market, then presumably, no competition concerns should arise if the market were to be defined more widely to include Motueka.

Christchurch

81. From discussions with Christchurch ready-mix firms, it appears that the area generally serviced by Christchurch ready-mixed concrete firms is that of greater Christchurch, including to the north Belfast, Kaiapoi, and Rangiora, south to the Rakaia River, (including Rolleston and Lincoln), inland to Darfield and Oxford, along with Akaroa, and Lyttelton.
82. The Applicant has included Ashburton in its competition analysis of the Christchurch market. Ashburton is 87 kilometres from Christchurch, and from the Commission's

enquiries, it is not serviced by the Christchurch plants. Ashburton has several ready-mixed concrete companies servicing its concrete needs, including Firth, Allied Concrete, Ashburton Contractors Limited (owned by the Ashburton District Council) and several small operators.

83. It is concluded that the Christchurch ready-mixed concrete market is that for greater Christchurch including to the north Belfast, Kaiapoi, and Rangiora, south to the Rakaia River, (including Rolleston and Lincoln), inland to Darfield and Oxford, along with Akaroa, and Lyttelton, but excluding Ashburton.

Timaru

84. From discussions with concrete firms, the area generally serviced by the Timaru ready-mixed concrete firms is Timaru city, south to St Andrews, north to Temuka and Geraldine (where the Firth plant is based), and inland to Cave.
85. Allied Concrete has a satellite plant situated at Makikihi, south of St Andrews but this is too far away to service the Timaru market.
86. It is concluded that the Timaru ready-mixed concrete market is Timaru city, south to St Andrews, north to Temuka and Geraldine, and inland to Cave.

Functional level

Cement

87. The relevant functional level of the market is that for the manufacture and wholesale supply of cement to users and retailers.

Ready-mixed concrete

88. The relevant functional level of the market is that for the manufacture and supply of ready-mixed concrete to end users.

Conclusion on Markets

89. The Commission concludes that the relevant markets are:
- the market for the manufacture and wholesale supply of cement in New Zealand;
 - the market for the manufacture and supply of ready-mixed concrete in Dunedin and environs;
 - the market for the manufacture and supply of ready-mixed concrete in Nelson and environs (excluding Motueka);
 - the market for the manufacture and supply of ready-mixed concrete in greater Christchurch (excluding Ashburton); and,
 - the market for the manufacture and supply of ready-mixed concrete in Timaru and environs.

COMPETITION ANALYSIS

Introduction

90. Section 66(3) of the Act, when read in conjunction with section 47(1) of the Act, requires the Commission to give clearance for a proposed acquisition if it is satisfied that the proposed acquisition would not result, and would not be likely to result in a person acquiring or strengthening a dominant position in a market. If the Commission is not so satisfied, it must decline to give clearance to the acquisition.

The Dominance Test

91. Section 47(1) of the Commerce Act prohibits certain business acquisitions:

“No person shall acquire assets of a business or shares if, as a result of the acquisition, -

- (a) That person or another person would be, or would be likely to be, in a dominant position in a market; or
- (b) That person’s or another person’s dominant position in a market would be, or would be likely to be, strengthened.”

92. Section 3(9) of the Commerce Act states:

“For the purposes of sections 47 and 48 of this Act, a person has ... a dominant position in a market if that person as a supplier ... of goods and services, is or are in a position to exercise a dominant influence over the production, acquisition, supply, or price of goods or services in that market and for the purposes of determining whether a person is ... in a position to exercise a dominant influence over the production, acquisition, supply, or price of goods or services in a market regard shall be had to-

- (a) The share of the market, the technical knowledge, the access to materials or capital of that person or those persons:
- (b) The extent to which that person is ... constrained by the conduct of competitors or potential competitors in that market:
- (c) The extent to which that person is ... constrained by the conduct of suppliers or acquirers of goods or services in that market.”

93. The test for dominance has been considered by the High Court. McGechan J stated:¹⁰

“The test for ‘dominance’ is not a matter of prevailing economic theory, to be identified outside the statute.”

“Dominance includes a qualitative assessment of market power. It involves more than ‘high’ market power; more than mere ability to behave ‘largely’ independently of competitors; and more than power to effect ‘appreciable’ changes in terms of trading. It involves a *high degree of market control*.”

94. Both McGechan J and the Court of Appeal, which approved this test,¹¹ stated that a lower standard than “a high degree of market control” was unacceptable.¹² The Commission has acknowledged this test:¹³

¹⁰ *Commerce Commission v Port Nelson Ltd* (1995) 5 NZBLC 103,762 103,787 (HC).

“A person is in a dominant position in a market when it is in a position to exercise a high degree of market control. A person in a dominant position will be able to set prices or conditions without significant constraint by competitor or customer reaction.

“A person in a dominant position will be able to initiate and maintain an appreciable increase in price or reduction in supply, quality or degree of innovation, without suffering an adverse impact on profitability in the short term or long term. The Commission notes that it is not necessary to believe that a person will act in such a manner to establish that it is in a dominant position, it is sufficient for it to have that ability.”

95. The dominance test is applied in the following section.

The Market for the Manufacture and Wholesale Supply of Cement in New Zealand

Market Concentration

96. As stated earlier, section 3(9)(a) of the Act provides that for the purposes of determining whether a person is in a position to exercise a dominant influence in a market, regard shall be had, inter alia, to the share of the market.

97. The *Business Acquisitions Guidelines* specify certain “safe harbours” which can be used to assess the likely impact of a merger in terms of section 47 of the Act -

“In the Commission’s view, a dominant position in a market is generally unlikely to be created or strengthened where, after the proposed acquisition, either of the following situations exist:

the merged entity (including any interconnected or associated persons) has less than in the order of a 40% share of the relevant market;

the merged entity (including any interconnected or associated persons) has less than in the order of a 60% share of the relevant market and faces competition from at least one other market participant having no less than in the order of a 15% market share.” (p 17)

98. These safe harbours recognise that both absolute levels of market share and the distribution of market shares between the merged firm and its rivals are relevant in considering the extent to which the rivals are able to provide a constraint over the merged firm. The guidelines further state that:

“Except in unusual circumstances, the Commission will not seek to intervene in business acquisitions which, given appropriate delineation of the relevant market and measurement of shares, fall within these safe harbours.”

99. Although, in general, the higher the market share held by the merged firm, the greater the probability that dominance will be acquired or strengthened (as proscribed by section 47 of the Act), market share alone is not sufficient to establish a dominant position in a market. Other factors intrinsic to the market structure, such as the extent of rivalry within the market and constraints provided through possible market entry, also typically need to be considered and assessed.
100. As noted earlier, the cement industry in New Zealand is a long-established duopoly, except for some limited imports over 1997-2000. The two companies involved are the Applicant and Golden Bay.

¹¹ *Commerce Commission v Port Nelson Ltd* (1996) 5 NZBLC 104,142 104,161 (CA).

¹² *Commerce Commission v Port Nelson Ltd* (1995) 5 NZBLC 103,762 103,787 (HC).
and *Commerce Commission v Port Nelson Ltd* (1996) 5 NZBLC 104,142 104,161 (CA).

¹³ *Business Acquisition Guidelines*, Section 7, p21.

101. The estimated domestic market shares are as shown in Table 2.

Table 2
Market shares: NZ Cement market

	Milburn	Golden Bay	Isaac Concrete	TONS Group New Zealand Ltd
NZ Market Share	[]	[]	[]	[]
Tonnes sold annually in NZ	[]	[] ¹⁴	[]	[]
Tonnes: annual production capacity	[]	[]	[]	Presumed unlimited

102. The Department of Statistics collects and publishes figures on annual sales of cement in New Zealand, while the sales volumes for Golden Bay are published in Fletcher Challenge Limited's annual report. Golden Bay exported a further 100,000 tonnes of cement in the year to June 2000.

103. In addition to the two major suppliers, TONS Group New Zealand Limited (TONS) was set up in 1997 to import cement into New Zealand. Although this fledgling importer achieved sales of about [] tonnes in 1998, it achieved sales of [] tonnes in 1999 and has sold less than [] tonnes in the year ending December 2000. This means its market share in the cement market for the calendar year 2000 is less than [] of national cement sales.

104. Included in the assets of Isaac Concrete's concrete business is a ball mill used for grinding cement clinker into cement. The ball mill is situated at Isaac Concrete's Christchurch plant. The Applicant advises that the ball mill dates from the 1950's when it was installed at what was then Milburn's Burnside works. About 10 years ago after the Burnside works closed, Isaac Concrete purchased the ball mill and recommissioned it to grind clinker into cement for its concrete operation. The Applicant reports that the ball mill has a capacity of [] tonnes per hour or [] tonnes per annum. Mr Murray Connor, a director of Isaac Concrete, reports that if the ball mill operated for [

]

105. Mr Alan Jones, another director of Isaac Concrete, explained that the purpose in recommissioning the ball mill was for Isaac Concrete to have control over the raw materials it needed for its concrete production, and also to reduce its input costs. Mr Jones said Isaac Concrete purchased clinker from Milburn at [] per tonne, carted it to its Christchurch plant at a cost of [] per tonne, ground it in the ball mill at a cost of [] per tonne, making a total cost of [] per tonne. [

] per tonne.] Mr Jones explained that the tonnage produced by the ball mill was sufficient to meet nearly all their cement needs for their Christchurch concrete production. He explained that the cost advantage from having their own clinker grinding operation had assisted Isaac Concrete

¹⁴ Sales figure sourced from Fletcher Challenge Limited's annual report for the financial year to June 2000.

to compete in what had become a very competitive ready-mixed concrete market in Christchurch.

106. Mr Jones pointed out that Isaac Concrete did not supply cement from its own ball mill to any of its other plants as it did not have the means to transport it.
107. The Applicant states that the ball mill is the last stage in the cement production process and does not replace the core manufacturing process of cement clinker production. It states it intends to use the ball mill in the event of:
- a breakdown or stoppage at the acquirer’s Westport works; or,
 - a problem with shipping cement from its Westport cement plant, including from difficulties arising from having to operate through a harbour which is influenced by sandbars.
108. Milburn adds that as markets develop, it may use the ball mill for inter-grinding of other materials. Examples given were the grinding of slag cement or carbon rich pot liners from the Bluff Aluminium Smelter, which could then be used as fuel in the acquirer’s Westport plant.
109. The Commission notes that the process of grinding cement clinker in the ball mill is only the end stage of the cement production process, and that Isaac Concrete does not on-sell the cement to other users. If the amount produced by the ball mill is calculated as a proportion of the total amount of cement sold in New Zealand, it amounts to just over [], giving the combined Milburn/Isaac Concrete entity a [] share of that market.
110. Therefore the combined entity’s market share falls within the Commission’s “safe harbours” (refer paragraph 97).

Constraint from Existing Competitors

111. In its application, Milburn points to constraints from its existing competitors in the cement market, namely Golden Bay and TONS, as factors which contribute to ensure that a dominant position is neither acquired nor strengthened.
112. [

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113. The Commission is of the view that while Golden Bay offers some constraint, the extent of that constraint is probably somewhat limited due to the duopolistic structure of the cement market. The Commission also notes that the constraint offered by the existing importing company appears to be of limited significance due to its very low, and declining, market share.

Constraint from Entry or Expansion

114. Both major cement companies service the North Island, Christchurch and the northern part of the South Island (Nelson and Blenheim). Golden Bay delivers cement into its silo at Picton, which is then delivered by road tanker to its plants in Nelson, Blenheim and Christchurch. However, at present, little or no bulk cement is supplied by Golden Bay south of the Rakaia River. This means that, for example, Firth’s plants at Geraldine,

Dunedin, Oamaru, Invercargill, Queenstown and Wanaka use Milburn cement. Therefore the Commission has examined what barriers would be encountered if an alternative supplier were to start distributing and selling cement in the south of the South Island.

115. The Applicant indicates that Golden Bay has the capacity to increase its cement production by [] tonnes to a level of [] tonnes per annum. The Applicant further contends that “there is no reason, with Golden Bay’s current delivery capabilities, why Firth could not easily substitute Golden Bay cement for Milburn cement in any of the South Island markets.”¹⁵

116. Mr Andrew Moss, Export and Logistics Manager for Golden Bay, has explained that Golden Bay has only one specialised ship operating from its Portland plant, the MV Golden Bay (MVGB), and that this vessel is currently operating at very close to full capacity. The MVGB is fully loaded at the Portland works and then makes separate trips to each of the following ports: Auckland, Tauranga, Napier, Wellington and Picton. The full load is discharged at each port (with the exception of Wellington and Picton where sometimes the load is split) and the ship returns to Portland to reload.

117. [

]

118. [

]

119. [

]

120. [

].

121. [

], the Commission has been provided with the following estimated costs for alternative supply, shown in Table 3 below.

Table 3

Estimated and Actual Costs for Alternative Supply of Cement to Dunedin and Christchurch

¹⁵ Attachment to letter dated 15 January 2001 from Anthony Harper, Solicitors for Milburn.

	[]	[]	[]	[]
[]	[]	[]	[]	[]
[]	[]	[]	[]	[]
[]	-	[]	-	[]
[]	-	[]	-	[]
[]	[]	[]	[]	[]
[]	[]	-	[]	-
[]	-	[]	-	[]
[]	-	[]	-	[]
TOTAL	[]	[] []	[]	[]

122. These totals can be compared with Milburn’s prices to customers in the south of the South Island and its costs. The price that Milburn currently charges to Firth Dunedin is [] Milburn has estimated its cost of manufacture and supply to its Dunedin customers as either []¹⁶

123. Therefore although Milburn currently supplies 100% of cement to the south of the South Island, the Commission is satisfied that []

[]. Thus, the potential for an alternative cement supply is considered to provide some competitive constraint to the merged entity.

124. In addition, the Applicant points to relatively low barriers to entry for imported cement. Small volumes of imported Asian cement arrived in New Zealand each year from 1997-2000, and although the quantities have reduced in the 1999 and 2000 years, the threat of imports on a larger scale might provide a limited competitive constraint to Milburn.

¹⁶ []

125. The Commission concludes that the potential for an alternative cement supply, especially to the south of the South Island, combined with the possibility of an increase in cement imports, provides some constraint on the merged entity.

Countervailing Power of Purchasers

126. Purchasers of cement may have some countervailing power in those parts of the country where both cement companies supply cement, ie., throughout the North Island, along with Nelson, Blenheim and Christchurch. However, the Commission considers the level of competitive constraint provided is somewhat limited due to the duopolistic nature of the cement market. As only Milburn supplies cement to the south of the South Island, little countervailing power for those customers currently exists. However, should market conditions change, the Commission considers there would be no significant barriers to prevent an alternative source of cement supply to this region, thus providing a choice of supplier to these customers as well.
127. The Commission concludes the countervailing power of purchasers is a factor providing some constraint on Milburn.

Conclusion on the Cement Market

128. Despite the advent of imports in 1997, the market share analysis above shows the cement market in New Zealand continues to operate as a duopoly, with imports accounting for less than [] in the year ending December 2000. The Commission's view is that the degree of competitive constraint each firm exercises over the other in this duopolistic market is limited. However, given that no market aggregation concerns have arisen as a result of this proposal, along with the potential for an alternative supply to the South Island, the Commission concludes that the acquisition would not result, or would not be likely to result, in any person acquiring or strengthening dominance in the market for the manufacture and wholesale supply of cement.

The market for the manufacture and supply of ready-mixed concrete in Dunedin and Environs

Market Concentration

129. Market shares have been assessed by obtaining the annual cubic metres of all grades of concrete sold by the each of the three competing firms servicing the Dunedin market for the last year.¹⁷ On the basis of the information provided by the Applicant and each competitor in each market, the Commission has estimated the respective market shares of the various companies. This approach has been adopted for the market share analysis in each market considered in this proposal.
130. The estimated market shares for the Dunedin market are as shown in Table 4.

¹⁷ The financial year used by each firm may differ, eg Allied Concrete and Allied Milburn financial year ends 31 August, while the Firth financial year ends 30 June each year.

Table 4
Market shares: Dunedin ready-mixed concrete market

Company	Production m3/annum	Market Share%
Allied Concrete	[]	[]
Isaac	[]	[]
Merged Entity	[]	[]
Firth	[]	[]
Total	[]	[]

131. The Applicant advises that if its acquisition of the shares in Isaac Concrete were to proceed, []. In calculating the merged entity's market share, the Commission has taken a conservative stance and added the total Isaac Concrete market share figure to the Allied Concrete/Allied Milburn share. According to this analysis, if the proposed acquisition goes ahead, the combined entity would have a market share of []. This level of market share exceeds the "safe harbours" set out in paragraph 97.
132. However, as stated earlier, the fact that a proposed acquisition may lead to a market share falling outside these safe harbours, does not necessarily mean that it will be likely to result in the acquisition or strengthening of a dominant position in a market. Additional factors must also be considered before a conclusion on dominance is reached. These other factors are discussed below.

Constraint from Existing Competitors/Expansion

Previous Competitive behaviour

133. If the acquisition were to go ahead, Firth would be the only remaining competitor to the merged entity in the Dunedin market.
134. Firth entered this market about 10 years ago, by building a new plant. It has one plant and four trucks in service. It has built up a substantial market share since entering and has secured a number of major contracts in recent years, including the University of Otago library extension, the Transit New Zealand motorway extension at Fairfield, and a large cool store development on the waterfront. Its plant has the capacity to produce [] cubic metres of concrete per hour, well above its existing production level which averages [] cubic metres per hour. Such excess capacity associated with concrete plants is common within the industry.
135. A Firth representative for the Otago and Southland area, states that Firth is also involved in residential work and that such work provides it with a good stable base to its commercial work, which tends to fluctuate to a greater extent. Firth's residential work is estimated to account for [] of its business in Dunedin. He commented that the number of houses being built in Dunedin is below what would be expected for a city of its size. This comment was echoed by others and is attributed to Dunedin's declining population¹⁸.

¹⁸ According to The Department of Statistics Population Information population estimates, both the Dunedin territorial area and its main urban area declined by 300 people (or 0.03%) in the year 2000, compared to 1999.

136. Activity in the Dunedin ready-mixed concrete market has been dominated by work commissioned by local government and the major institutions, consisting of the University of Otago, with its Medical and Dental schools, and the Dunedin Hospital. In the last couple of years, there have been major works commissioned by these institutions, some of which are ongoing. Market participants commented that there has been little in the way of new industry or new investment in Dunedin by private firms for some years.
137. It is useful at this point to review developments in the Dunedin market since 1990. Until December 1990, there was in effect only one company supplying ready-mixed concrete, but it was trading under two names: Palmers Concrete and Shield Concrete. In late 1990 or early 1991, both Allied and Firth entered, Allied by the acquisition of Shield Concrete and Firth by building a new plant. Firth quickly picked up about a [] share of the market. Palmers' share was estimated at between [] and Allied at around []. The subsequent battle for market share by the three firms saw prices fall to a low point of \$112 for 17.5 MPa concrete in late 1993 or early 1994. Market shares then settled to around [] for Palmers, [] for Allied, while Firth's share steadily grew to around [].
138. Over the period 1994 until May 1998, market shares remained fairly stable and prices gradually returned to levels of about [] for 17.5 MPa concrete. In May 1998, Allied acquired Palmers Concrete, giving it an assumed share of [] of the market. Prices fell by about [] per metre over the next 18 months, which was attributed to the fact that Firth was trying to increase its market share at a time when there was a downturn in building and construction activity in the Dunedin market. By one estimate, the volumes of concrete produced fell by one-third during the latter part of 1997 and over 1998. It is reported that the level of activity picked up from February 1999 onwards. By the time Isaac Concrete arrived in October 1999, prices are reported to have fallen to about [] for 17.5 MPa concrete.
139. Since Isaac Concrete's entry by building a new plant, price competition has been very keen in Dunedin. Market participants generally agree that prices for 17.5 MPa concrete have fallen by about [] per cubic metre, from levels around [] to current levels of []. Isaac Concrete entered with a price of around [] in order to gain a foothold in this market, but subsequently prices fell to levels as low as [] per metre, before recovering to current levels.
140. Mr Murray Connor, a Director of Isaac Concrete, states that it has experienced difficulties in breaking into both the Dunedin and Nelson markets. He attributes this to strong customer loyalties and relationships by the construction firms with their existing suppliers. This has been the case despite the fact that Isaac Concrete was initially offering a cheaper price than the established companies. It appears that for certain key customers – often the large and medium-sized construction firms – the incumbent concrete firms have been prepared to reduce their tender prices to a level equivalent to, or lower than, any previous tender price offered by Isaac Concrete. This is probably due to the fact that established concrete firms are very reluctant to lose any of their customers because, as with a new entrant, retaining their volume of production is crucial to profitability. Thus, with the entry of Isaac Concrete, the Dunedin market has operated very competitively.
141. [

]

142. The Commission notes that, despite the difficulties reported above, Isaac Concrete has acquired a market share of [] in its first 10 months of operation.
143. Market participants have pointed out that prices in the Dunedin ready-mixed concrete market have decreased, both before and since Isaac Concrete's entry. However as noted above, the price decrease prior to Isaac Concrete's entry coincided with a significant downturn in activity in the Dunedin market.

Cement supply

144. The Commission notes that if this acquisition were to proceed, the Applicant, through the merged entity will have [] of the ready-mixed concrete market and would also continue to supply 100% of the cement to this market.
145. Currently, Firth acquires all its cement from Milburn in the south of the South Island, including Dunedin. This arrangement predates the proposed acquisition and is not affected by it. The issue arises as to what extent, if any, this dependence limits Firth's ability to compete in the ready-mixed concrete market.
146. Milburn's cement supply to Firth's Dunedin plant is included in a wider agreement which provides for Milburn to supply cement to certain Firth sites throughout the country. During the last 12 months of the agreement, the amount of cement supplied to Firth under the agreement was []. The amount of cement used by Firth Dunedin is estimated as around [], and thus this cement accounts for only [] of the cement used by Firth under the agreement. Some of the key terms and conditions of that agreement are as follows:
- [];
 - [];
 - [];
 - [];
 - [];
 - [];
-]

147. Milburn's price for cement supplied to Firth Dunedin is currently [].

148. It would appear that [] and there is no other indication that Firth's ability to compete in this market would be detrimentally affected by the terms of the cement supply agreement.

149. However, the supply agreement must be renegotiated at regular intervals and is due to expire in []. The Commission is obliged to consider possible scenarios should this agreement not be renewed, or should it be renewed on less favourable terms to Firth. The Commission has considered several possible outcomes if this were to eventuate.
150. One possible outcome is that Firth would still be able to source cement from Milburn at a competitive price provided it did not engage in competitive conduct which could be to the disadvantage of the merged entity's interests in the Dunedin market. The situation could arise where, with stable market shares accepted by the two major firms remaining in Dunedin, prices could gradually increase to supra-competitive levels.
151. Another possibility is that Milburn could increase its price of cement to Firth.[
]
152. On balance, the Commission considers that it is unlikely that the cement supply agreement will not be renewed, or that it will be renewed under significantly less favourable terms and conditions, for the following reasons:

- the agreement was first negotiated in [], and has been renewed on a regular basis since then;
- [];
- Milburn would face a significant loss of revenue should it lose part or all of Firth's custom on a national basis;
- []

153. However, if this supply agreement were not renewed, the Commission is satisfied that Firth's competitive position in the market would not be compromised, as explained in paragraphs 115 to 125.

Conclusion on constraint from existing competitors/expansion

154. Given that Firth will be the only remaining competitor to the merged entity in the Dunedin market, the Commission has examined previous competitive behaviour displayed by Firth in this market. It has also investigated whether Firth's ability to provide a constraint to the merged entity in the Dunedin market is limited by its current dependence on Milburn for supply of cement. The Commission's enquiries (refer to paragraphs 115 to 125) show that it is possible for Firth to obtain an alternative cement supply, at a cost that should enable Firth to continue to compete in Dunedin. Therefore the Commission concludes that Firth would provide sufficient competitive constraint to the merged entity in the Dunedin ready-mixed concrete market.

Constraint from Entry

155. As it has been concluded that Firth would provide sufficient competitive constraint to the merged entity in this market, it is not necessary in this instance to consider barriers to entry.

Countervailing Power of Purchasers

156. Some major purchasers of concrete in the Dunedin market were interviewed for the purposes of assessing to what degree they would be able to exercise countervailing power against the merged entity.
157. The larger building firms which operate in Dunedin also operate in other South Island centres such as Christchurch, Invercargill and Queenstown. Several of these major firms reported that they have used Isaac Concrete for concrete supply in Christchurch and other centres. Two of these firms have what could be considered to be alliances with either Firth or Allied, and almost always use one or other of these two concrete firms. The others do not have particular alliances and always put work out for tender.
158. Overall, the major firms said they were satisfied that they will have sufficient countervailing power to provide a competitive constraint on the merged entity. Several commented that the market had been operating competitively prior to Isaac Concrete's entry, when only Firth and Allied were operating. One firm's representative commented that if Isaac Concrete exited the Dunedin market, the larger firms will probably not notice any difference, but smaller volume consumers, who have less purchasing power, may have to pay higher prices.

Conclusion on the Countervailing Power of Purchasers

159. It is concluded that the countervailing power of purchasers in the Dunedin market will provide some competitive constraint on the merged entity.

Conclusion on the Market for the Manufacture and Supply of Ready-mixed Concrete in Dunedin and Environs

160. For the purposes of the competition analysis, the merged entity would have a market share of [] which is outside the Commission's safe harbour guidelines.
161. The competitive constraint provided by the single competitor to the merged entity in the Dunedin market, Firth, has been assessed. The Commission has considered the possibility that Firth's ability to compete in this market is limited by its reliance on Milburn for the supply of cement, in the event that the supply agreement was not renewed, or was renewed on less favourable terms. However, the Commission's enquiries show that an alternative cement supply exists should market conditions disadvantage Firth. Firth has significant excess capacity which can be utilised without further investment and so the barriers to expansion in its production of ready-mixed concrete are not significant. The Commission has concluded that the merged entity is likely to be effectively constrained by its existing competitor, Firth.
162. It is considered that the major building firms will be likely to exercise some degree of countervailing power on the merged entity.
163. Taking the above factors into account, the Commission is satisfied that the proposed acquisition would not result, or would not be likely to result, in any person acquiring or strengthening a dominant position in the market for the manufacture and supply of ready-mixed concrete in the Dunedin market and environs.

The Market for the Manufacture and Supply of Ready-mixed Concrete in Nelson and Environs (excluding Motueka)

Market Concentration

164. Market shares have been assessed using the same approach set out under the Dunedin market discussion.
165. The Applicant has argued that the competitive constraints offered by the Motueka ready-mixed concrete firms should be included in the Commission's market share and competition analysis for the Nelson market. For the purposes of this analysis, however, the Commission has concluded that the Motueka and Nelson ready-mixed concrete markets operate separately from each other. The reasons for this are set out in paragraphs 78 to 80 of this decision. Therefore the Commission has not included information from the Motueka firms in the market share analysis.
166. Table 5 shows the market shares in the Nelson ready-mixed concrete market.

Table 5
Market Shares: Nelson ready-mixed concrete market

Company	Production m3/per annum	Market share%
Allied Concrete	[]	[]
Allied Milburn trading as Transit Mix	[]	[]
Isaac	[]	[]
Merged Entity	[]	[]
Firth	[]	[]
Total	[]	[]

167. The Applicant advises that if its acquisition of the shares in Isaac Concrete were to proceed, [

].

In calculating the merged entity's market share, the Commission has taken a conservative stance and added the total Isaac Concrete market share figure to the Allied Concrete/Allied Milburn share. On the basis of this allocation of shares, the combined entity's market share would be []. Therefore, the combined entity's market share falls outside the "safe harbours" discussed at paragraph 97.

168. However, as stated earlier, the fact that a proposed acquisition may lead to a market share falling outside these safe harbours does not necessarily mean that it will be likely to result in the acquisition or strengthening of a dominant position in a market. Additional factors must also be considered before a conclusion on dominance is reached. These other factors are discussed below.

Constraint from Existing Competitors/Expansion

169. The Applicant submits that the combined entity would continue to be constrained by the conduct of existing competitors in the Nelson market. The applicant argues that three small Motueka firms (Motueka Premix, CJ Industries, and Concrete and Metals) would also provide competitive constraint to the Nelson market.

170. The Commission notes that CJ Industries Limited – which had an ungraded plant – has recently purchased the assets of Motueka Premix, and taken over its graded plant. However, the owners of these small plants have indicated to the Commission that they do not, at present, service the Nelson market and have expressed reluctance to do so in the future, even if market conditions were to become significantly more attractive. The reason given for this is simply the time it takes for a loaded concrete truck to travel from Motueka to Nelson. This is estimated to be at least 45 minutes, and when the costs associated with the return trip are added, it becomes uneconomic to incur the extra truck and driver costs. A representative of CJ Industries explained that if concrete is required for a job that he is doing in Nelson, he usually purchases it from one of the firms operating in Nelson. A representative from Isaac Concrete advised that it hires its concrete trucks to Motueka Premix. Hence the Motueka suppliers are not believed to constrain market participants in Nelson to any significant extent.

171. The Commission considers, therefore, that in Nelson, the acquisition will mean that the only remaining competitor would be Firth. The competitive constraint provided by Firth must therefore be assessed.
172. The Commission notes that Firth is the largest ready-mixed concrete producer in New Zealand and has the market power and financial resources to be able to grow its market share.
173. A Firth representative responsible for the Nelson, Blenheim and Wellington regions advised that Firth entered the Nelson ready-mixed concrete market in 1995. Firth built a new plant on land already available at its pre-existing masonry plant. It was decided that Firth would enter the Nelson market on the basis that Nelson had a port facility and a reasonable amount of industry and commercial activity.
174. After only five years, Firth has been able to build up its market share to its current level of []. The Firth representative also pointed out that in the last six months of 2000, Firth's volumes have increased from the rates achieved in the previous financial year (which ended 30 June 2000), to the extent that if current volumes continue, it will pick up another [] cubic metres of concrete production in the current financial year.
175. Another Firth representative described Firth's customer base in Nelson as being "across the board" and noted that, as Nelson is a small market, Firth does not attempt to specialise as it would in a larger centre. He said Firth has built up its customer base through a combination of offering an excellent service and competitive pricing. [] Firth also appears to have a particular focus on the residential market and about 18 months ago, it won a contract with []. Firth estimates its proportion of residential work in this market as about [].
176. Since Isaac Concrete's entry in July 1998, it has been reported that price competition has been very keen in the Nelson market. Market participants generally agree that since Isaac Concrete's entry prices have fallen from levels around [] to current levels of []. Isaac Concrete entered with a price of around [] in order to gain a foothold in this market, but subsequently the market price dropped to levels as low as [] per metre, before recovering to current levels.
177. A manager for Firth's Nelson plant states that the plant has a much greater production capacity than its current level of production. This is the case with almost all concrete plants. Specifically, he estimated that the Nelson plant's capacity is up to [] cubic metres per year as against its current production of [] cubic metres per year. However, a further investment – the purchase of trucks to deliver the concrete – would be necessary if production levels were to go up to this level. Alternatively it could simply borrow or lease trucks from another Firth branch, such as Blenheim. He estimated that the production level could go up to [] cubic metres per year without a requirement for further investment in concrete trucks. Either way, it is clear that Firth has more than sufficient capacity to increase production if the merged entity increases prices to supra-competitive levels, resulting in increased demand for concrete.

Conclusion on Constraint from Existing Competitors/Expansion

178. Taking the above factors into account, the Commission considers Firth's Nelson branch would offer significant constraint on the merged entity's activities in the Nelson market.

Constraint from Entry

179. As it has been concluded that Firth would provide sufficient competitive constraint to the merged entity in this market, it is not necessary in this instance to consider barriers to entry.

Countervailing Power of Purchasers

180. The major purchasers of concrete are building and construction firms. The concrete component of the larger construction jobs is usually tendered. Since Isaac Concrete's entry in July 1998, the concrete price decreases and pricing behaviour by the ready-mixed concrete firms trading in the Nelson market, indicates that purchasers have been able to use their individual purchasing power to exercise a degree of countervailing power over the Nelson ready-mixed concrete firms. It is considered likely that this will provide some constraint on the merged entity.

Conclusion on Constraint by Countervailing Power of Purchasers.

181. The Commission concludes that the countervailing power of purchasers will continue to provide some competitive constraint on the merged entity.

Conclusion on the Market for the Manufacture and Supply of Ready-mixed Concrete in Nelson and Environs (excluding Motueka)

182. For the purpose of the competition analysis, the merged entity would have a market share of [] which is outside the Commission's "safe harbours" guidelines.
183. It is concluded that the merged entity is likely to face sufficient constraint from its existing competitor, Firth.
184. In addition, it has been concluded that the barriers to expansion in this market are not significant, and that the major purchasers of ready-mixed concrete in this market have sufficient countervailing power to provide a constraint on the merged entity.
185. On the basis of the above discussion, the Commission is satisfied that the proposed acquisition would not result, or would not be likely to result, in any person acquiring or strengthening a dominant position in the market for the manufacture and supply of ready-mixed concrete in Nelson and environs (excluding Motueka).

The Market for the Manufacture and Supply of Ready-mixed Concrete in Greater Christchurch (excluding Ashburton)*Market Concentration*

186. The market shares for the Christchurch market have been estimated using the same procedure as that outlined for the Dunedin market. On the basis of this information, the market shares of the firms involved are as shown in Table 6.

Table 6

Market shares: Christchurch ready-mixed concrete market

Company	Production m3/annum	Market Share%
Allied Concrete	[]	[]
Allied Concrete t/a Kiwi Concrete	[]	[]
Allied Milburn t/a Ashby's	[]	[]
Isaac	[]	[]
Merged entity	[]	[]
Firth Industries Limited	[]	[]
Christchurch Readymix Concrete Limited	[]	[]
Others	[]	[]
Total	[]	[]

187. According to this analysis, if the proposed acquisition went ahead, the combined entity would have a market share of []. This level of market share is within the “safe harbours” set out paragraph 97.

Constraint from Existing Competitors/Expansion

188. From its discussions with Christchurch market participants, the Commission concludes that the combined entity will be constrained by competition from the two well-established competitors with significant market shares, ie., Firth [] and Christchurch Readymix Concrete Limited (Christchurch RMC) [].

189. Firth operates its major plant at Hornby, which has a capacity of [] cubic metres per hour. A total fleet of 21 trucks deliver concrete produced at the Hornby plant, of which six trade as Canterbury Minimix. The Canterbury Minimix plant is now closed. Firth has a number of major customers including [] and its distributor, Placemakers.

190. Firth uses Winstone aggregates for its aggregate supply and Golden Bay cement for [] of its cement needs, with the remainder [] of its cement needs coming from Milburn.

191. Mr Roly Grant, of Christchurch RMC, advises that it operates two plants in Christchurch, its major one at Belfast and one at Hornby. Its Hornby plant was built only five years ago. Christchurch RMC has a total fleet of 20 concrete trucks, which move between both plants. Mr Grant advises that his customer base is made up of builders, small contractors and home owners.

192. Mr Grant also advised that Christchurch RMC is []

]

193. Industry participants agree that the Christchurch ready-mixed concrete market has been operating at an extremely competitive level for the last three years or so. Prices have been reported to have been as low as [] recently for some large volume jobs. Mr Grant reports that currently, concrete pricing in Christchurch is [] per cubic metre, at levels of around [] for some builders. However, prices appear to be slowly moving up from these levels, given the flow-on effects of increased diesel prices.

Conclusion on Constraint from Existing Competitors/Expansion

194. The Commission concludes that existing competitors are likely to offer significant constraint on the merged entity. Both Firth and Christchurch RMC have significant excess capacity which could be utilised immediately should market conditions change.

Constraint from Entry

195. As it has been concluded that Firth and Christchurch RMC would provide sufficient competitive constraint to the merged entity in this market, it is not necessary in this instance to consider barriers to entry.

Countervailing Power of Purchasers

196. Again, the major purchasers of concrete are building and construction firms. The concrete component of the larger construction jobs is usually tendered. Over the last three years in particular, the price decreases and pricing behaviour by the ready-mixed concrete firms trading in the Christchurch market, indicate that purchasers have been able to use their individual purchasing power to exercise a degree of countervailing power over the Christchurch ready-mixed concrete firms. It is considered likely that this will continue and will provide some constraint on the merged entity.

Conclusion on Constraint by Countervailing Power of Purchasers.

197. The Commission concludes that the countervailing power of purchasers will continue to provide some competitive constraint on the merged entity.

Conclusion on the Market for the Manufacture and Supply of Ready-mixed Concrete in Greater Christchurch (excluding Ashburton)

198. For the purposes of the competition analysis, the merged entity would have a market share of [] which is within the Commission's safe harbour guidelines.
199. The merged entity is likely to be constrained by the two large and well established existing competitors, Christchurch RMC and Firth. These two competitors both have access to extensive further capacity, without further investment being required, and thus barriers to expansion in this market are not considered significant.
200. It is also considered likely that purchasers will exercise a degree of countervailing power over the merged entity.
201. The Commission is satisfied that the combined entity is not likely to acquire or strengthen a dominant position in the market for the manufacture and supply of ready-mixed concrete in greater Christchurch (excluding Ashburton).

The market for the manufacture and supply of ready-mixed concrete in Timaru and Environs

Market Concentration

202. The market shares for the market have been estimated using the procedure already outlined. On the basis of this information, the market shares of the firms involved are as set out in Table 7.

Table 7
Market shares: Timaru ready-mixed concrete market

Company	Production m3/annum	Market Share%
Allied Concrete	[]	[]
Isaac	[]	[]
Merged entity	[]	[]
Firth	[]	[]
Scott and Lilley	[]	[]
Total	[]	[]

203. According to this analysis, if the proposed acquisition went ahead, the combined entity would have a market share of []. This level of market share [] the “safe harbours” set out in paragraph 97.
204. However, as stated earlier, the fact that a proposed acquisition may lead to a market share falling outside these safe harbours, does not necessarily mean that it will be likely to result in the acquisition or strengthening of a dominant position in a market. Additional factors must also be considered before a conclusion on dominance is reached. These other factors are discussed below.

Constraint from Existing Competitors/Expansion

205. According to the above data, the merged entity will face competition from Firth [] and Scott and Lilley [].
206. Firth services this market from its plant in Geraldine, about 30 minutes drive from Timaru. It has one plant, three concrete trucks, and a mini-mix truck for delivering smaller loads. The manager of the plant states that Firth entered this market about 10 years ago through acquiring an existing plant. It does a substantial amount of rural work for farmers, in addition to light commercial work in Timaru. []
207. Scott and Lilley’s plant is an ungraded one which has been in operation for about 12 years. It has a concrete batching plant in its yard and has two mini-mix trucks, which take up to two cubic metres each. It caters mainly to smaller users, and home owners.
208. Mr Murray Connor, a Director of Isaac Concrete, said Isaac Concrete first entered the Timaru market in 1992. This was Isaac Concrete’s first venture outside the Christchurch market. Isaac Concrete transports its own aggregate from its Christchurch quarry to its Timaru plant. Mr Connor attributed Isaac Concrete’s success in the Timaru market to several factors. One was the fact that it had employed a local manager, whose local knowledge and networks had enabled Isaac Concrete to win over new customers. Another factor was that Isaac Concrete had a concrete pump at its Timaru plant, whereas the other competitors did not have one.

209. Competition in the Timaru market has been described as fairly stable over the last few years.
210. Both Firth, and Scott and Lilley, have excess production capacity at their respective plants which could be utilised without requiring further capital investment. Thus there is no barrier to expansion for either of these firms should the need arise.

Conclusion on Constraint from Existing Competitors/Expansion

211. Firth is a substantial competitor with strong market share, and [] Despite the fact that Scott and Lilley is an ungraded plant catering to the small scale user only, it is a well-established local business and provides further competition to a small part of the market. There are no barriers to expansion by the existing firms. The Commission concludes that competition from these two firms is likely to offer significant constraint on the merged entity.

Constraint from Entry

212. As it has been concluded that Firth in particular would provide sufficient competitive constraint to the merged entity in this market, it is not necessary in this instance to consider barriers to entry.

Conclusion on the Market for the Manufacture and Supply of Ready-mixed Concrete in Timaru and Environs

213. For the purposes of the competition analysis, the merged entity would have a market share of [] which falls [] the Commission's safe harbour guidelines.
214. The major competitor in this market, Firth, has a market share of [], and is considered to provide effective constraint to the merged entity. The barriers to expansion in this market are not considered significant as both competitors have significant excess capacity, which can be utilised without further investment.
215. The Commission is satisfied that the combined entity is not likely to acquire or strengthen a dominant position in the market for the manufacture and supply of ready-mixed concrete in Timaru and environs.

OVERALL CONCLUSION

216. The Commission has considered the likely impact of the proposal in the following markets:
- The market for the manufacture and wholesale supply of cement in New Zealand;
 - The market for the manufacture and supply of ready-mixed concrete in Dunedin and environs;

- The market for the manufacture and supply of ready-mixed concrete in Nelson and environs excluding Motueka;
- The market for the manufacture and supply of ready-mixed concrete in greater Christchurch (excluding Ashburton); and,
- The market for the manufacture and supply of ready-mixed concrete in Timaru and environs.

217. Having regard to the various elements of section 3(9) of the Act, and all the other relevant factors, the Commission is satisfied that implementation of the proposed acquisition, would not result, or would not be likely to result, in any person acquiring or strengthening a dominant position in any of the above mentioned markets.

DETERMINATION ON NOTICE OF CLEARANCE

218. Accordingly, pursuant to section 66(3) of the Commerce Act 1986, the Commission gives clearance for the acquisition by Milburn New Zealand Limited of 100% of the shares of Isaac Concrete Limited.

Dated this 26th day of January 2001.

M N Berry
Deputy Chair

APPENDIX A: RELATIONSHIP BETWEEN MILBURN, ALLIED MILBURN AND ALLIED CONCRETE.