

Determination

Concrete Group Limited and Drymix [2021] NZCC 6

The Commission:	Dr Derek Johnston Vhari McWha John Crawford
Summary of application:	An application from Dunlop Drymix Limited, a subsidiary of the Concrete Group Limited, seeking clearance to acquire the assets and business of Drymix N.Z. Limited, Drymix Cement Limited, Drymix Bitumen Limited, Drymix Imports Limited, XNP Limited and Romex N.Z. Limited.
Determination:	Under section 66(3)(a) of the Commerce Act 1986, the Commerce Commission gives clearance to the proposed acquisition.
Date of determination:	9 June 2021

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

The proposed acquisition

1. On 3 May 2021, we registered an application from Dunlop Drymix Limited (the Applicant) seeking clearance to acquire the assets and business of Drymix N.Z. Limited, Drymix Cement Limited, Drymix Bitumen Limited, Drymix Imports Limited, XNP Limited and Romex N.Z. Limited (together, Drymix) (the Proposed Acquisition).
2. The Proposed Acquisition relates to the supply of bagged concrete and mortar products. These products are typically sold in 20kg bags and supplied to hardware merchants (eg, Bunnings Warehouse, Mitre 10 and Placemakers).

Our decision

3. The Commission gives clearance to the Proposed Acquisition as it is satisfied that the acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in a market in New Zealand.
4. Each of the Drymix companies were placed into receivership in mid-2020. Since this time, the receiver appointed for Drymix, Grant Thornton New Zealand Limited (the Receiver), has operated Drymix as a going concern and has subsequently run a competitive sale process to sell Drymix.
5. In deciding to give clearance to the Proposed Acquisition, we assessed what would likely happen if the Receiver did not sell Drymix to the Applicant.
6. We determined that there was no realistic prospect that Drymix would be sold to another purchaser as a going concern and operated in competition with the Applicant. Rather, absent the Proposed Acquisition, the Receiver would likely close down Drymix and then sell Drymix's assets individually to separate purchasers. In this scenario, Drymix's assets would not be used to compete against the Applicant. Given this, we consider there would likely be no material difference in (and therefore no substantial lessening of) competition between the scenarios with and without the Proposed Acquisition.

Our framework

7. Our approach to analysing the competition effects of mergers is based on the principles set out in our Mergers and Acquisitions Guidelines (our guidelines).¹
8. We assess mergers using the substantial lessening of competition test. We determine whether a merger is likely to substantially lessen competition in a market by comparing the likely state of competition if the merger proceeds (the scenario with the merger, often referred to as the factual), with the likely state of competition if the merger does not proceed (the scenario without the merger, often referred to as the counterfactual).²

¹ Commerce Commission, *Mergers and Acquisitions Guidelines* (July 2019).

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

9. No substantial lessening of competition will arise when there is no material difference between competition in the factual and counterfactual. This commonly occurs where, absent the merger, the target is unlikely to continue operating, and its assets are unlikely to remain in the market under different ownership. This is sometimes referred to as a 'failing firm'.³

The parties

The Applicant – Cemix

10. The Applicant is a subsidiary of the Concrete Group Limited, trading predominantly in New Zealand as Cemix.
11. Cemix is a manufacturer and distributor of bagged concrete and mortar, bagged cement, wet bagged sand, builders mix, asphalt, tile adhesives and construction chemicals. Its main customer is the hardware merchant Bunnings Limited.

The Target – Drymix

12. Drymix includes the assets and business of six entities, all of which are in receivership (with two also in liquidation), although most of the relevant business and assets reside in Drymix N.Z. Limited.⁴
13. Like Cemix, Drymix is a manufacturer and distributor of bagged concrete, mortar, plaster and sand products. Its main customer is the hardware merchant Mitre 10 (New Zealand) Limited).

With and without scenarios

14. To assess whether competition is likely to be substantially lessened in any market, we compare the likely state of competition with the Proposed Acquisition to the likely state of competition without the Proposed Acquisition.⁵
15. With the Proposed Acquisition, the Receiver is selling to Cemix the business and assets of Drymix as a going concern.
16. We consider the status quo is not a likely counterfactual. This is because Drymix is in receivership and the Receiver was appointed to sell the Drymix business and/or assets to recover money for creditors. Under the Receiverships Act 1993, the Receiver has an obligation to creditors to maximise the revenues from the sale of Drymix (whether as a going concern or via the sale of its assets).⁶ The Receiver

³ Although the Applicant did not submit that Drymix is a 'failing firm', based on our assessment of the Proposed Acquisition we consider that it most likely is one. See also *Mergers and Acquisitions Guidelines* above n1 at Attachment E.

⁴ Clearance Application at [3.3].

⁵ *Mergers and Acquisitions Guidelines* above n1 at [2.29]; *Commerce Commission v Woolworths Limited* (2008) 12 TCLR 194 (CA) at [63].

⁶ Under section 19 of the Receiverships Act 1993, a receiver owes a duty to a company and its creditors to obtain the best price reasonably obtainable as at the time of sale; and a receiver has a duty of care to act with reasonable care in dealing with the company assets to secure the best possible price.

advised that,

[

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17. Absent the Proposed Acquisition, we consider that the only likely counterfactual would be Drymix ceasing to operate as a going concern and its assets being sold individually. This is because, based on the evidence we received (and considering the Receiver's obligations), in our view:
- 17.1 the Receiver would realise more from the sale of Drymix's assets individually than from selling Drymix as a going concern to a party other than the Applicant. Given its obligations to obtain the best sales price, the Receiver would decide to sell off Drymix's assets individually absent the Proposed Acquisition;
 - 17.2 having made the decision to sell off Drymix's assets individually, the Receiver would close down Drymix meaning that Drymix would no longer be available for an alternative purchaser to acquire as a going concern; and
 - 17.3 once sold, the assets would leave the relevant market(s) in New Zealand, rather than being purchased by a party that would use them to supply bagged concrete and mortar products in competition with the Applicant.
18. We discuss each of the above further below.

The Receiver would realise more from selling Drymix's assets individually

19. We considered whether the value the Receiver would realise for Drymix's assets individually would be more than the value realised by selling Drymix as a going concern to a party other than the Applicant.
20. We conservatively estimate that the Receiver would realise over [] from such an asset sale. This estimate is higher than the estimated [] that the Receiver would realise from the sale of Drymix as a going concern to a party other than the Applicant. Given this, to maximise value for creditors, the Receiver would decide to sell off Drymix's assets individually absent the Proposed Acquisition.

Sale of Drymix as a going concern to an alternative purchaser

21. Absent a sale to the Applicant, we considered who would be potential alternative purchasers of Drymix, and at what price.
22. The Receiver ran a comprehensive competitive sales process for Drymix.⁸ The second highest bidder for Drymix was [], which offered [] for Drymix, plus value of any inventory. We confirmed that [] remains interested in acquiring

⁷ Commerce Commission meeting with Grant Thornton, Receiver for Drymix (18 May 2021).

⁸ Commerce Commission meeting with Grant Thornton, Receiver for Drymix (18 May 2021) and letter from Simpson Grierson (acting on behalf of Receiver for Drymix) to the Commerce Commission (21 April 2021).

Drymix, [].⁹ Based on this and taking into account sales costs, we estimate that the Receiver would realise a maximum of [] from the sale of Drymix as a going concern to a party other than the Applicant.¹⁰

Sale of Drymix's assets individually

23. To assess the value the Receiver would realise from the sale of Drymix's assets individually, we estimated the realisable value of Drymix's various assets including:
- 23.1 the land and buildings that Drymix owns, and operates from, in Feilding,
 - 23.2 a Concetti bagging plant, which is located at Drymix's Feilding site, and
 - 23.3 other assets.
24. As noted above, we conservatively estimate that the Receiver would realise over [] from the sale of Drymix's assets individually.
25. A significant portion of this value comes from the sale of Drymix's land and buildings at Feilding. The potential realisable value of this property is at least [] after sales costs. This value is consistent with information provided by the Receiver,¹¹ and is supported by independent evidence we obtained from several commercial real estate agents as part of our investigation.¹² We understand that there is currently strong demand for industrial and commercial zoned land in Feilding and in the wider Manawatu region, making this estimate conservative.
26. Drymix's next most valuable asset is a relatively new Concetti bagging plant. Based on information gathered, we consider there is demand for this plant and that the Receiver would be able to find a buyer for it. While there is no readily available data on the second-hand value of such a plant,¹³ on a conservative basis, we estimate that

⁹ [] considers its offer for Drymix as a going concern to be [], given [] Drymix's assets and the value that could be attributed to any future supply arrangement that could be negotiated with Drymix's main customer, Mitre 10. [] advised it could not envisage any scenario where it would be incentivised to increase its offer, other than [], which we consider unlikely based on []. []

¹⁰ Our [] estimate is arrived at by adding to [] offer the estimated value that [] would pay for inventory at cost and then deducting sales costs, as estimated by the Receiver.

¹¹ [] provided under the cover of an e-mail from Simpson Grierson (acting on behalf of Receiver for Drymix) to the Commerce Commission (10 May 2021).

¹² [].

¹³

[]

the Receiver would realise around [] (after sales costs) from the sale of this plant.¹⁴

27. The remaining assets include plant and equipment, inventory and intangible assets. On a conservative basis, we estimate that the Receiver would realise around [] from the sale of all other assets. Half of this value relates to assorted plant and engineering equipment, which may be attractive to a wide range of manufacturing and industrial businesses. The next most significant other asset (in terms of value) is inventory, which [].¹⁵

The Receiver would close down Drymix in order to sell Drymix's assets individually

28. Having made a decision to sell Drymix's assets individually absent the Proposed Acquisition, we consider that the Receiver would close down Drymix before selling the assets. This would mean that Drymix would no longer be available for an alternative purchaser to acquire as a going concern.
29. The Receiver would close down Drymix before selling its assets because [].¹⁶ Closure of the business would also reduce the costs of the Receiver (which would be deducted from any sales value) as the Receiver would no longer be overseeing the day to day running of Drymix's business.

Drymix's assets would be sold for use outside the relevant market(s)

30. Finally, we considered whether an alternative purchaser (or purchasers) would be likely to acquire any of Drymix's assets upon closure of the business and use them to supply bagged concrete and mortar products in competition with the Applicant. In particular, we focussed on whether anyone would be likely to acquire Drymix's Concetti bagging plant and use it to enter the relevant market(s). This bagging plant is a key asset needed to supply such products.
31. If the Receiver sold off Drymix's assets, we consider that the assets would leave the relevant market(s) in New Zealand, rather than being purchased by a party that would use them to supply bagged concrete and mortar products in competition with the Applicant.
32. We were unable to identify any parties within New Zealand that are likely to buy Drymix's bagging plant absent the Proposed Acquisition and use it to manufacture and supply bagged concrete and mortar products in competition with the Applicant.

¹⁴ Our [] estimate represents [] of the depreciated book value of the plant as at 30 November 2020, less sales costs, as estimated by the Receiver. A key reason for the applying such a large discount to the book value is that any purchaser would incur significant costs to disassemble, move and reassemble the plant on a new site.

¹⁵ []

¹⁶ Commerce Commission meeting with Grant Thornton, Receiver for Drymix (18 May 2021).

32.1 [] did not express any interest in acquiring the bagging plant in order to [].¹⁷

32.2 The bagging plant on its own is of substantially less value to any new entrant than Drymix is as a going concern. In our view, the plant would only be acquired and used to supply bagged concrete and mortar if a new entrant was able to, []. Based on the evidence provided by industry participants, including [], we consider this would be unlikely.¹⁸ For example, [] advised that it would not be interested in acquiring the assets of Drymix as it was only interested in Drymix as a going concern.¹⁹

33. Conversely, our market enquiries suggested that there may be demand from overseas buyers for a concrete and mortar bagging plant.²⁰

34. Alternatively, Drymix's bagging plant could be sold to a party in New Zealand that then uses it to bag different products. While Drymix's plant is currently customised to produce bagged concrete and mortar, we understand the components of the plant are generic and parts of the plant can be converted (or substituted for other components) to enable the plant to bag other products.²¹

Overall conclusion – no substantial lessening of competition

35. Given the above, we consider that, in both the factual and counterfactual scenarios, the Drymix assets would no longer be used to compete against the Applicant and so there would be no material difference in competition between the scenarios with and without the Proposed Acquisition. Post-acquisition, the merged entity would continue to face competition from one competitor of roughly equivalent size (Firth Industries, which supplies Dricon branded products), plus some smaller suppliers of bagged concrete and mortar products.²²

36. Accordingly, we are satisfied that the Proposed Acquisition will not have, or would not be likely to have, the effect of substantially lessen competition in any relevant market.

¹⁷ []

¹⁸ []

¹⁹ []

²⁰ []

²¹ []

²² The Applicant estimated that the merged entity would have a market share of []%, compared to Firth's []% share. Clearance Application at Table 1.

Determination on notice of clearance

37. Under section 66(3)(a) of the Commerce Act 1986, the Commerce Commission determines to give clearance to Dunlop Drymix Limited to acquire the assets and business of Drymix N.Z. Limited (in receivership and liquidation), Drymix Cement Limited (in receivership and in liquidation), Drymix Bitumen Limited (in receivership), Drymix Imports Limited (in receivership), XNP Limited (in receivership) and Romex N.Z. Limited (in receivership).

Dated this 9th day of June 2021

Dr Derek Johnston
Division Chair