

Determination

Fletcher Building Holdings New Zealand Limited and Higgins Group Holdings Limited [2016] NZCC 14

- The Commission:** Dr Mark Berry
Dr Stephen Gale
Elisabeth Welson
Graham Crombie
- Summary of application:** Fletcher Building seeks clearance to acquire the business and assets of Higgins
- Determination:** Under s 66(3)(a) of the Commerce Act 1986, the Commerce Commission gives clearance to the proposed merger.
- Date of determination:** 7 July 2016

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The proposed merger

1. On 18 February 2016, Fletcher Building Holdings New Zealand Limited (Fletcher Building) applied for clearance to acquire:
 - 1.1 up to 100% of the shares in Higgins Group Holdings Limited (Higgins); and/or
 - 1.2 the assets of Higgins and its interconnected bodies corporate in New Zealand (but excluding the assets related to Higgins' ready-mix concrete business and property business which will transfer to a new company owned by Higgins' existing shareholders).¹
2. On 17 June 2016 Fletcher Building amended its application to exclude Higgins' 50% of the shares in Horokiwi Quarries Limited from the acquisition.
3. Higgins is a privately held New Zealand company that specialises in:
 - 3.1 road surfacing and road maintenance;
 - 3.2 civil infrastructure;
 - 3.3 construction products (aggregates, bitumen); and
 - 3.4 ready-mix concrete.
4. Fletcher Building's application for clearance covers the first three of Higgins' business units as described above but excludes Higgins's property business (including some dormant quarries and land holdings) and Higgins' 50% shares in Horokiwi Quarries Limited. The application also excludes Frances Holdings Limited, referred to below, which is being retained by the vendor.²

The decision

5. The Commission gives clearance to the proposed merger as it is satisfied that the proposed merger would not have, or would not be likely to have, the effect of substantially lessening competition in a market in New Zealand. In particular:
 - 5.1 there is no overlap between Fletcher Building and Higgins in the road surfacing and road maintenance markets;

¹ The proposed merger is expected to proceed by way of Fletcher Building acquiring the shares in Higgins Group Holdings Limited. However, that acquisition is conditional on a reorganisation of the Higgins Group occurring, to enable the vendors to retain ownership of the ready mix concrete business and excluded commercial property. The reference to "assets of Higgins and its interconnected bodies corporate in New Zealand" is for contingency purposes should the structure of the transaction change to an asset transfer. Email from Bell Gully on behalf of Fletcher Building to the Commerce Commission 7 July 2016.

² Clearance Application from Fletcher Building at [30]. Frances Holdings Limited is [].

- 5.2 there is no material overlap between Fletcher Building and Higgins in the civil infrastructure market; and
- 5.3 there is overlap between Fletcher Building and Higgins' construction products businesses, in particular their aggregate businesses, however, for the reasons set out below, the Commission is satisfied that the proposed merger would not have, or would not be likely to have, the effect of substantially lessening competition in these markets.

Our framework

- 6. Our approach to analysing the competition effects of the proposed merger is based on the principles set out in our Merger and Acquisition Guidelines.³

The substantial lessening of competition test

- 7. 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).⁴
- 8. We make a pragmatic and commercial assessment of what is likely to occur in the future, with and without the acquisition, based on the information we obtain through our investigation and taking into account factors including market growth and technological changes.
- 9. A lessening of competition is generally the same as an increase in market power. Market power is the ability to raise price above the price that would exist in a competitive market (the 'competitive price'),⁵ or reduce non-price factors such as quality or service below competitive levels.
- 10. Determining the scope of the relevant market or markets can be an important tool in determining whether a substantial lessening of competition is likely.
- 11. We define markets in the way that we consider best isolates the key competition issues that arise from the merger. In many cases this may not require us to precisely define the boundaries of a market. A relevant market is ultimately determined, in the words of the Act, as a matter of fact and commercial common sense.⁶

When a lessening of competition is substantial

- 12. Only a lessening of competition that is substantial is prohibited. A lessening of competition will be substantial if it is real, of substance, or more than nominal.⁷

³ Commerce Commission *Merger and Acquisition Guidelines* (July 2013).

⁴ *Commerce Commission v Woolworths Limited* (2008) 12 TCLR 194 (CA) at [63].

⁵ Or below competitive levels in a merger between buyers.

⁶ Section 3(1A). See also *Brambles v Commerce Commission* (2003) 10 TCLR 868 at [81].

⁷ *Woolworths & Ors v Commerce Commission* (2008) 8 NZBLC 102,128 (HC) at [127].

Some courts have used the word ‘material’ to describe a lessening of competition that is substantial.⁸

13. There is no bright line that separates a lessening of competition that is substantial from one that is not. What is substantial is a matter of judgement and depends on the facts of each case. Ultimately, we assess whether competition will be substantially lessened by asking whether consumers in the relevant market(s) are likely to be adversely affected in a material way.

When a substantial lessening of competition is likely

14. A substantial lessening of competition is ‘likely’ if there is a real and substantial risk, or a real chance, that it will occur. This requires that a substantial lessening of competition is more than a possibility, but does not mean that the effect needs to be more likely than not to occur.⁹

The clearance test

15. We must clear a merger if we are satisfied that the merger would not be likely to substantially lessen competition in any market.¹⁰ If we are not satisfied – including if we are left in doubt – we must decline to clear the merger.¹¹
16. The burden of proof lies with Fletcher Building as the applicant to satisfy us on the balance of probabilities that the acquisition is not likely to have the effect of substantially lessening competition.¹² The decision to grant or refuse a clearance is necessarily to be made on the basis of all the evidence¹³

Key parties

Fletcher Building

17. Fletcher Building is New Zealand’s largest construction firm and building materials supplier. Fletcher Building’s New Zealand business operates within the following divisions:
- 17.1 building and construction products such as aggregates and cement;
 - 17.2 laminates and panels;
 - 17.3 distribution of building and construction products; and

⁸ Ibid at [129].

⁹ *Woolworths & Ors v Commerce Commission* (HC) above n 5 at [111].

¹⁰ Section 66(3)(a).

¹¹ In *Commerce Commission v Woolworths Limited* (CA), above n 2 at [98], the Court held that “the existence of a ‘doubt’ corresponds to a failure to exclude a real chance of a substantial lessening of competition”.

¹² *Commerce Commission v Southern Cross Medical Care Society* (2001) 10 TCLR 269 (CA) at [7]. *Commerce Commission v Woolworths Ltd* (CA) above n 2 at [97].

¹³ *Commerce Commission v Woolworths Ltd* (CA) above n 2 at [101].

17.4 construction and civil infrastructure.¹⁴

18. Fletcher Building's building and construction products division produces a wide range of products, including aggregates, plastic pipes, GIB plasterboard, fibreglass insulation, aluminium window and door frames, sinkware, plasterboard, roofing, cement, ready-mix concrete (operating as Firth Concrete), and concrete products.¹⁵
19. Fletcher Building's construction and civil infrastructure business is involved in large scale residential, commercial and civil infrastructure construction projects.¹⁶ Examples of major projects include roading and bridge projects, wind farms, the Auckland Sky Tower, Te Papa, and Westpac Stadium.¹⁷

Higgins

20. Higgins's primary business in New Zealand is road construction and maintenance with a focus on the surfacing and maintenance of roads. Higgins is also involved in civil infrastructure projects including surfacing of airport runways, port container handling yards and carparks. To the extent Higgins is involved in civil infrastructure projects, it is primarily involved in the surfacing component of these projects.¹⁸
21. Higgins also supplies its own downstream business with a number of key inputs for construction and roading, primarily aggregates, concrete, asphalt, bitumen and the manufacture of road signs.¹⁹

Extent of overlap between Fletcher Building and Higgins

Building and construction products – aggregates

22. The key area of overlap between Higgins and Fletcher Building's businesses is in the supply of aggregates. Winstone Aggregates (part of the Fletcher Building group) operates a number of quarries that produce a full range of aggregate products for Fletcher Building's downstream businesses and other firms across New Zealand. Fletcher Building also has a substantial degree of influence over Rangitiki Aggregates Limited (RAL), a joint venture company that owns and operates a number of quarries in the Manawatu-Whanganui region. For the purposes of this application, we treat RAL as part of the Fletcher Building group.²⁰

¹⁴ Clearance Application from Fletcher Building at [3].

¹⁵ Adapted from Clearance Application from Fletcher Building at [3].

¹⁶ In terms of Australia and New Zealand Standard Industry Codes (ANZIC) 2006, these are Division E Construction: Subdivision 30 Building Construction - Group 301 Residential Building Construction, Group 302 Non-Residential Building Construction, Subdivision 31 Heavy and Civil Engineering Construction, Group 310 Heavy and Civil Engineering Construction, Class 3101 Road and Bridge Construction, Class 3109 Other Heavy and Civil Engineering Construction.

¹⁷ Adapted from www.fletcherconstruction.co.nz/

¹⁸ Clearance Application from Fletcher Building at [8].

¹⁹ Clearance Application from Fletcher Building at [9].

²⁰ We consider that it is appropriate to treat RAL as being part of Fletcher Building for the purposes of our assessment, as our investigation shows that Fletcher Building appears to have a substantial degree of influence over RAL. This is on the basis that Winstone own 50% of the shares in RAL, Winstone have two of four directors on the board, and []

23. The acquisition will result in Fletcher Building acquiring 16 of Higgins' active quarries spread throughout the North and South Island.²¹ However, there are only five regional markets where there is material overlap between Fletcher Building's and Higgins' aggregates business. These are Manawatu-Wanganui, Napier-Hastings, Kapiti, North Waikato & Canterbury. These markets and the competition effects of the proposed merger in these markets are explained and analysed in detail below.

Construction and civil infrastructure

24. In the civil infrastructure industry, Fletcher Building provides major infrastructure services, such as constructing bridges and tunnels and building the infrastructure on which the road surface is laid; however, Fletcher Building has no road surfacing or road maintenance capability.
25. In contrast, Higgins' core business is the horizontal road surfacing and road maintenance of these infrastructure projects.
26. Fletcher Building has regularly partnered with Higgins over the last 25 years to provide road surfacing for its projects when required.²²
27. We consider that there is no material overlap from the proposed merger in these markets. We are therefore satisfied that the acquisition will not be likely to substantially lessen competition in any construction and/or civil infrastructure market. We do not consider these markets further in these reasons.

Ready-mix concrete

28. Higgins and Fletcher Building, through Firth Concrete, have overlapping ready-mix concrete businesses. However, Higgins's ready-mix concrete business will be retained by the Higgins family. As such, we do not consider any aggregation arises in the ready-mix concrete market as a result of the proposed merger.
29. However, Fletcher Building and Higgins have signed an aggregates supply agreement that provides certainty of aggregate supply to Higgins' ready-mix concrete business from Fletcher Building's quarries. We have analysed whether this agreement is likely to substantially lessen competition either in markets for aggregates or in the market for the manufacture and supply of ready-mix concrete in the vertical effects section below.

Key competitors

30. According to the Aggregate and Quarry Association of New Zealand, there are around 200-300 quarries actively involved in the supply of aggregates.²³ Competitors to the merged entity fall into three general categories:

²¹ The proposed merger also includes dormant quarries and landholdings (potential quarry sites). Where relevant these are discussed in the competition analysis below.

²² There have been instances where Higgins has partnered with other firms such as HEB.
[] Interview with [] 14 March 2016.

- 30.1 a small number of large vertically integrated businesses that own multiple quarries across New Zealand such as Fulton Hogan, Holcim, Fletcher Building and Higgins, which also have downstream road building and maintenance, construction or concrete businesses which they supply aggregate products to;
 - 30.2 a number of vertically integrated regional businesses which have smaller downstream road building and maintenance or construction businesses which they supply aggregate products to but who focus on particular regions; and
 - 30.3 stand-alone quarries with no vertical integration.
31. We set out in more detail the relevant competitors for each region in the competition analysis below.

Aggregate customers

32. Aggregates are demanded by a wide range of customers across New Zealand, from very large New Zealand-wide construction and concrete/asphalt companies to smaller regional commercial contractors down to one-off project and residential demand. For vertically integrated firms, some of their demand for aggregates, when the aggregate source is close to the project can be covered by self-supply.²⁴ However, these firms source aggregates from third parties when their own quarries are at capacity or are materially further from a project than other quarries.²⁵ Others non-vertically integrated firms such as HEB and Downers rely on aggregate supply from third party suppliers.²⁶
33. The share of customer demand is roughly as follows:²⁷
- 33.1 65% of aggregates are used for road construction and maintenance in New Zealand. These businesses must win regional tenders from local councils or the New Zealand Transport Agency (NZTA) to gain the right to build/maintain roads in particular regions across New Zealand. These contractors purchase specific types of aggregates that are generally specified by the NZTA or local councils, although contractors sometimes have discretion over which aggregates to use.
 - 33.2 27% of aggregates are used as the main ingredient in ready-mix concrete. This market is split between self-suppliers that operate regionally or nationally and are vertically integrated, and stand-alone independent contractors that rely on aggregate supply from third party suppliers; and

²³ Aggregate and Quarry Association Submission on “Residential Construction Sector: Market Study Paper” (11 June 2013) at [5.2.9].

²⁴ Interview with [] 19 April 2016; Information responses from [] 30 March 2016; information response from Fletcher Building 30 March 2016.

²⁵ Information response from [] 30 March 2016; Information response from [] 30 March 2016.

²⁶ Interview with [] 14 March 2016; Interview with [] 14 March 2016.

²⁷ Adapted from Aggregate and Quarry Association Submission on “Residential Construction Sector: Market Study Paper” (11 June 2013) at [5.2.2] and Commission internal analysis from third party interviews.

- 33.3 8% of aggregates are used for other specific applications such as landscape gardening and residential demand, the use of large blocks of rock known as armour rock or rip-rap for protecting the coast and river banks from erosion and railway ballast for building and maintaining railway tracks.

With and without scenarios

34. To assess whether competition is likely to be substantially lessened in any market, we compare the likely state of competition with the acquisition to the likely state of competition without the acquisition.²⁸

With the acquisition

35. Fletcher Building is proposing to acquire the business and assets of Higgins except for Higgins' ready-mix concrete business, property business and Higgins' 50% share of Horokiwi Quarries Limited.

Without the acquisition

36. Based on the information provided, we consider that the appropriate without the acquisition scenario is the status quo. Specifically, that Higgins' business [].²⁹

How the acquisition could substantially lessen competition

37. We consider there are three potential ways in which the acquisition could substantially lessen competition for aggregates in regional markets:
- 37.1 unilateral effects could arise from the merged entity profitably increasing prices of aggregates above competitive levels;
 - 37.2 vertical effects could arise from the merged entity foreclosing upstream inputs (such as aggregates) to downstream rivals (such as competitors in roadbuilding and maintenance).
 - 37.3 coordinated effects could arise if the merged entity and its rivals could coordinate their behaviour post-acquisition in aggregates markets.
38. In addition, we have also considered whether the aggregate supply agreement, between the merged entity and Higgins' ready-mix concrete business would give rise to competition issues. Specifically, we assessed whether the agreement would:
- 38.1 mean that competitors of Higgins Concrete and Firth Concrete would not be able to purchase aggregate from Fletcher Building and therefore have no other viable alternative sources of supply; and

²⁸ *Mergers and Acquisitions Guidelines* above n 1 at [2.29]; *Commerce Commission v Woolworths Limited* (2008) 12 TCLR 194 (CA) at [63].

²⁹ Clearance Application from Fletcher Building at [6].

- 38.2 make entry or expansion in aggregate supply less likely as it would remove Higgins Concrete as a prospective customer.
39. We consider the horizontal effects of the merger first and then any relevant vertical effects.

Market definition

Our approach to market definition

40. Market definition is a tool that helps identify and assess the competitive constraints the merged entity would face. Determining the relevant market requires us to judge whether, for example, two products are sufficiently close substitutes as a matter of fact and commercial common sense to fall within the same market.
41. We define markets in the way that best isolates the key competition issues that arise from the merger. In many cases this may not require us to precisely define the boundaries of a market. What matters is that we consider all relevant competitive constraints, and the extent of those constraints. For that reason, we also consider products which fall outside the market but which still impose some degree of competitive constraint on the merged entity.

Aggregates: product dimension

42. Aggregates are granular rocks, gravel or sand. In New Zealand, aggregates are usually derived from deposits of greywacke or basalt, and sometimes other types of rock such as andesite. Aggregates can be quarried from inland rock-faces, or extracted from riverbeds or coastal locations (alluvial quarries).
43. The most common aggregate resource, greywacke, consists of weaker argillite rock, known as brown rock, and stronger sandstone, known as blue rock.³⁰ Brown and blue rock can be obtained from both land and alluvial quarries.³¹ To extract blue rock, selective quarrying and processing may be needed to maintain the quality of the materials that are produced.³²
44. The extraction of aggregate also varies according to the type of quarry with land-based quarries generally requiring more drilling and blasting than alluvial quarries, which allow aggregate to be excavated directly. Further processing can involve equipment to crush, sift and wash extracted product. Extraction and processing equipment can be fixed at quarry sites or mobile.³³ In recent years, the use of mobile equipment has increased. For example, Higgins stated that its use of mobile equipment has increased around [] from 10 years ago.³⁴ Our investigation indicates that some firms exclusively use mobile equipment.³⁵ The use of mobile equipment

³⁰ Interview with [] 15 March 2016; Interview with [] 1 March 2016.

³¹ The quality of the potential aggregate available from river quarries is improved by natural processes.

³² Appendix I- Aggregates Assessment Report submitted by Winstone Aggregates (Fletcher) to Kapiti District Council, July 2015 at [4].

³³ Clearance Application from Fletcher Building at [9].

³⁴ Interview with Higgins 14 June 2016.

³⁵ Interview with [] 13 April 2016; Interview with [] 13 April 2016.

can assist quarries to increase or decrease production in response to changes in demand.³⁶

45. Producing particular types of aggregate can result in other types of aggregate being produced as by-products. For example, sand is produced as a by-product in the production of some granular aggregates.³⁷

Demand-side substitutability

46. From our internal analysis, we observe that the price of different types of aggregate products varies, from around \$5 a tonne to more than \$60 a tonne, suggesting that different aggregate products are used for different applications.³⁸ For example, in the sealing of roads, due to the particular quality standards required, there are few alternatives to road sealing chip.³⁹ In contrast, for certain applications, such as in-fill, the type of aggregate product used is of little importance.⁴⁰
47. For other applications, such as the manufacture of concrete and asphalt, there can be some flexibility to vary the types of aggregates used, subject to cost. For example, concrete is made with concrete aggregate and concrete sand and there are a variety of different ‘mixes’ that concrete manufacturers can use depending on the aggregate available.
48. We therefore conclude that while for some applications there may be some degree of demand-side substitutability, for other applications there are limits to alternative aggregate products that can be used.

Supply-side substitutability overview

49. The applicant submitted that there is a high degree of supply-side substitutability. This is on the basis that many commonly used aggregates can be produced from greywacke by changing the amount and type of processing carried out with the same machinery. The parties also submitted evidence of supply-side switching at some of their own quarries, noting that the proportions of given aggregates produced at a site can change significantly year-on-year.⁴¹
50. To test supply-side substitutability, we evaluated whether other suppliers could switch production “easily, profitably and quickly... without significant cost” in response to a price increase.⁴² Our investigation indicated that some suppliers make

³⁶ For example, [] quarry increased its volumes [] in one year by using mobile equipment. Interview with [] 14 June 2016.

³⁷ When extracting and crushing larger aggregate, smaller by-products are often created which includes fines such as sands, course such as chip or granular where the aggregates are non-uniform such as AP (All Passing) types. Also sand occurs naturally as a by-product in alluvial quarries. Interview with Higgins 14 June 2016.

³⁸ Commission estimates based on data [] 30 March 2016; [] 30 March 2016.

³⁹ Additional concrete can be added in some cases if there are insufficient quantities of road sealing chip but road sealing chip is still required. Interview with NZTA 26 May 2016; Interview with [] 19 April 2016.

⁴⁰ Interview with Higgins 6 April 2016.

⁴¹ Clearance Application from Fletcher Building at [10].

⁴² Commerce Commission Merger and Acquisition Guidelines July 2013 at [24].

a range of aggregate products and can generally switch between producing these aggregates relatively easily and without significant cost from the same quarry.⁴³ Other quarries, however, can only make a narrower range of aggregate products due to factors such as the nature of their resource, because they lack the scale or demand to invest in or hire suitable machinery, expertise to make other products or a combination of the above factors.⁴⁴ Our investigation indicated that the least supply-side substitutable aggregate product is road sealing chip where the lack of suitable rock, suitable machinery or insufficient demand would prevent some quarries from producing it regularly. Also, as road sealing chip is not easily substitutable on the demand side, we consider that there is a separate aggregate market for road sealing chip.

51. In terms of aggregates other than road sealing chip, we note that some quarries may have limits to supply-side substitutability. However, because there are a sufficient number of rivals to the merged entity in each region, producing a wide range of aggregates, there is sufficient supply-side substitutability collectively among rivals within a region. We therefore consider that there is a single product market for all other aggregates, except road sealing chip.
52. The one exception to this is sand suitable for concrete in Napier-Hastings. We have investigated the potential impact of the merger on the supply of sand in Napier-Hastings separately on the basis that there was a potential vertical foreclosure issue in this specific market.

Conclusions on the product market

53. For the purposes of evaluating this transaction, there are two separate product markets in each region (see below):
 - 53.1 road sealing chip; and
 - 53.2 all other aggregates (referred to in the remainder of the reasons as general aggregates).
54. In addition, we consider there is a separate market for sand suitable for concrete in Napier-Hastings.

Aggregates: geographic market

55. The parties submitted that the following regions could be identified as relevant markets in which their operations have some overlap:
 - 55.1 Manawatu-Wanganui;
 - 55.2 Napier-Hastings;

⁴³ For example, Commission interviews with [] 30 June 2016, [] 19 May 2016 and [] 19 April 2016

⁴⁴ Interview with [] 13 April 2016; Interview with [] 13 April 2016; Interview with [] 15 March 2016; Interview with [] 1 March 2016.

- 55.3 Kapiti;
- 55.4 North Waikato; and
- 55.5 Christchurch.
56. A feature of the aggregates market is the relative importance of transportation costs to the overall cost of aggregate products. While aggregates are not perishable, our investigation indicated that aggregates can typically be transported economically 35-45km from a quarry and that the total cost of aggregates supplied doubles for every 35-45km that they are required to be transported from the quarry site.
57. For this reason, our evidence shows that for any given construction project, the source of aggregate will most often be the nearest quarry to that project. As set out above, this approach, equally applies to roading contractors who are vertically integrated with their own quarries. If supply from the nearest quarry to a project is exhausted, then aggregate is likely to be sourced from the next nearest quarry and so forth.
58. However, the distance that aggregate can be transported can increase due to efficiencies combined with the value of some types of aggregate products. For example, [] transports road sealing chip from [] to [] because it backhauls [] for famers in the opposite direction.
59. We have also identified instances where, due to the nearest quarry being exhausted of supply, general aggregates are transported beyond typical distances, for example aggregates being sourced from the Manawatu-Whanganui and Wellington regions for State Highway 1 improvements in the Kapiti region.⁴⁵ However, these instances are rare, and are caused by abnormal and often transient market conditions. Therefore, the regions identified above are appropriate markets for the sale of aggregates for the purposes of this application.

Additional industry background

Barriers to entry/expansion

60. There are relatively low time and cost barriers to entry for an alluvial river based quarry as entrants/competitors can enter/expand by gaining permits to extract alluvial gravel (if there are rivers in the region with extraction capacity) from the local council. These permits are often readily available, granted in a number of days or weeks and relatively cheap to obtain.⁴⁶
61. In contrast opening a new land-based quarry takes longer, around 18 months, and fees to secure approval are more costly than alluvial quarries.⁴⁷ Our analysis suggests

⁴⁵ Interview with [] 2 June 2016.

⁴⁶ Interview with [] 30 June 2016.

⁴⁷ Interview with Fletcher Building 2 June 2016.

that the benefit of a land-based quarry is it can provide much greater capacity of aggregate supply than an alluvial river quarry.⁴⁸

62. There are also a number of companies which offer rental of mobile crushers in the short or long term which allow entrants/competitors to enter/expand in the market with a smaller upfront capital investment.⁴⁹

National Operation Contracts

63. NZTA are moving their state highway road maintenance contracts to seven year contracts (from much shorter contracts) which also cover larger regions than historically. These road maintenance contracts, known as National Operation Contracts (NOCs), have been established to incentivise firms to only re-seal roads when necessary. As a result of this new contract structure, a number of quarry owners, including the merger parties, have indicated that there will be a decrease in the amount of road sealing chip demanded. Another impact of the NOCs is that roading contractors have longer lead times to negotiate aggregate requirements and so are able to exercise some degree of countervailing power in negotiations with a quarry once a NOC has been awarded.

Competition analysis

Summary

64. We are satisfied that Fletcher Building's proposed merger would not have, or would not be likely to have, the effect of substantially lessening competition in a market in New Zealand.

Detailed competition analysis: aggregates

65. In each relevant region, we consider how the proposed merger may change the competitive situation with respect to:
- 65.1 general aggregates except road sealing chip; and
 - 65.2 road sealing chip.
66. We separately consider how the merger may change the competitive situation with respect to concrete aggregates and particularly sand in Napier-Hastings.
67. Given that the merging parties supply aggregate for internal use as well as external customers, we focus on how the proposed merger would affect competition for the merging parties' external customers.
68. In order to assess this, we consider:
- 68.1 the merged entity's likely external sales post-merger; and

⁴⁸ Commission estimates using parties' data provided 30 March 2016.

⁴⁹ Information response from Fletcher Building 20 May 2016.

- 68.2 existing competitors' current annual spare capacities and abilities and incentives to expand to constrain the merged entity from increasing prices to its external customers post-merger.
69. We focus on the collective constraint, in terms of maximum potential capacity to supply external customers, likely to be applied by all rivals to the merged entity. This is because discussions with customers confirmed that there are no significant differences between aggregate products supplied by more established larger quarries to those supplied by smaller quarries in the relevant regions. In this regard, customers advised that they can make up purchases of a required quantity from several suppliers and often do so because they do not wish to be reliant on a single aggregate supplier.⁵⁰
70. We also consider the future viability of dormant sites of the merged parties and rivals, if known.
71. We consider the horizontal effects of the proposed merger first and then any relevant vertical effects.⁵¹

Manawatu-Whanganui

Parties' active quarries

72. In Manawatu-Whanganui the merger would bring together the following active quarries:
- 72.1 RAL's Campion and Kakariki quarries; and
- 72.2 Higgins' Awapuni, Bulls, Linton and Te Matai quarries.

Parties' dormant quarries

73. We also understand that Higgins has [] dormant quarries in the region. [] of those dormant quarries, [] and would be transferred to the merged entity. All other dormant quarries will be retained by the Higgins family and are not included in Fletcher Building's application for clearance.⁵²
74. [] As such, we have not considered these dormant quarries as offering any potential constraint for the purposes of our assessment of the proposed merger.⁵³

⁵⁰ Interview with [] 19 April 2016; interview with [] 14 March 2016.

⁵¹ The only regional market where our evidence highlighted potential vertical effects was Napier-Hastings where we have considered the likelihood of the merged entity foreclosing the supply of sand suitable for concrete to a non-vertically integrated downstream concrete producer.

⁵² Email from Chapman Tripp on behalf of Higgins to the Commerce Commission on 16 June 2016.

⁵³ Entry or expansion must likely to occur within a reasonably short time period following a price increase in order for it to constrain the merged firm and prevent a substantial lessening of competition, Commerce Commission Merger and Acquisition Guidelines July 2013 at [38].

Manawatu-Whanganui market for general aggregates

75. Table 1 below shows the 2015 market shares for all general aggregate producers in the Manawatu-Whanganui market (excluding road sealing chip). In the far left column is the total general aggregate production of each competitor. This total figure is then split into internal sales (to the parties’ vertically integrated downstream businesses) and external sales. Data are based on interviews and information request responses from third parties and the proposed merged entity.
76. Currently, RAL has [] of the market share of total general aggregate production in Manawatu-Whanganui and Higgins has []. They then each have [] and [], respectively, of the market share for external sales. Post-merger, the merged entity would have [] of the market share of general aggregates and [] of the market share for external sales.

Table 1: Market shares by production, 2015, m³ – general aggregates not including road sealing chip

Supplier	All supply	Shares	Internal sales	Shares	External sales	Shares	Competitors' annual spare capacities
RAL (Fletcher)	[]	[]	[]	[]	[]	[]	
Higgins	[]	[]	[]	[]	[]	[]	
Merged entity	[]	[]	[]	[]	[]	[]	
Longburn	[]	[]	[]	[]	[]	[]	[]
Bullock	[]	[]	[]	[]	[]	[]	[]
Hoult	[]	[]	[]	[]	[]	[]	[]
Blackleys	[]	[]	[]	[]	[]	[]	[]
ZMR	[]	[]	[]	[]	[]	[]	[]
Pratt Quarries	[]	[]	[]	[]	[]	[]	[]
Byfords	[]	[]	[]	[]	[]	[]	[]
Others ⁵⁴	[]	[]	[]	[]	[]	[]	[]
Total competitors	[]	[]	[]	[]	[]	[]	[]

Competitors' annual average spare capacities vs. merging parties' external sales []	[]
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77. Table 1 also compares the merging parties’ external sales for 2015 with competitors’ 2015 spare capacities in general aggregates, excluding road sealing chip. We have excluded competitors that produce only specific aggregate products (for example, []), those that are operating at capacity already, [], The table shows that competitors’ combined annual spare

⁵⁴ The supply figure for ‘Others’ of [] is taken from the Clearance Application of Fletcher Building at [32]. The split between internal/external has been estimated at [] and the spare capacity is a conservative estimate extrapolated from the [] figure.

capacities are greater than (by a factor of []) the proposed merged entity's annual external sales over 2015.

78. We have included [] in the above table even though it has indicated that it may [].⁵⁵ Fletcher Building and Higgins have both used [] before and it is a suitable quarry. Our evidence suggests [] however, the quarry has good quality rock and can produce all grades of aggregate. [] Therefore, we have included it in the above table.⁵⁶
79. In summary, we consider that existing competitors in Manawatu-Whanganui have sufficient spare capacity to constrain the merged entity from increasing prices for the supply of general aggregates. We expect that in response to a price increase, external customers would relatively easily source supply of general aggregates from competitors of the merged entity.
80. In addition, we also understand [] is looking to expand its general aggregates business, as is [], a relatively new entrant in the market [].⁵⁷
81. The majority of quarries in Manawatu-Whanganui are alluvial quarries. There are relatively low barriers to entry for an alluvial river quarry as competitors can enter or expand by gaining permits to extract alluvial gravel from a number of the rivers in the Manawatu-Whanganui region from Horizons Council in 20 working days, as long as there is excess extraction capacity available on these rivers and there are no other factors to consider such as environmental or cultural concerns.⁵⁸

Road sealing chip

82. The majority of road sealing chip is used for roading and maintenance contracts, and Higgins currently holds most of the contracts in the Manawatu-Whanganui.⁵⁹ RAL sells to other users of road sealing chip who are generally large, established roading firms such as [], and these contractors often use this chip in the wider Manawatu-Whanganui/Palmerston North/Tararua region.
83. Table 2 below shows shares of production volumes in 2015 for road sealing chip. The figures show that the merged entity would have [] total market share for road sealing chip, and [] of the external sales of road sealing chip. [] production in 2015 gave it only [] of all volumes and it produced [] for external supply.

⁵⁵ Interview with [] 2 June 2016.

⁵⁶ Interview with [] 2 June 2016.

⁵⁷ [] is also looking to expand production of road sealing chip which is discussed further below.

⁵⁸ Interview with Horizons 6 July 2016.

⁵⁹ Interview with Higgins 14 June 2016.

Table 2: Market shares by production, 2015, m³ – road sealing chip

Supplier	All production	Shares	Internal sales	Shares	External sales	Shares
RAL (Fletcher)	[]	[]	[]	[]	[]	[]
Higgins	[]	[]	[]	[]	[]	[]
Merged party	[]	[]	[]	[]	[]	[]
Byfords	[]	[]	[]	[]	[]	[]
Bullock	[]	[]	[]	[]	[]	[]
Hoult	[]	[]	[]	[]	[]	[]
Blackleys	[]	[]	[]	[]	[]	[]
ZMR	[]	[]	[]	[]	[]	[]
Pratt Quarries	[]	[]	[]	[]	[]	[]
Longburn	[]	[]	[]	[]	[]	[]

84. In terms of volumes, [] currently produces []m³ of road sealing chip, and has the current spare capacity to produce up to a total of []m³ in Manawatu-Whanganui (its [] there is not much demand for this road sealing chip).
85. Higgins has recently won the Manawatu-Whanganui NOC roading and maintenance contract from Downer for the next seven years. However, Higgins' internal demand is [] to change as a result of this contract.⁶⁰
86. Therefore, this merger would reduce competition in the road sealing chip market from three to two players, with [] being the other competitor in the market. [] is currently expanding capacity to supply the external market in the Manawatu-Whanganui region with road sealing chip.⁶¹ At the time of interviewing, [] had ordered [] from [] which would allow them to [] making road sealing chip. [] considers this [] and would allow [].⁶² []
87. [] aims to expand its market share in road sealing chip and has strong incentives to do so following its []. [] goal with this [] supply more road sealing chip to external customers.
88. [] expects that it could produce []m³ of road sealing chip with the [], [] of which it could sell in the Manawatu-Whanganui. However, it considers there will be insufficient demand in the Manawatu-Whanganui region for this volume, and

⁶⁰ [] 4 July 2016.

⁶¹ Interview with [] 29 June 2016.

⁶² Ibid.

expects it will sell the rest to customers in the wider [] region. [] capacity of []m3 is [] times the amount which [] currently sells to external buyers. [] notes that its expansion into road sealing chip means it will compete directly with RAL and Higgins for external road sealing chip customers.⁶³ We therefore consider that [] plans to increase its market share would provide a substantial competitive constraint in the market for road sealing chip in Manawatu-Whanganui post-merger.

Entry into the road sealing chip market in Manawatu-Whanganui

89. For completeness, we considered whether entry into supplying road sealing chip in Manawatu-Whanganui was likely.
90. The higher grade of rock required to produce road sealing chip is present in the majority of quarries in the Manawatu-Whanganui. Furthermore, the lead time available to supply road sealing chip is generally much longer than for general aggregates, as road sealing chip is mainly used for major highways which are tendered and planned many months or years before construction.⁶⁴ Finally, there are a number of rivers in the region where alluvial permits can be gained from the council if market entrants wish to do so. This allows time for sponsored entry by downstream contractors.⁶⁵
91. Fletcher Building and Higgins submitted that third parties could enter or expand in the Manawatu-Whanganui region as any equipment currently able to produce concrete aggregates can produce road sealing chip or that the necessary equipment can be hired. Furthermore, according to Higgins, a number of third parties have previously supplied road sealing chip in the area, including to Higgins. It has not [] its aggregates prices [] due the constraint provided by third party expansion or entry.
92. In the short to medium term, our investigation suggests that [] is a potential entrant into the road sealing chip market. It has a quarry with suitable rock and is [].⁶⁶
93. We also considered whether [] would [] the road sealing chip market in Manawatu-Whanganui region.⁶⁷ [] with road sealing chip through the hiring of mobile equipment from its quarry.⁶⁸ [] currently does not supply any road sealing chip on the basis that there is not enough demand in the market. As stated above, [] has indicated to us that it is [], however, another competitor may [] the market if demand increases. However, as the supply of road sealing chip would require the hiring of

⁶³ Ibid.

⁶⁴ Interview with [] 14 June 2016.

⁶⁵ Interview with [] 6 July 2016.

⁶⁶ Interview with [] 29 June 2016.

⁶⁷ []. Interview with [] 5 April 2016.

⁶⁸ [] 20 May 2016 at 8; Interview with [] 5 April 2016.

equipment and sufficient demand, we have considered [] ability to constrain prices in the general aggregates market only.

94. However, as there is sufficient competitive constraint from existing competition in the road sealing chip market in the Manawatu-Whanganui region, we do not rely on entry into the supply of road sealing chip to constrain the proposed merged entity from increasing prices of road sealing chip in the Manawatu-Whanganui region.

Conclusion

95. Our analysis suggests that in the Manawatu-Whanganui region, there would be sufficient constraint on the merged entity post-merger to prevent the merged entity from raising prices in the general aggregates and road sealing chip markets. Therefore, the Commission is satisfied that the proposed merger would not have, or would not be likely to have, the effect of substantially lessening competition in these markets in Manawatu-Whanganui.

Napier-Hastings

Parties' active quarries

96. In Napier/Hastings the proposed merger would bring together three active quarries:
- 96.1 Fletcher Building's quarries at Awatoto and Fernhill; and
 - 96.2 Higgins' quarry at Roy's Hill.
97. Awatoto's main production is general aggregates, mainly concrete aggregates, such as sand.⁶⁹ Fernhill produces all aggregates excluding road sealing chip.⁷⁰ Roy's Hill produces all aggregates including road sealing chip.
98. As there is no overlap (current or prospective) in road sealing chip from the proposed merger, we only consider general aggregates in the analysis below.
99. The proposed merger would also result in the loss of a non-vertically integrated supplier of sand as Higgins does not have a concrete business in Napier-Hastings. Therefore, we also consider the impact of the proposed merger on the market for concrete sand.

Additional quarries

100. Higgins' [] river consents that it is [] are part of the acquisition.⁷¹ These consents are along the Waipawa River about []km from Napier-Hastings.

⁶⁹ Awatoto also produces some roading aggregates []
[]. Source information response [] 4 July 2016

⁷⁰ []
[] 4 July 2016.

⁷¹ The capacity of these river consents is not specified by [] as it changes yearly dependant on the flow of the river.

These assets are not considered to currently overlap with Fletcher Building's Awatoto and Fernhill quarries because of the transport costs involved in moving aggregate from the Waipawa River to the Napier-Hastings market.⁷² However, we note that [] which we discuss further below.⁷³

101. In addition, Frances Holdings Limited (currently part of Higgins) also has rights to extract aggregates from a resource at Maraekakaho (about 25km west of Napier), which is being developed as a ski lake.⁷⁴ Frances Holdings Limited will not be acquired by Fletcher Building and will be retained by the Higgins family.⁷⁵ Furthermore, Fletcher Building confirmed that Frances Holdings Limited []
⁷⁶ However, as this site is [], it is excluded from our analysis.⁷⁷]

Overview of the production of general aggregates

102. The three largest competitors in the region, Fletcher Building, Holcim and Higgins, use on average around [] of the region's alluvial consented annual capacity.⁷⁸ The remaining annual capacity is accounted for by smaller operators, some of which have consents as part of roading contracts, while others use their consents for self-supply.⁷⁹
103. Table 3 shows the 2015 market shares for general aggregate producers in the Napier-Hastings market. The far left column is the total aggregate production of each competitor, separating out internal sales (where sales to the merging parties' vertically integrated businesses are treated as internal) and then another column for external customers.

⁷² Interview with [] 30 June 2016.

⁷³ Ibid.

⁷⁴ Clearance Application from Fletcher Building at [30]

⁷⁵ Ibid.

⁷⁶ Email from [] on 12 July 2016.

⁷⁷ []. Interview with [] 30 June 2016

⁷⁸ [], March 2015 at [6].

⁷⁹ Interview with [] 30 June 2016.

Table 3: Market shares by production, 2015, m³ – general aggregates except sand**Market shares: 2015, m³ – general aggregates except sand**

Supplier	All supply	Shares	Internal sales	Shares	External sales	Shares
Fletcher	[]	[]	[]	[]	[]	[]
Higgins	[]	[]	[]	[]	[]	[]
Merged entity	[]	[]	[]	[]	[]	[]
Holcim	[]	[]	[]	[]	[]	[]
Esk River Shingle	[]	[]	[]	[]	[]	[]
Russell Roads	[]	[]	[]	[]	[]	[]
Others ⁸⁰	[]	[]	[]	[]	[]	[]
Total competitors	[]	[]	[]	[]	[]	[]

104. Holcim is the largest supplier of aggregates in Napier-Hastings, producing around [] of total market production and [] of external sales. Currently, Fletcher Building has [] of total aggregate production in Napier-Hastings and Higgins has []. They each have [] and [], respectively, of the market share for external sales.

105. Another key supplier is Russell Roads who has a [] share of the total market production [] external sales.

[

81

]

106. As Higgins has [] share of the external sales for aggregates in Napier-Hastings, there is minimal aggregation in the general aggregates market. We nonetheless analyse the market for general aggregates further below since future competitive constraints largely depend on the extent of spare capacity and, given any capacity constraints, the ability of existing market participants to expand and the likelihood of new entry.

Existing competition, including spare capacities

107. The extent of competition in the market is influenced by the extent of spare capacity that each of these parties currently has at its quarries for external sales.

108. [] indicated that its alluvial site was currently producing [] []. It also indicated that it would [] []

⁸⁰ The supply figure for 'Others' of [] is taken from the [] figure in the Clearance Application of Fletcher Building at [30] and decreased by [] which interviews with [] indicate is the industry average sand content in aggregate production in the region. The split between internal/external has been estimated at [].

⁸¹ Interview with [] [] 30 June 2016.

resource consent from its current site to extract additional volumes.⁸² This means that if the merged entity increased the price it charges external customers for general aggregates,

[
].

109. There are, however, other areas in the Hawke's Bay region, particularly along the Waipawa River, where aggregate resource is plentiful.⁸³ [] advised it would consider these resources if there was a sustained and significant increase in demand for aggregates such as a major roading project, as there would be additional costs of transporting the aggregate from Waipawa to Hastings where [].⁸⁴
110. In terms of the merged entity's spare capacity, Fletcher Building has submitted evidence that it is currently operating []. Higgins advised us that its production []. While Higgins, [], we do not consider it [] to currently be having much if any price disciplining effect.
111. In addition, the above discussion of the extent of existing competition does not fully reflect the ability of other users of aggregates, particularly roading contractors, to self-supply. Hawke's Bay Regional Council confirmed that council roading contracts will often include river extraction rights to ensure adequate aggregate supply close to where the roading contract is.⁸⁵ These extraction rights cover the entire Hawke's Bay region.
112. With respect to the Ngaruroro River and the corresponding Napier-Hastings area where Fletcher Building, Higgins and Holcim are located, the other extraction sites are temporary or consist of mobile operators extracting aggregate when there is sufficient demand, or for on one-off projects, such as forestry.⁸⁶
113. In 2015, Hawke's Bay Regional Council allocated 37,500m³ to smaller contractors primarily for self-supply. The average volume extracted is 1,750m³ among 17 firms with frequent small volumes such as 200m³ being extracted.⁸⁷ Furthermore, there are additional rivers close to Napier-Hastings such as the Tukituki with additional extraction consents available.

Expansion and entry into general aggregates

114. The market in Napier-Hastings is characterised by alluvial quarries along the Ngaruroroa River where annual resource consents are granted by Hawke's Bay

⁸² Interview with [] 30 June 2016.

⁸³ Interview with [] 30 June 2016.

⁸⁴ Interview with [] 30 June 2016.

⁸⁵ Interview with [] 30 June 2016.

⁸⁶ [], August 2015 at [54].

⁸⁷ Commission analysis [] 6 July 2016.

Regional Council. In terms of land-based quarries, there is [], which is the one potential hard rock quarry in the area (see above), a number of terrace gravel pits, which are suitable for bulk filling but not crushed rock products such as road sealing chip, and several limestone quarries.⁸⁸

115. We understand that [].⁸⁹ For example, there are some rivers such as the Esk River which are unsuitable for further extraction and so suppliers on these rivers have seen their allocation rights drop in recent years.⁹⁰
116. In contrast, rivers in the south such as the Waipawa River have plentiful aggregate resources that need extraction for flood protection reasons.⁹¹ [].⁹² If prices of aggregates increase in the Napier-Hastings region, it is likely that the [] to make extraction from the Waipawa to Napier-Hastings competitive.
117. Furthermore, as outlined above, [] indicated that while currently it has been allocated []m3, if there was interest from external customers, it could increase its volumes to between []m3. [] envisages that it would be relatively easy to gain resource consent for this expansion. This was confirmed by Hawke's Bay Regional Council which stated that while resource consents are granted annually, there is scope to increase initial capacities granted subject to gravel limits on any given river, particularly those that are [].⁹³ If [] increased its external sales by []m3, then this capacity would cover between [] of the merged entity's current external market share.
118. In terms of costs of obtaining additional consents, [] indicated that obtaining additional consent is a very easy process which takes [], and that costs of the consent would be [] per m3 extracted plus an application cost of [].⁹⁴ As an illustrative example, the costs to extract []m3 would be between \$20,000 to \$32,000 plus the application fee.
119. All competitors interviewed in the region stated that stable customers were key to investing in additional machinery or pursuing resourcing consents with councils. This would either be through a major project or the growth of a supplementary business where aggregates are a key input.⁹⁵

⁸⁸ [], August 2015 at [12].

⁸⁹ [], August 2015 at [52].

⁹⁰ For example [] 1 March 2016.

⁹¹ Interview with [] 30 June 2016.

⁹² Ibid.

⁹³ Ibid.

⁹⁴ Interview with [] 30 June 2016; Interview with [] 30 June 2016.

⁹⁵ Interview with [] 30 June 2016; Interview with [] 29 June 2016.

120. Other potential suppliers, such as [], confirmed that they would not be motivated to enter the Napier-Hastings market due to transport costs and time.⁹⁶

Other aggregates: Concrete sand

121. Sand is a key input for concrete. In Napier-Hastings there are two main concrete producers, Firth Concrete, and Bridgeman Concrete (Bridgeman) which is an independent (non-vertically integrated) concrete producer. Firth Concrete has [] market share and Bridgeman has [] of the ready-mix concrete market.⁹⁷ Allied Concrete (Allied), which is []% owned by Holcim, also operates in Napier-Hastings with an estimated [] of the local [] market.

[]⁹⁸

122. [].
[] concrete sand is []-supplied by []. The relevant market shares for concrete sand are set out in table 4 below.

⁹⁶ Interview with [] 8 June 2016.

⁹⁷ [] 6 July 2016.

⁹⁸ Interview with [] 6 July 2016.

Table 4: Market shares 2015 concrete sand

Supplier	All supply	Shares	Internal sales	Shares	External sales	Shares
Fletcher	[]	[]	[]	[]	[]	[]
Higgins	[]	[]	[]	[]	[]	[]
Merged entity	[]	[]	[]	[]	[]	[]
Holcim	[]	[]	[]	[]	[]	[]
Waldrom	[]	[]	[]	[]	[]	[]
Esk River Shingle	[]	[]	[]	[]	[]	[]
Russell Roads	[]	[]	[]	[]	[]	[]
Others ⁹⁹	[]	[]	[]	[]	[]	[]
Total competitors	[]	[]	[]	[]	[]	[]

[

]

[

]

123. The degree of aggregation of external sales in the sand market from the proposed merger is not large. Fletcher Building has a [] market share and Higgins has [] of the market. The merged entity would have [] of the external market for concrete sand. Holcim has the majority of the market with [].
124. [] suggests that there is little difference in the quality of sand between Higgins and Holcim as they are both located on the Ngararoro River.¹⁰⁰ Also, information from []¹⁰² In terms of volumes, the sand produced by []; this is consistent with independent estimates for sand production in the area when the primary purpose of a quarry is to extract aggregates for roading.¹⁰³
125. The Commission has considered horizontal and vertical concerns about the impact of the merger on the price of sand.
126. In regard to horizontal concerns, [] ability to increase prices.

⁹⁹ The supply figure for 'Others' of [] is taken from the [] figure in the Clearance Application of Fletcher Building at [30] and multiplied by [] which interviews with [] indicate is the industry average sand content in aggregate production in the region. The split between internal/external has been estimated at [].

¹⁰⁰ Interview with [] 9 June 2016.

¹⁰¹ Interview with [] 1 July 2016; Interview with [] 30 June 2016.

¹⁰² Information response from [] 4 July 2016.

¹⁰³ Discussions with [] stated that around 10-15% of aggregate in the area would be sand occurring as a by-product of extraction. Interview with [] 30 June 2016.

127. [

].

128. In regard to the horizontal issue, we consider that the proposed merger is not likely to cause a substantial lessening of competition in the concrete sand market as the amount of horizontal overlap between Higgins and Fletcher Building in the supply of sand is minimal. []¹⁰⁴.

129. In regard to the vertical issue, we do not consider that [] is likely to be foreclosed (or otherwise rendered less competitively effective) post-merger. This is for the following reasons:

129.1 [

].

129.2 [

105

].

130. Therefore, given [], we do not consider it is likely that the merged party would seek to foreclose the supply of sand in the downstream market.

Expansion in other aggregates: concrete sand

131. [], which is [], has in the past sold sand to [], but at present does not have surplus supply for external sales.¹⁰⁶ Currently, [] does not have washing and screening equipment for sand [], but it is looking at purchasing equipment to make sand as well as other aggregate products.¹⁰⁷

132. [] indicated that if it purchased this equipment, and applied for the additional [] consent that the site could make, then it would supply sand if there were customer demand for it. Screens and a washer would cost at [] and [] stated it would make this investment if a customer was interested in a [] supply agreement, somewhere in the order of []m3 a year.¹⁰⁸ In terms of sponsoring such entry,

[]¹⁰⁹.

¹⁰⁴ [] 4 July 2016.

¹⁰⁵ []

¹⁰⁶ It uses the sand for []. Interview with [] 29 June 2016.

¹⁰⁷ Interview with [] 29 June 2016.

¹⁰⁸ Interview with [] 29 June 2016.

¹⁰⁹ Interview with [] 9 June 2016.

133. Therefore, [] may be alternative source of concrete sand. In which case, there would be no benefit from the merged entity in foreclosing supply in the downstream market.

Conclusion

134. In Napier-Hastings, our analysis suggests that the proposed merger would not lead to a substantial lessening of competition in both a market for general aggregates and a separate market other aggregates, specifically sand for concrete.

Kapiti

Parties' existing quarries

135. In Kapiti the proposed merger would bring together:

135.1 Fletcher Building's Otaki quarry consisting of a land-based resource and river gravel quarry; and

135.2 Higgins' Kapiti land-based quarry.

136. Fletcher Building's Otaki quarry produces []. Higgins' Kapiti quarry does [].¹¹⁰ Therefore, as there is no overlap (current or prospective) in road sealing chip from the proposed merger, we only consider general aggregates in the analysis below.

137. We note that since applying for merger clearance, Fletcher Building has been successful in securing additional resource consent in the Kapiti region. Specifically, Fletcher Building has secured an extension to the Otaki quarry, from which it will be able to extract around []m³ annually over [] years. The site will be able to produce a [].¹¹¹ We consider the impact of the proposed merger using this larger amended site.

Parties' dormant quarries

138. Fletcher Building has a dormant quarry at Waikanae that is not operating at present. According to information submitted by the applicant, the aggregate resource here is of lower quality than that obtained from the Otaki River and it is unsuitable for concrete making and road sealing materials. Consents and possibly a plan change would be needed to develop the Waikanae resource.¹¹² By way of background, Fletcher Building's Otaki extension took around 18 months and cost about [] in direct fees.¹¹³

¹¹⁰ Information provided to Commission

[] 13 June 2016 at [9].

¹¹¹ Interview with Kapiti Council 11 May 2016.

¹¹² Appendix I Aggregate Assessment Report, July 2015 submitted to Kapiti Council by Fletcher Building.

¹¹³ Interview with Kapiti council 11 May 2016.

Overview of existing competitors

139. In terms of competitors in the Kapiti region, the two alternatives to Higgins or Fletcher Building are Graham Bagrie Contracts (GBC) and Webb, both land-based quarries that produce the same range of products as the Higgins quarry.

Kapiti market analysis for general aggregates

140. At current aggregate supply levels, Higgins quarry in Kapiti is [].
141. [].¹¹⁴ In this scenario there is no material aggregation in the Kapiti area as Fletcher Building is effectively acquiring a quarry [].¹¹⁵ As such external customers will have Webb and GBC as alternatives if the merged party were to raise prices.
142. For completeness, we have analysed the market shares and competitors capacities on the basis that Higgin’s supply contract to [], and Higgin’s quarry continues to supply externally in line with 2015 volumes. We have also assumed in the figures that Fletcher Building’s new Otaki quarry comes online and sells []. Even in this scenario, our evidence shows the capacity of [] more than covers the merged party’s likely external sales.
143. Table 5 sets out the market share figures on this basis. In this scenario the proposed merged entity’s production of general aggregate in the market is [], and the merged entity’s share of external aggregate sales is [].

Table 5: Market shares 2015 data m³ in general aggregates (excluding sealing chip)

Supplier	All supply	Shares	Internal sales	Shares	External sales	Shares	Competitors’ annual spare capacities
Fletcher Higgins	[] []	[] []	[] []	[] []	[] []	[] []	
Merged entity	[]	[]	[]	[]	[]	[]	
Webb	[]	[]	[]	[]	[]	[]	[]
GBC	[]	[]	[]	[]	[]	[]	[]
Others ¹¹⁶	[]	[]	[]	[]	[]	[]	[]
Total competitors	[]	[]	[]	[]	[]	[]	[]

¹¹⁴ Interview with [] 7 July 2016 and follow-up email.

¹¹⁵ *ibid.*

¹¹⁶ The supply figure for ‘Others’ of [] is taken from the Clearance Application of Fletcher Building at [33]. The split between internal/external has been estimated at [] and the spare capacity is a conservative estimate extrapolated from the [] figure.

Competitors' annual spare capacities vs parties' external sales	
--	--

[]	
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	[]
--	-----

Existing competition capacities

144. Total competitors' spare capacity would amount to [] of the merged parties' external sales. Further, existing competitors have shown the ability to increase production in response to the increased demand from SH1 improvements in the region. Both Webb and GBC have increased volumes and capacities over the last [], for example with [].

Conclusion

145. In Kapiti, our analysis suggests that the proposed merger would not lead to a substantial lessening of competition as there is likely to be no material aggregation in the Kapiti area as Fletcher Building is []. In the alternative, if Higgins' quarry is [], existing competitors' spare capacity would provide a competitive constraint to the merged entity if it sought to raise prices for general aggregates.

Canterbury

Merging parties' existing quarries

146. In Canterbury the acquisition would bring together:

146.1 Fletcher Building's Yaldhurst quarry; and

146.2 Higgins' Selwyn quarry.

147. With the acquisition the merged entity would have []% of the total aggregates market.¹¹⁷

148. We note that the acquisition would not result in any aggregation in the production of road sealing chip. The following analysis relates to the market for general aggregates only.

Existing competition: general aggregates

149. Fletcher Building submits, and our investigation and analysis has confirmed, that the merged entity would face strong competition in Canterbury across general aggregates from existing competitors, such that the acquisition would not be likely to result in a substantial lessening of competition.

¹¹⁷ This is Fletcher Building's estimate of the merged entity's market share for external sales. As no concerns were raised about the Canterbury market by industry participants, we did not obtain data to confirm the market share tables provided in the Application.

150. Strong competitors in the region are Fulton Hogan, Road Metals and KB Contracting Quarries Limited. Other competitors in the Canterbury market include Christchurch Ready-Mix and Isaac Construction Limited.
151. Fulton Hogan is the largest supplier of general aggregates in the Canterbury region, with []% of the total aggregates market.¹¹⁸ It has [] sites supplying the region.¹¹⁹
152. Road Metals is the second largest supplier in the Canterbury region behind Fulton Hogan. It has quarries throughout the South Island, including [] quarries in the Canterbury region.
153. Competitors to the proposed merged entity did not raise any concerns about the proposed merger in relation to the Canterbury region. [] does not consider that the acquisition would have any impact on Canterbury aggregate markets.¹²⁰ [] considers the aggregates market in Christchurch is one of the most competitive aggregates markets in New Zealand and considers it will remain that way.¹²¹

North Waikato

154. The acquisition would result in aggregation in the supply of aggregates in North Waikato. Fletcher Building operates two quarries in this region and Higgins operates one.¹²²
155. Fletcher Building submits that the Higgins quarry, with []% market share, provides very little competitive constraint on the North Waikato aggregates markets, and that any horizontal aggregation is marginal.
156. Our investigation confirmed there is minimal aggregation in the North Waikato markets, such that further analysis of these markets is not necessary.

Conclusion on unilateral effects

157. Our analysis indicates that the proposed merger would not have, or would not be likely to have, the effect of substantially lessening competition in these markets in the regions identified above.

Vertical effects

Concrete

158. We considered whether [] would give rise to competition issues.¹²³ Competition issues could arise if, as a result from the agreement, the merged entity foreclosed the sale of concrete aggregates to

¹¹⁸ [].

¹¹⁹ [] 13 April 2016.

¹²⁰ Interview with [], 7 March 2016.

¹²¹ Interview with [], 7 March 2016.

¹²² The Fletcher Building quarries are the Smeeds Quarry at Pukekawa and Huna Gorge Road Quarry at Hunua. Higgins' Meremere Quarry is near Te Kauwhata.

¹²³ Aggregate Product Supply Agreement – Terms Sheet at [2]

competitors of Higgins Concrete which would then be unable to source similar price and quality products from alternative sources. The agreement may also substantially lessen competition in concrete aggregates markets by foreclosing Higgins Concrete as a customer to the merged entity's rivals.

159. The agreement applies to quarries in [], [] and []. We have ascertained that there is sufficient competition in concrete aggregate in these regions or there is no overlap between the merging parties. Our specific reasons for [] are set out above as part of our analysis of general aggregates in that region.
160. Furthermore, there is flexibility within the agreement to allow for Higgins Concrete to switch supply of concrete aggregate away from the merged entity if prices rise above market levels.
161. We therefore consider that there is no substantial lessening of competition arising from the aggregate supply agreement between the merged entity and Higgins Concrete.

Coordinated effects

162. We assessed whether the proposed merger may give rise to coordinated effects, including consideration of whether the acquisition may provide the conditions for the combined entity and its rivals to coordinate by allocating customers between themselves.
163. The affected markets have some features that may facilitate coordination, including:
- 163.1 some homogenous products (in the most common products);
 - 163.2 a small number of competitors; and
 - 163.3 quarries that are jointly owned by competitors as joint ventures.
164. Factors that make coordinated effects less likely include:
- 164.1 unstable demand;
 - 164.2 innovation on how aggregate products are used, for example switching reliance from high-PSV road sealing chip to using high-PSV road sealing chip only in certain high potential skid areas;¹²⁴
 - 164.3 asymmetries in market share and cost structures;
 - 164.4 the diversity of each roading project where aggregates are used; and
 - 164.5 the lack of price transparency of aggregates at the time of bidding for a project.

¹²⁴ Interview with NZTA 8 June 2016.

165. These factors will continue unaffected in the factual. Furthermore, we have found no evidence of coordination between the merging parties. The acquisition in our view will not make coordination more likely so as to result in a substantial lessening of competition.

Determination

166. The Commission is satisfied that the proposed merger would not have, or would not be likely to have, the effect of substantially lessening competition in a market in New Zealand.
167. Under section 66(3)(a) of the Act, the Commerce Commission gives clearance for Fletcher Building to acquire the shares and/or assets of Higgins as described in paragraph 1 of this determination.

Dated this 7th day of July 2016

Dr Mark Berry
Chairman