

## **Determination**

### **Bligh Finance Limited and Hire Equipment Group Limited [2013] NZCC 2**

- The Commission:** Dr Mark Berry  
Sue Begg  
Elisabeth Welson
- Summary of application:** The application by Bligh Finance Limited seeking clearance to acquire up to 100% of the shares and/or assets of Hire Equipment Group Limited and its subsidiaries.
- Determination:** Pursuant to section 66(3)(a) of the Commerce Act 1986, the Commission gives clearance for Bligh Finance Limited or any interconnected body corporate thereof to acquire up to 100% of the shares and/or assets of Hire Equipment Group Limited and its subsidiaries.
- Date of determination:** 21 February 2013

Confidential material in this report has been removed. Its location in the document is denoted by [ ].

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## The proposal

1. A notice under s 66(1) of the Commerce Act 1986 (the Act) was registered on 15 October 2012. Bligh Finance Limited (which owns Hirepool Limited (Hirepool)) or any of its interconnected bodies corporate (Bligh) sought clearance to acquire up to 100% of the shares and/or assets of Hire Equipment Group Limited and its subsidiaries (Hirequip).

## The decision

2. The Commission considers that the markets relevant to this application are:
  - 2.1 the national market for the supply of heavy construction and earthworks equipment hire services (heavy equipment over 12 tonnes); and
  - 2.2 sub-regional markets for the supply of building construction and maintenance equipment hire services (equipment up to 12 tonnes).
3. In the heavy equipment market, the Commission considers that the merged entity would be constrained by significant competition from Porter Hire as well as other competitors.
4. In the markets for building construction and maintenance equipment hire services, the Commission considers that the presence of existing competitors, low barriers to entry and/or the countervailing power of large customers are likely to be sufficient to constrain the merged entity in each sub-regional market.
5. Accordingly, the Commission is satisfied that the proposed acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in any of the relevant markets.

## Procedure

6. Section 66(3) of the Act requires the Commission to either clear or decline to clear the acquisition referred to in a s 66(1) notice within 10 working days unless the Commission and the person who gave notice agree to a longer period. An extension of time was agreed between the Commission and Bligh. Accordingly, a decision on the application was required by 28 February 2013.

## Statutory framework

7. Any person who proposes to acquire assets of a business or shares can apply for clearance of that acquisition under s 66 of the Act.
8. If the Commission is satisfied under s 66(3)(a) of the Act that the proposed acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in a market, the Commission must give a clearance for the proposed acquisition.

9. The Court of Appeal in *Port Nelson v Commerce Commission*<sup>1</sup> noted that for something to be “likely” it must be “above the mere possibility but not so high as more likely than not and is best expressed as a real and substantial risk that the stated consequence will happen”.
10. The High Court in *Woolworths & Ors v Commerce Commission* observed that “...a substantial lessening of competition is one that is “real or of substance” as distinct from ephemeral or nominal. Accordingly a substantial lessening of competition occurs if it is likely that there will be a reduction in competition that is real or of substance.”<sup>2</sup> A substantial lessening of competition in a significant section of a market, may, according to circumstances, be a substantial lessening of competition in a market.<sup>3</sup> Hence the Commission conducts its analysis across all customers in a market.

### Analytical framework

11. The Commission’s analytical framework for assessing a substantial lessening of competition in the context of an acquisition is described in the Commission’s Mergers and Acquisitions Guidelines.<sup>4</sup>
12. A useful tool in the Commission’s assessment is determining the affected market or markets. To do this, the Commission identifies the areas of overlap between the acquirer and the target, and then considers what, if any, products and geographic regions, constitute relevant close substitutes from both a customer’s and a supplier’s point of view.<sup>5</sup>
13. The Commission uses a forward-looking analysis to assess whether a substantial lessening of competition is likely. This exercise “requires a comparison of the likely state of competition if the acquisition proceeds (the factual), against the likely state of competition if it does not (the counterfactual)”.<sup>6</sup>
14. In framing a suitable counterfactual, the Commission bases its view on a pragmatic and commercial assessment of what is likely to occur in the absence of the proposed acquisition.<sup>7</sup>

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<sup>1</sup> *Port Nelson v Commerce Commission* [1996] 3 NZLR 554 at 562-563 (CA).

<sup>2</sup> *Woolworths & Ors v Commerce Commission* (2008) 8 NZBLC 102,128 (HC) at [127].

<sup>3</sup> As the Federal Court of Australia noted in *Dandy Power Equipment Pty Ltd & Anor v Mercury Marine Pty Ltd* (1982) 64 FLR 238, 260; 44 ALR 173, 192; ATPR 40-315, 43,888, cited with approval by McGechan J in *Commerce Commission v Port Nelson Ltd* (1995) 6 TCLR 406 at 435: “Although the words “substantially lessened in a market” refer generally to a market, it is the degree to which competition has been lessened which is critical, not the proportion of that lessening to the whole of the competition which exists in the total market. Thus a lessening in a significant section of the market, if a substantial lessening of otherwise active competition may, according to circumstances, be a substantial lessening of competition in a market”.

<sup>4</sup> Commerce Commission *Mergers and Acquisitions Guidelines* (2004).

<sup>5</sup> The Commission’s approach to defining markets is discussed further in the market definition section at paras 28 to 31 below.

<sup>6</sup> *Commerce Commission v Woolworths Ltd* (2008) 8 NZBLC 102,336 (CA) at [63].

<sup>7</sup> *New Zealand Electricity Market* (Commerce Commission Decision 277, 30 January 1996), at 16.

15. A comparison of the extent of competition in the relevant markets in the factual and counterfactual scenarios enables the Commission to assess the extent of any lessening of competition under the proposed acquisition, and whether that contemplated lessening is likely to be substantial.
16. The High Court in *Air New Zealand v Commerce Commission (No.6)*<sup>8</sup> accepted that an absence of market power would suggest there had been no substantial lessening of competition in a market but did not see this as a reason to forgo an analysis of the counterfactual as well as the factual.
17. The Commission's standard time frame for conducting competition analysis in respect of proposed acquisitions is two years.<sup>9</sup> This two year time frame was adopted in *Air New Zealand v Commerce Commission (No.6)*<sup>10</sup> when assessing the LET test for entry and the prospect of a substantial lessening of competition,<sup>11</sup> although the Commission recognises that, in certain cases, a different time frame may be appropriate.<sup>12</sup> As the High Court noted in *Woolworths & Ors v Commerce Commission*,<sup>13</sup> the question is what the Commission can determine now about the likely future.

## Parties

### Hirepool

18. Bligh is the owner of Hirepool. Hirepool is a rental business that primarily hires out general construction and building equipment. Hirepool also hires out other, more specialist, items including motor vehicles, marquee and event equipment, portable toilets, and portable buildings. Hirepool has 46 branches throughout the country.

### Hirequip

19. Hirequip, like Hirepool, hires out general construction and building equipment and other, more specialist, items such as motor vehicles, marquee and event equipment, portable toilets, and portable buildings. Hirequip has 37 branches throughout the country.

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<sup>8</sup> *Air New Zealand v Commerce Commission (No.6)* (2004) 11 TCLR 347. Justice Rodney Hansen stated at [42] that "...a comparative judgment is implied by the statutory test which now focuses on a possible change along the spectrum of market power rather than on whether or not a particular position on that spectrum, that is, dominance has been attained."

<sup>9</sup> Merger and Acquisitions Guidelines, above n4 at p 13.

<sup>10</sup> *Air New Zealand v Commerce Commission (No 6)* above n8.

<sup>11</sup> A longer period was adopted by all parties for assessing benefits and detriments under the public benefit test required by the authorisation regime.

<sup>12</sup> In *Commerce Commission v New Zealand Bus Limited* (2006) 11 TCLR 679 at [155] Miller J adopted a three year time frame to examine the likelihood of entry.

<sup>13</sup> *Woolworths & Ors v Commerce Commission* (HC) above n2 at [131].

## Background

### The industry

20. The hire industry is comprised of numerous businesses hiring out varying sizes and ranges of equipment. There are 'general hire' businesses that supply a wide range of equipment and promote themselves as a 'one-stop-shop' where customers can get all their hire equipment. There are also specialist hire businesses that focus on hiring a smaller range of specialist equipment, but may offer a greater range of sizes or types of the equipment that they specialise in compared to a general hire business. In addition, there are other parties with only a limited involvement in the hire industry, such as service stations hiring trailers, and contractors hiring out their own excess equipment.
21. Hirepool and Hirequip are general hire businesses. They offer a wide range of equipment for hire from small hand tools and garden implements up to large (eg 20 tonne) excavators at their branches around the country. Hirepool's and Hirequip's customers range from individuals doing home improvement projects to large infrastructure and construction companies.
22. Hirepool and Hirequip are not the only general hire businesses in New Zealand. However, almost all other general hire businesses currently only have hire shops located within an individual town or city.<sup>14</sup>
23. There are numerous specialist hire companies. Some specialist hire businesses are only located within an individual town or city, while others have multiple branches around the country. Specialist hire businesses primarily hire out one of the following categories of equipment:
  - 23.1 access equipment – eg cherry pickers, scissor lifts, scaffolding and cranes;
  - 23.2 earthworks equipment – eg excavators, rollers and loaders;
  - 23.3 air, power and pumps equipment – eg generators, pumps and compressors;
  - 23.4 portable toilets and buildings;
  - 23.5 temporary fencing;
  - 23.6 forklifts;
  - 23.7 marquee and event equipment; and
  - 23.8 motor vehicles and trailers.

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<sup>14</sup> The exception is Hireways, which has currently hire shops in both Palmerston North and Petone, Wellington.

### Previous decision and developments

24. The Commission considered the hire industry in 2003 when Southern Capital Limited (the then owners of Hirequip) applied for clearance to acquire Hirepool.<sup>15</sup> The Commission gave clearance to Hirequip, but the merger did not proceed as Hirepool was sold to an alternative purchaser.
25. At the time of the *Southern Capital* decision, Hirepool was not a nationwide hire company. Hirepool had branches in only four cities – Auckland, Hamilton, Wellington and Christchurch. Since 2003, Hirepool has expanded to have a network of branches throughout the country. This has been achieved through a combination of opening greenfields branches and through acquiring other hire businesses (a mix of general and specialist hire businesses).
26. There are now 18 towns/cities across the country in which Hirepool and Hirequip both have branches.

### Market definition

27. The Commission considers the markets relevant to this application are:
  - 27.1 the national market for the supply of heavy construction and earthworks equipment hire services (heavy equipment over 12 tonnes); and
  - 27.2 sub-regional markets for the supply of building construction and maintenance equipment hire services (equipment up to 12 tonnes).

### Commission's approach to market definition

28. The Act defines a market as:<sup>16</sup>

...a market in New Zealand for goods or services as well as other goods or services that, as a matter of fact and commercial common sense, are substitutable for them.
29. In general, the more closely substitutable two products or sources of supply are, the closer the competition and the greater the competitive constraint between those products or sources of supply.
30. As part of defining the relevant markets, the Commission looks to evidence that serves to identify appropriate markets in accordance with commercial common sense and uses the internationally accepted SSNIP test as an analytical tool to aid the market definition exercise.
31. The SSNIP test assesses substitutability by identifying the smallest space within which a hypothetical, profit maximising, sole supplier of a good or service, not constrained by the threat of entry could impose at least a small yet significant and non-transitory increase in price (SSNIP), assuming all other terms of sale remain

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<sup>15</sup> *Southern Capital Limited and Hirepool Limited* (Commerce Commission Decision 493, 6 March 2003).

<sup>16</sup> Section 3(1A) of the Act.



constant. Under the SSNIP test, the smallest space in which such market power may be exercised is considered to be the relevant market.<sup>17</sup>

### **Bligh's views on market definition**

32. Following the Commission's approach to market definition in *Southern Capital*, Bligh (in its application) analysed the impact of the proposed acquisition in terms of the following markets:
- 32.1 the national market for the supply of heavy construction and earthworks equipment hire services;
  - 32.2 regional markets for the supply of building construction and maintenance equipment hire services to commercial customers; and
  - 32.3 sub-regional markets for the supply of building construction and maintenance equipment hire services to domestic 'do it yourself' or 'home handyman' customers.
33. However, Bligh noted that the market boundaries were not clear, particularly in respect of the commercial building and DIY product markets. Bligh referred to comments in *Southern Capital*<sup>18</sup> and submitted that the distinction between these two markets was somewhat artificial because "much of what is termed DIY equipment is hired by contractors for commercial purposes".<sup>19</sup>
34. Bligh further submitted that the geographic market boundaries were not as narrow or clear cut as the Commission found in *Southern Capital*. Bligh submitted that the boundaries were blurred as "in many instances customers' hiring patterns will not necessarily confine them to that sub-regional market"<sup>20</sup> and hire companies "will often deliver equipment outside of their geographic market".<sup>21</sup> Bligh stated:<sup>22</sup>

In the applicant's experience, the size and expense of particular equipment (or hire order which may include a number of items) will impact how far a customer or supplier is prepared to travel. For example, large, expensive pieces of equipment such as excavators (which are typically hired for periods of up to six months) can be transported from and to any point in the country (or overseas). Smaller less expensive equipment tends to be hired within a region or sub-region, but there are no absolute rules.

### **The Commission's market definition**

35. For the purposes of assessing the competitive effect of the proposed acquisition, the Commission has adopted different markets to those defined in *Southern Capital*.
36. The relevant markets in this instance are best characterised as a continuum of products and customer types.

<sup>17</sup> Merger and Acquisitions Guidelines, above n4 at p 29.

<sup>18</sup> *Southern Capital*, above n15, at para 41.

<sup>19</sup> Application, para 12.17.

<sup>20</sup> Ibid at para 12.19.

<sup>21</sup> Ibid at para 12.20.

<sup>22</sup> Ibid at para 9.17.

37. Heavier equipment tends to be transported greater distances and has different participants than equipment under 12 tonnes and some customers have separate supply agreements for equipment above and under 12 tonnes. There is also little overlap between the merging parties in heavier equipment due to Hirepool having little heavy equipment. As such, for the purposes of assessing the competitive effects of the proposed acquisition, the Commission considers it appropriate to define a distinct product market for heavy equipment.<sup>23</sup> This is a national market, as the Commission concluded in *Southern Capital*.
38. In respect of equipment up to 12 tonnes, the Commission does not consider that it would assist its analysis to separate out this equipment into commercial building and DIY product markets. Any distinction is unlikely to change the competition analysis in this case.<sup>24</sup> The Commission therefore has considered the competitive effects of the merger in the supply of building construction and maintenance equipment hire services (covering all equipment up to 12 tonnes).
39. The Commission considers the geographic dimension of the building construction and maintenance equipment market is best defined as sub-regional – a city/town and a limited surrounding area but smaller than an entire region. This is because, the information received indicates that:
- 39.1 as noted in *Southern Capital*, customers do not travel significant distances to hire light equipment (that they carry or tow away);<sup>25</sup>
  - 39.2 competition between Hirepool, Hirequip and hire companies located in smaller towns outside of the 18 towns/cities where Hirepool and Hirequip overlap is asymmetric;<sup>26</sup> and
  - 39.3 while it can be economic to transport larger equipment under 12 tonnes from one town/city to a customer in another town/city, this is only the case for

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<sup>23</sup> In *Southern Capital* the Commission defined this market as comprising all equipment weighing above 10 tonnes. However, our investigations reveal that industry participants generally consider equipment above 12 tonnes as heavy equipment.

<sup>24</sup> Each piece of equipment should technically be considered to constitute a separate market – there is no demand-side substitutability between these products and there are different competitors in each product group (for example, where specialist hire companies are active).

<sup>25</sup> *Southern Capital*, above n15, at para 62.

<sup>26</sup> When working on a project within one of the 18 towns/cities in which commercial customers and Hirepool/Hirequip are based, evidence indicates that commercial customers are unlikely to travel to smaller towns outside of that town/city to hire equipment. However, when working on a project outside of such a town/city, a commercial customer may hire equipment from Hirepool or Hirequip in the main town/city (transporting it out to the site), or hire from a smaller hire company close to the project site.

longer term hires,<sup>27</sup> and information indicates that the majority of equipment under 12 tonnes is hired for only a few days.<sup>28</sup>

40. The Commission has assessed the impact of the proposed acquisition on 16 sub-regional markets for the supply of building construction and maintenance equipment hire services where Hirepool and Hirequip each have a competing branch. Those 16 markets are: Whangarei, Auckland, Hamilton, Tauranga/Mt Maunganui, Rotorua, Napier/Hastings, New Plymouth, Palmerston North, Wellington, Nelson, Blenheim, Christchurch, Timaru, Dunedin, Queenstown and Invercargill.
41. Hirepool and Hirequip are the only general hire companies with a 'national' presence. As a result the Commission considered whether it was appropriate to define a market for the supply of building construction and maintenance equipment hire services to national (or multi-regional) customers.<sup>29</sup>
42. Having considered the information provided, the Commission does not consider it necessary to define a separate market for national customers. The Commission does not consider there to be a relevant distinction in competition for regional and multi-regional customers and defining a national customer market would not change the Commission's competitive assessment.<sup>30</sup>

## Factual and counterfactual

### Factual

43. In the factual, Hirequip would be purchased by Hirepool.

### Counterfactual

44. The Commission considers that without the acquisition, Hirequip would likely be sold to a third party which would continue to operate Hirequip as a standalone competitor to Hirepool.
45. Hirequip's owner, Pacific Equipment Solutions Limited (Pacific) (via its subsidiary PES Finance Limited), was placed into receivership on 11 July 2012. The receivers are selling Hirequip to generate cash to contribute to repaying Pacific's debts. The Commission does not consider that the receivers would not sell Hirequip absent the merger.<sup>31</sup>

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<sup>27</sup> All equipment under 12 tonnes that cannot be carried to towed away is delivered to customers. In some circumstances the customer may be charged for transport (otherwise, the hire company bears the cost).  
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<sup>28</sup>

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<sup>29</sup> The Commission defined a market for services provided to multi-regional (national) customers in Transpacific Industries Group (NZ) Limited and Ironbridge Capital Pty Limited (Commerce Commission Decision 604, 14 December 2006).

<sup>30</sup> [ ]

<sup>31</sup> The receivers advised the Commission that [ ]

### Competition analysis –national market for heavy equipment

46. The Commission is satisfied that the proposed acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in the national market for heavy equipment.
47. Bligh submitted that the proposed acquisition presents an opportunity for Hirepool to acquire a largely complementary business, as Hirepool and Hirequip to a large extent focus on different types of equipment and customer segments.<sup>32</sup> Bligh further submitted that there would be negligible aggregation in the heavy equipment market, and that the merged entity’s market share would fall well within the Commission’s safe harbours.
48. The Commission broadly agrees. As already noted, there is little overlap between the merging parties in this market. Hirequip has excavators up to 45 tonnes, but Hirepool’s heaviest excavator is 20 tonnes.<sup>33</sup> Hirequip’s annual revenue from the hire of heavy equipment is [ ] compared to Hirepool’s revenue of [ ].
49. In addition, there are numerous other competitors who offer heavy equipment for hire. In particular, Porter Hire is the market leader and a vigorous competitor in the heavy equipment market.<sup>34</sup> As such the Commission considers that the merged entity would be constrained by significant competition from Porter Hire, as well as other competitors.<sup>35</sup>

### Competition analysis – sub-regional markets for equipment up to 12 tonne

50. The Commission is satisfied that the proposed acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in any of the sub-regional markets for the supply of building construction and maintenance equipment hire services. For the reasons explained below, the Commission considers that the presence of existing competitors, low barriers to entry and/or the countervailing power of large customers are likely to be sufficient to constrain the merged entity in each sub-regional market.

### Existing competition

51. Bligh submitted that the merged entity would be constrained by a number of existing competitors, large and small, across all segments throughout New Zealand.

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<sup>32</sup> Bligh submitted that Hirepool’s customers are primarily small–medium construction businesses which it targets with specialist equipment divisions while Hirequip’s customers are primarily large construction and civil infrastructure companies.

<sup>33</sup>

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<sup>34</sup> *Southern Capital*, above n15, at para 94.

<sup>35</sup> Other competitors in the heavy equipment market include, but are not limited to, CAT Rental, Heavy Trax Hire, Hireways, Magnum Hire, Equipment Transport and Leasing and Clarke Machine Hire.

52. The Commission’s investigation revealed that in some sub-regional markets, the merged entity would face significant competition from other existing general hire businesses. In a number of other sub-regional markets, while Hirepool and Hirequip are the only existing general hire businesses, they nonetheless face some competition from specialist hire companies and other fringe competitors.<sup>36</sup>
53. In *Southern Capital*, the Commission considered specialist hire companies to be fringe competitors who only competed at the margin where the activities of a specialist overlapped with those of a general hire company.<sup>37</sup> Bligh submitted that the market has developed since 2003 and that there is “no legitimate justification to exclude specialist hire companies” from the market.<sup>38</sup>
54. The information provided to the Commission indicates that in many of the sub-regional markets, a significant portion of the equipment hired by Hirepool and Hirequip is equipment also available from specialist hire companies. Given this, a portion of the building construction and maintenance equipment hire services provided by the merged entity may be subject to competitive constraint from specialist hire companies.

#### **Potential competition**

55. Bligh submitted that even in geographic areas with higher levels of aggregation, potential entry satisfies the LET test because:
- 55.1 barriers to entry are low;
  - 55.2 there are hire businesses in adjacent areas that supply those markets or could easily do so;
  - 55.3 specialist hire companies could easily expand their range of equipment;
  - 55.4 there are heavy equipment providers which could easily expand or enter if prices materially increased; and
  - 55.5 entry can occur quickly – a new (greenfields) mid-sized full service branch could be established within approximately 1-3 months and an existing competitor could establish a new branch “quickly and at a relatively low cost”.<sup>39</sup>
56. For the reasons explained below, the Commission considers that there are no significant barriers to entry, and that the merged entity will be constrained by actual or threatened entry (or expansion) in each sub-regional market.

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<sup>36</sup> This includes service stations hiring trailers, Bunnings hiring out a limited range of equipment within its stores, and contractors hiring out their own excess equipment.

<sup>37</sup> *Southern Capital*, above n15, at para 42.

<sup>38</sup> Application, para 12.3.

<sup>39</sup> *Ibid* at para 9.12.

### *Commission's approach to potential competition*

57. Potential competitors can act as a constraint on a business or businesses that might otherwise be able to exert market power. An acquisition is unlikely to result in a substantial lessening of competition if the businesses in the market continue to be subject to real constraints from the credible threat of market entry.<sup>40</sup> The Commission considers whether viable entry is likely, timely and on sufficient scale so as to prevent any substantial lessening of competition comparing the factual to the counterfactual.
58. The likely effectiveness of entry is determined by the nature and effect of the aggregate conditions of entry and expansion into the relevant market.<sup>41</sup> Hence the Commission examines entry conditions, together with any impediments to entry and expansion that entrants would face.<sup>42</sup>
59. In order for market entry to be a sufficient constraint, entry of new participants in response to a price increase or other manifestation of market power must be:
- 59.1 likely in commercial terms;
  - 59.2 sufficient in extent to cause market participants to react in a significant manner; and
  - 59.3 timely, that is, feasible within the short-term (usually two years) from the point at which market power is first exercised.
60. The question posed by the LET test is designed to answer the question of whether entry will either constrain the merged entity's current pricing, or would be sufficient to prevent the effects of any temporary lessening of competition becoming substantial.<sup>43</sup> This involves the Commission analysing whether any businesses, incentivised by price rises by Hirepool, would enter the relevant market and thereafter expand.

### *Requirements for entry*

61. In *Southern Capital*, the Commission considered that there were low barriers to entry or expansion in all markets.<sup>44</sup> The only obstacle to entry or expansion was access to capital for purchasing equipment. However, in that case the Commission found that equipment was easily sourced (domestically or internationally) and could be new or used. The Commission also found that a new entrant was capable of sourcing equipment from distributors at similar rates to existing competitors. The

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<sup>40</sup> *Mergers and Acquisitions Guidelines*, above n4, at p 27.

<sup>41</sup> *Commerce Commission v Southern Cross Medical Care Society* (2001) 10 TCLR 269 (CA) at [73].

<sup>42</sup> Natural, regulatory and strategic barriers to entry are discussed on p 28 of the Commission's *Mergers and Acquisitions Guidelines*.

<sup>43</sup> "For it is the ease with which firms may enter which establishes the possibilities of market concentration over time; and it is the threat of entry of a new firm or a new plant into a market which operates as the ultimate regulator of competitive conduct." *Re Queensland Co-operative Milling Association* (1976) 8 ALR 481, 526.

<sup>44</sup> *Southern Capital*, above n15, at para 178.

Commission also considered that there was a strong second hand market for used equipment such that capital investment in equipment was not a sunk cost.<sup>45</sup>

62. Bligh submitted that it agreed with the Commission's conclusions from *Southern Capital* and that the basis for those conclusions had not materially changed since 2003. It submitted that investment of approximately \$200,000 was required for a hire shop with equipment up to 1.5 tonnes and \$1.3 million for a hire shop with a full range of building construction and maintenance equipment.<sup>46</sup> Bligh submitted that there are no factors that would impede entry or expansion.
63. The Commission remains of the view that there are low barriers to entry or expansion in the sub-regional markets for the supply of building construction and maintenance equipment hire services. The Commission also notes that even where a hire shop is established with lighter equipment (perhaps up to 1.5 tonnes), that hire shop can provide a greater range of equipment to customers by re-hiring heavier equipment from specialist hire companies.

*Is potential entry or expansion likely to constrain?*

64. In *Southern Capital*, the Commission considered that entry or expansion (into all the markets considered) satisfying the LET test was likely if the merged entity attempted to exercise market power. In reaching this view, the Commission also noted evidence of a history of entry into the relevant markets.
65. There have been further examples of entry and expansion since 2003. As already noted, since *Southern Capital*, Hirepool has grown to establish a national presence and some of that expansion has partly occurred through it opening new (greenfields) branches. In addition, there is evidence of entry and/or expansion by other hire companies. For example:
- 65.1 City Hire Centre and Richmond Hire were opened in Napier (2004) and Nelson in 2008), respectively, after Hirequip closed down one of its branches in each of those locations;
- 65.2 Amond Hire was opened in Timaru in 2005 after Hirequip acquired Timaru Hire;
- 65.3 Hireways entered the Wellington market last year through the acquisition of Pronto Hire [ ];
- 65.4 Magnum Hire in Auckland has expanded its range of hire equipment within the last year [ ];
- 65.5 [ ]; and

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<sup>45</sup> *Southern Capital*, above n15, at paras 132-134. Costs that are not recoverable after investment, sunk costs, are an indicator of the risk of entry.

<sup>46</sup> [ ]

65.6 Kennards Hire entered the New Zealand market in late 2012 by acquiring nine branches of McEntee Hire across Auckland and has invested in increasing the range and depth of equipment available through those branches.<sup>47</sup>

66. Over the same period, there has also been consolidation in the industry, with a number of hire shops being acquired by Hirepool, Hirequip and other companies. Many industry participants commented that the proposed acquisition may lead to owner-operator hire shops being re-established.

67. [

] <sup>48</sup>

[ ]

68. [

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69. As the Commission found in *Southern Capital*, given that there are no significant barriers to entry, and a demonstrated history of entry and expansion in this market, the Commission is satisfied that the merged entity would be constrained by actual or threatened entry (or expansion).

**Countervailing power**

70. In *Southern Capital*, the Commission considered that customers had a high degree of countervailing power and that this would further constrain the merged entity.<sup>49</sup> In reaching this view, the Commission noted that many customers held multiple accounts with several suppliers, and hired on the basis of convenience and price. There also did not appear to be any switching costs in changing suppliers of hire equipment.<sup>50</sup>

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<sup>47</sup> Kennards Hire is a large Australian, privately-owned, general hire company. Kennards has successfully expanded such that it now has approximately 130 branches across Australia.

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<sup>49</sup> *Southern Capital*, above n15, at para 172.

<sup>50</sup> *Ibid* at para 171.



- 71. The Commission’s investigation indicates that these facts remain the same today.
- 72. Indeed, Bligh submitted that the countervailing power of customers may even have increased since 2003. Bligh noted that customers frequently conduct price checks of Hirepool’s pricing against other hire companies (both regional general hire companies and specialist hire companies). It further submitted that customers “play one hire company off against another for the most competitive terms”. Bligh also submitted that Hirepool had little, if any ability, to price discriminate in different regions.
- 73. The Commission considers that larger customers may have more countervailing power than smaller customers. There are generally more competing hire companies in the most populated main cities (or sub-regional markets) than in smaller towns.<sup>51</sup> Customers that hire equipment in multiple regions may, therefore, have the ability to threaten to switch to alternative suppliers in the main cities (both general hire companies and specialist hire companies) if faced with higher prices from the merged entity in smaller towns and, by doing so, discipline the prices they face in those smaller towns.<sup>52</sup> In addition, larger customers representing a significant portion of demand for hire equipment in a particular sub-regional market may also have a significant degree of countervailing power.

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**Determination on notice of clearance**

74. The Commission is satisfied that the proposed acquisition will not have, or would not be likely to have, the effect of substantially lessening competition.
75. Pursuant to section 66(3)(a), the Commission gives clearance for Bligh Finance Limited or any interconnected body corporate thereof to acquire up to 100% of the shares and/or assets of Hire Equipment Group Limited and its subsidiaries.

Dated this 21<sup>st</sup> day of February 2013

Dr Mark Berry

Chair