

**COMMERCE COMMISSION**

**DECISION NO. 314**

Determination pursuant to the Commerce Act 1986 (the Act), in the matter of an application for clearance of a business acquisition involving:

NUPLEX INDUSTRIES LIMITED and NUPLEX (HOLDING) PTY LIMITED

and

AUSTRALIAN CHEMICAL HOLDINGS LIMITED

- The Commission:** Peter Allport  
Terry Stapleton  
Kate Brown
- Summary of Proposal:** The purchase by Nuplex Industries Limited and Nuplex (Holding) Pty Limited of all the issued capital of Australian Chemical Holdings Limited.
- Determination:** Pursuant to s 66(3)(a) of the Act, the Commission determines to give a clearance for the proposed acquisition.
- Date of Determination:** 24 December 1997

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## MEMORANDUM

To: Peter Allport  
Terry Stapleton  
Kate Brown

From: John Preston  
Jane Chilcott

Date: 22 December 1997

Subject: **Business Acquisition: Nuplex Industries Limited/  
Australian Chemical Holdings Limited**

**Working Day 11: 24 December 1997**

**Confidential material in this report is contained in square brackets.**

### THE PROPOSAL

- 1 On 9 December 1997, the Commission registered a notice pursuant to s 66(1) of the Commerce Act 1986 (“the Act”) seeking clearance for the acquisition by Nuplex Industries Limited (“Nuplex”) and Nuplex (Holding) Pty Limited (“Nuplex Holding”) of all of the issued capital of Australian Chemical Holdings Limited (“ACH”).

### THE PROCEDURES

- 2 Section 66(3) of the Act requires the Commission either to clear, or to decline to clear, a notice given under s 66(1) within 10 working days, unless the Commission and the person who gave the notice agree to a longer period. As the applicant agreed to an extension of one working day, a determination is required by 24 December 1997.

- 3 In the notice, the applicant requested confidentiality as to the fact of the proposal until 11 December 1997, the date on which the offer for the issued capital of ACH was to be announced. A confidentiality order was granted on that basis.
- 4 This report concludes that staff are satisfied that implementation of the proposal would not result, and would not be likely to result, in the combined entity acquiring or strengthening a dominant position in any relevant market. Accordingly, it is recommended that in terms of s 66(3)(a) of the Act, the Commission give clearance for the proposal.

#### THE INVESTIGATION

- 5 Staff discussed the proposal with a range of parties with interests in the synthetic resin industry. These included an existing manufacturer, importers and major users of synthetic resins in the paint, bathroom products, and building industries.

#### THE PARTICIPANTS

##### **Nuplex Industries Limited (“Nuplex”)**

- 6 Nuplex is a New Zealand registered company based in Auckland, and listed on the New Zealand Stock Exchange. The company’s 10 largest shareholders<sup>1</sup> are as follows:

<b>Shareholder</b>	<b>% Issued Capital</b>
ANZ Nominees Ltd	10.66%
BT New Zealand Nominees Ltd	4.40%
National Mutual Life Association of Australasia Ltd	4.21%
The Trustees Executors and Agency Company of New Zealand Ltd	3.78%
National Nominees New Zealand Ltd	2.72%
National Bank of New Zealand Custodians Ltd	2.62%
Newburg Nominees Limited A/C Joseph Banks NZ Equities Imputation Trust	2.57%
The New Zealand Insurance Life Ltd	2.31%
The Colonial Mutual Superannuation (NZ) Ltd	2.09%
The NZ Guardian Trust Co Ltd - Guardian Trust Investment Ltd	2.08%

- 7 Nuplex is involved in the manufacture and distribution of synthetic resins, polymers and construction products in New Zealand and Australia. In New Zealand that business is carried out by the company's wholly owned subsidiaries, Construction and Flooring Merchants Ltd and Plaster Systems Ltd. Nuplex exports synthetic resins to Asia and the Pacific Islands.
- 8 Nuplex is also involved in the collection, treatment and disposal of hazardous wastes through its wholly owned subsidiaries, United Environmental Group Ltd and Medical Waste Group Ltd.

#### **Nuplex (Holding) Pty Limited (“Nuplex Holding”)**

- 9 Nuplex Holding was formed in Australia in December 1997 for the purpose of joining in making the bid for ACH. All the shares in Nuplex Holding are owned by Nuplex.

#### **Australian Chemical Holdings Limited (“ACH”)**

- 10 ACH is an Australian registered company listed on the Australian Stock Exchange. The company's top 10 shareholders<sup>2</sup> are as follows:

<b>Shareholders</b>	<b>% Issued Capital</b>
Permanent Trustee Company Ltd	11.46%
National Mutual Trustees Ltd	7.67%
BT Custodial Services Pty Ltd	6.79%
SAS Trustee Corporation	6.51%
Australian Mutual Provident Society	5.25%
Chase Manhattan Nominees Ltd	5.07%
Perpetual Trustees Nominees Ltd	4.91%
Westpac Custodian Nominees Ltd	3.77%
Queensland Investment Corporation	3.17%
The National Mutual Life Association of Australasia Ltd	2.88%

- 11 ACH, with operations in Australia, New Zealand and Vietnam, is principally involved in the manufacture, importation and distribution of synthetic resins and emulsions, industrial chemicals, metal driers, paper making chemicals and food ingredients. In New Zealand, the company's wholly owned subsidiaries are A C Hatrick (NZ) Ltd (“A C Hatrick”), and Essar (NZ) Ltd trading as FGI.

## OTHER RELEVANT PARTIES

### **Rohm & Haas NZ Ltd (“Rohm & Haas”)**

- 12 Rohm & Haas, based in Auckland, is involved in the manufacture and importation of synthetic resins, principally for the New Zealand paint industry, and agricultural/horticultural chemicals. It is a subsidiary of Rohm & Haas Company in the United States.

### **BASF New Zealand Ltd (“BASF New Zealand”)**

- 13 BASF New Zealand is a subsidiary of BASF in Germany, which is the third largest multi-national chemical company in the world. BASF New Zealand is involved in the importation of resins, crop protection agents and fertilisers.

### **Albright & Wilson New Zealand Ltd (“Albright & Wilson”)**

- 14 Albright & Wilson is a subsidiary of Albright & Wilson plc, a UK based multi-national chemical company. The Auckland based company imports a range of resins, industrial chemicals and adhesives. Most of the resins are sourced from Albright & Wilson Specialities Pty Ltd in Australia and S C Johnson in the United States. The company estimates that it would import between [ ] tonnes of resin per annum.

### **ICI Paints NZ Ltd (“ICI Paints”)**

- 15 ICI Paints, based in Wellington, is a member of the ICI group of companies. It is involved in the manufacture and distribution of paints and related products to the trade and retail sectors. The company’s major paint brands include “Dulux” and “British Paints”. The company sources its synthetic resin requirements, approximately [ ] tonnes per annum, principally from Nuplex, AC Hatrick and Rohm & Haas. It also buys resin from its parent company in Australia, ICI Australia Ltd, and imports a small quantity from the United States. ICI Paints estimated that approximately [ ] of its resin requirements would be supplied from domestic manufacturers with the balance from imports.

### **Wattyl (NZ) Ltd (“Wattyl”)**

- 16 Wattyl is an Auckland based company engaged in the manufacture and supply of a variety of paints and related products. The company markets paint primarily under the “Taubmans” and “Wattyl” brands and sources synthetic resins from both Nuplex and AC Hatrick. It was estimated that the company would purchase approximately [ ] of resins per annum from these two resin manufacturers.

### **Benjamin Moore Pacific Ltd (“Benjamin Moore”)**

- 17 Benjamin Moore, based in Auckland, is also involved in the manufacture of paints and related products, principally under its own brand. It purchases synthetic resins from both Nuplex and AC Hatrick, approximately [ ] tonnes per annum. It does not currently import resins from overseas.

### **Resene Paints Ltd (“Resene”)**

- 18 Resene is a privately owned New Zealand company based in Wellington. It produces paints under the “Resene” brand and operates a chain of retail stores selling paint and wall coverings. Resene sources synthetic resins from AC Hatrick, Nuplex, and Rohm & Haas. It is not involved in the importation of resins.

### **Croda Lusteroid Paints Ltd (“Croda”)**

- 19 Croda is an Auckland based paint manufacturer, specialising in industrial paints for the manufacturing industry. Croda sources synthetic resins from Nuplex and AC Hatrick, although the majority of the company’s resin requirements are supplied by Nuplex. For example, Croda estimated that it would purchase approximately [ ] of resins from Nuplex and [ ] from AC Hatrick. Croda also sources resin from Rohm & Haas, and imports a small quantity of specialised resin products.

### **BACKGROUND INFORMATION**

- 20 A variety of synthetic resins are manufactured in New Zealand by Nuplex, AC Hatrick, Rohm & Haas, and a number of smaller companies including Edson

Chemicals and Petersons. These synthetic resin manufacturers supply resins for use in the manufacture of paint and other surface coatings, adhesives, printing inks, and fibreglass reinforced plastics. The paint industry represents the largest user of resins in New Zealand.

- 21 Nuplex states that demand for resins has been falling in recent years, with the price for resins being driven down as a consequence of direct competition from imported resins and from imported end products containing resins. For example, Nuplex estimates that its resin plant production has fallen from approximately [ ] tonnes in 1995 to [ ] tonnes in 1997.
- 22 A number of paint companies confirmed that an increasing quantity of finished paint is being imported into New Zealand, and rationalisation in the paint industry generally has also impacted on resin demand. There has also been a trend away from solvent-based paints to water-based paints, which has impacted on the demand for specific resins. This trend is expected to continue as further technological developments are made. It is also noted that the closure of other manufacturers, including boat builders and motor vehicle assemblers, has had a significant impact on the demand for resins.
- 23 This reduction in volume and price has impacted on the profitability of both Nuplex and AC Hatrick, and has occurred at the same time that additional capital investment is required to comply with increasingly stringent health, safety and environmental regulations.
- 24 Nuplex also submits that there is over capacity in the industry in New Zealand, Australia, and South East Asia. While not specifying what plant closures will be made after implementation of the proposal, Nuplex states that the merged entity *will* be reducing plant capacity in both New Zealand and Australia.
- 25 Nuplex states that reduced demand as a result of a falling number of resin users, increased competition from imports, and the cost of compliance with health and safety regulations means that the only way in which resin manufacture in New Zealand can remain viable in the longer term is for rationalisation. Many of the industry participants contacted by Commission staff agreed with this view.

## THE RELEVANT MARKETS

### Introduction

- 26 The purpose of defining markets is to provide a framework within which the competition implications of a business acquisition can be analysed. The relevant markets are those in which competition may be affected by the acquisition under consideration. Identification of the relevant markets enables the Commission to examine whether the acquisition would result, or would be likely to result, in the acquisition or strengthening of a dominant position in terms of s 47(1) of the Act in any of those markets.
- 27 Section 3(1A) of the Act provides that:
- ... the term ‘market’ is a reference to a market in New Zealand for goods and services as well as other goods and services that, as a matter of fact and commercial common sense, are substitutable for them.
- 28 Markets are defined in relation to product type, geographical extent, and functional level. With the first two dimensions, market boundaries are determined by testing for substitutability in terms of the response to a change in relative prices of the good or service in question, and possible substitute goods or services. A properly defined market will include products which are regarded by buyers as being not too different (‘product’ dimension), and not too far away (‘geographical’ dimension), and are thus products to which they could switch if a small yet significant and *non-transitory* increase in price (“*ssnip*”) of the product in question was to occur. It will also include those suppliers currently in production who are likely, in the event of such a *ssnip*, to shift promptly to offer a suitable alternative product.
- 29 In addition, markets are also defined in relation to functional level. Typically, the production, distribution, and sale of products proceeds through a series of functional levels, so the functional levels affected by the application have to be determined as part of the market definition. For example, that between manufacturers and wholesalers might be called the “manufacturing market”, while that between wholesalers and retailers is usually known as the “wholesaling market”.



## **Market Definition**

- 30 Both Nuplex and ACH are involved in the manufacture of synthetic resins in Australia and New Zealand, with raw materials sourced principally from Australia, the United States, Brazil and Korea. Nuplex submits that the specific markets which will be affected by implementation of the proposal are those for the manufacture and distribution of the following synthetic resin products:
- aqueous dispersions;
  - Alkyd resins; and
  - unsaturated polyesters.
- 31 Aqueous dispersions and Alkyd resins are principally used in the paint industry for the manufacture of water-based and solvent-based paints respectively. Aqueous dispersions or water-based resins are discrete particles of polymer dispersed in water which dry to form an adhesive coating and are principally used in the manufacture of acrylic paints, adhesives, paper board coatings, printing inks and textiles. Alkyd resins are used for the manufacture of enamel or solvent-based paints. For example, they are used in high gloss enamel paint, industrial coatings, automotive paint and printing inks.
- 32 Nuplex states and other industry participants have confirmed that there are no complete substitutes for Alkyd resins and aqueous dispersions. However, as previously noted, there has been some move away from the use of Alkyd resins towards aqueous dispersions as technology in this area is developed and because of growing environmental concerns about the use of solvents.
- 33 Also, powder coatings can be substituted for Alkyd resin-based paints in limited circumstances; for example, for whiteware manufacture, but not for house paint. Powder coatings are imported into New Zealand from Germany, Japan and the United States.
- 34 While there is little or no substitutability for Alkyd resins and aqueous dispersions, there is a degree of substitutability between the finished paint products. For example, water-based and solvent-based paints may be substitutes for each other in some applications, with the extent of substitutability depending on customer preference and on end use. There is only limited substitutability between water-based paints and certain specialist

solvent-based paints such as varnishes and lacquers. Major manufacturers currently produce both water-based paints and solvent-based paints.

- 35 Unsaturated polyesters are used to make fibreglass reinforced plastic products used in boat building, and for the manufacture of clearlight roofing, bathroom products and chemical tanks. Nuplex submits that potential substitutes for unsaturated polyesters exist in the form of completely different products such as steel, concrete, aluminium or timber. While these materials may be substitutable for some applications in the building industry, they are not alternatives for the manufacture of bathroom products.
- 36 Epoxy resins were also listed as a potential substitute for unsaturated polyesters. However, it was noted that epoxy resins are more expensive and tend to be used in higher performance products; for example, racing yachts in the boat building industry.
- 37 Again, industry participants noted that the market for unsaturated polyesters has reduced in recent years due to manufacturers closing down or moving their operations off-shore, and because of increased competition from imports of finished products.
- 38 Based on the information provided by Nuplex and other industry participants, it is considered appropriate to define separate product markets for aqueous dispersions, Alkyd resins, and unsaturated polyesters for the purposes of this report.
- 39 It is noted that there will be no aggregation in relation to the collection and treatment of hazardous wastes, or the manufacture and distribution of industrial chemicals, metal driers, paper making chemicals and food ingredients.

### **Conclusion on Market Definition**

- 40 It is concluded that the relevant product and functional markets for the purpose of assessing the dominance implications of the proposal are as follows:
- the market for the manufacture and distribution of aqueous dispersions;
  - the market for the manufacture and distribution of Alkyd resins; and

- the market for the manufacture and distribution of unsaturated polyesters.

41 In each case the relevant geographic market is New Zealand.

#### ASSESSMENT OF DOMINANCE

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

43 Section 3(9) of the Act states that a person is in a “dominant position” if:

... a person as a supplier or an acquirer of goods or services either alone or together with an interconnected or associated person is in a position to exercise a dominant influence over the production, acquisition, supply, or price of goods or services in that market ...

44 That section also states that a determination of dominance shall have regard to:

- market share, technical knowledge and access to materials or capital;
- the constraint exercised by competitors or potential competitors; and
- the constraint exercised by suppliers or acquirers.

45 In reaching a conclusion on whether a person is in a position to exercise a dominant influence in a market, the Commission considers the foregoing non-exhaustive factors and any other relevant matters that may be found in a particular case. Important factors to consider in this case include the constraint from imports and the countervailing market power of end users.

46 In *Port Nelson Ltd v Commerce Commission* [1996] 3 NZLR 554, the Court of Appeal approved the following dominance standard, adopted by McGechan J in the High Court:

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

47 A dominance assessment for each of the relevant markets follows.

**Market for the Manufacture and Distribution of Aqueous Dispersions in New Zealand (“the Aqueous Dispersions Market”)**

48 In New Zealand, the largest manufacturers of aqueous dispersions are AC Hatrick, Nuplex, and Rohm & Haas. Smaller manufacturers include Edson Chemicals, Protective Paints, and Petersons. Aqueous dispersions are also imported into New Zealand and Nuplex submits, and Rohm & Haas agrees, that there is potential for increased imports in the future.

49 The paint companies are the major purchasers of aqueous dispersions in New Zealand. The carpet industry also uses a large volume of aqueous dispersions.

*Market Shares*

50 In the Commission’s view, a dominant position in a market is generally unlikely to be created or strengthened where, after the proposed acquisition, either of the following situations exist<sup>3</sup> :

- the merged entity (including any interconnected or associated persons) has less than in the order of a 40% share of the relevant market;
- the merged entity (including any interconnected or associated persons) has less than in the order of a 60% share of the relevant market and faces competition from at least one other market participant having no less than in the order of a 15% market share.

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

52 Nuplex estimates<sup>4</sup>, and staff have confirmed, that existing participants would have the following market shares in the aqueous dispersions market:

<b>Supplier</b>	<b>Quantity</b>	<b>Market Share</b>
Nuplex	[ ]	[ ]
AC Hatrick	[ ]	[ ]
<b>Combined Entity</b>	[ ]	[ ]

Rohm and Haas	[ ]	[ ]
Imports	[ ]	[ ]
Edson Chemicals	[ ]	[ ]
Petersons	[ ]	[ ]
Protective Paints	[ ]	[ ]
Total	[ ]	100.0%

53 Rohm & Haas, noting that the company is more actively involved in the supply of aqueous dispersions for only some applications, such as surface coatings, estimated that it would have a market share of between [ ] and [ ] of the aqueous dispersions market.

54 While implementation of the proposal would lead to some aggregation in this market, the combined entity's market share would appear to fall within one of the Commission's safe harbours. That is, the combined entity would have less than in the order of a 60% share of the market, facing competition from one other competitor having a market share of no less than in the order of 15%. As such, it is considered that the combined entity would continue to face strong competition from Rohm & Haas, and imports. Accordingly, staff consider that the proposal does not give rise to any competition concerns in relation to the aqueous dispersions market.

### **Conclusion on Aqueous Dispersions Market**

55 Based on the high market share for Rohm and Haas, and the competition from smaller manufacturers and imports, staff conclude that the proposed acquisition would not result, and would not be likely to result, in the combined entity acquiring or strengthening a dominant position in the market for the manufacture and distribution of aqueous dispersions in New Zealand.

### **Market for the Manufacture and Distribution of Alkyd Resins in New Zealand ("the Alkyd Resins Market")**

56 Nuplex and AC Hatrick are the only domestic manufacturers of Alkyd resins in New Zealand, which are principally used to manufacture solvent-based paints.

### *Market Shares*

- 57 Nuplex estimates<sup>5</sup>, and staff have confirmed, that existing participants would have the following market shares in the Alkyd resins market:

<b>Supplier</b>	<b>Quantity</b>	<b>Market Share</b>
Nuplex	[ ]	[ ]
AC Hatrick	[ ]	[ ]
<b>Combined Entity</b>	[ ]	[ ]
Imports	[ ]	[ ]
Total	[ ]	100.0%

- 58 Implementation of the proposal will lead to the combined entity having a market share of approximately [ ], which falls outside the Commission's "safe harbours". However, whether a dominant position would exist in a market post acquisition, is not determined on the basis of market share analysis alone. As Tipping J stated in *New Zealand Magic Millions Ltd & Anor v Wrightson Bloodstock Ltd* (1990) 3 NZBLC 99-175:

... market share is not the sole determinant of the presence or absence of dominance or market power. The most that can be said is that dominance is frequently attended by a substantial market share but all other relevant factors must be brought into account. For example, a substantial market share without barriers to entry will seldom, if ever, be indicative of dominance.

- 59 Accordingly, the Commission considers a range of additional factors before reaching a conclusion about the acquisition or strengthening of a dominant position in a market, such as the constraint from existing and potential competition and barriers to entry. These additional factors are discussed below in relation to the markets for both Alkyd resins and unsaturated polyesters.

### **Market for the Manufacture and Distribution of Unsaturated Polyesters in New Zealand ("the Unsaturated Polyesters Market")**

- 60 Unsaturated polyesters, used to make bathroom products, chemical tanks, and fibreglass reinforced plastic products, are manufactured in New Zealand only by Nuplex and AC Hatrick. A small volume of unsaturated polyesters is also imported into the country.

- 61 Staff contacted a number of unsaturated polyester users in the course of their investigation of the proposal. Clearlite Ltd (“Clearlite”), an Auckland-based company involved in the manufacture of bathroom products including shower units, vanity units and baths, sources its unsaturated polyester requirements from both Nuplex and AC Hatrick. The company estimated that it would spend approximately [ ] on polyester resins per annum, two-thirds of which would be supplied by Nuplex.
- 62 Englefield Industries Ltd (“Englefield”), based in Auckland, also manufactures bathroom products and purchases unsaturated polyesters from both Nuplex and AC Hatrick.
- 63 Alsynite Building Products NZ Ltd (“Alsynite”), based in Cambridge, uses unsaturated polyesters in the manufacture of fibreglass translucent commercial roofing. The company purchases all of its polyester resin requirements from Nuplex. Alsynite does not currently import polyester resins from overseas manufacturers, but has done so in the past, specifically from Anzol in Australia.
- 64 Dimond Industries (“Dimond”), a roofing materials manufacturer based in Auckland, sources its unsaturated polyester resin requirements principally from Nuplex. It was estimated that Dimond would spend approximately [ ] on polyester resins per year.
- 65 Maskell Productions Ltd (“Maskell”), based in Auckland and Melbourne, is an engineering company which manufactures chemical plant and equipment, and petrol storage tanks. The company estimated that it would spend approximately [ ] per annum on polyester resins from both Nuplex and AC Hatrick, although the majority of its requirements were sourced from Nuplex. While Maskell has imported polyester resins in the past, it is not currently doing so and expressed some reluctance at doing so in the future.
- 66 As previously stated, there has been a reduction in the demand for unsaturated polyesters in recent years due to manufacturers closing down or moving their operations off-shore, and from an increasing amount of imported finished products. For example, Dimond’s usage of polyester resins in the last three years has fallen from [ ] to [ ].

### *Market Shares*

- 67 Nuplex estimates<sup>6</sup>, and staff have confirmed, that existing participants would have the following market shares in the unsaturated polyesters market:

<b>Supplier</b>	<b>Quantity</b>	<b>Market Share</b>
Nuplex	[ ]	[ ]
AC Hatrick	[ ]	[ ]
<b>Combined Entity</b>	[ ]	[ ]
Imports	[ ]	[ ]
Total	[ ]	100%

- 68 As with the Alkyd resins market, the combined entity will have a very high market share which falls outside the Commission's "safe harbours". As such, it is necessary to consider other relevant factors to determine whether the proposal would result, or would be likely to result, in the acquisition or strengthening of a dominant position in the market.

### **Constraint from Market Entry in the Alkyd Resins Market and the Unsaturated Polyesters Market**

- 69 As there are no existing domestic competitors in either market, it is necessary to determine whether the combined entity would be subject to significant constraints from the threat of market entry. Potential competition which could act as a constraint could come from either new entry to the market or imports. Before the Commission will consider that new entry will provide an adequate constraint on a combined entity so as to allay dominance concerns, such entry must be shown to be *likely*, of sufficient *extent*, *timely* and *sustainable* (the "lets" test).<sup>7</sup>
- 70 Based on the information provided by Nuplex, and from staff enquiries, de novo entry by a new domestic manufacturer is considered unlikely and would therefore not provide an effective constraint on the combined entity. While the necessary raw materials are available, and the technology is not complex, a new domestic manufacturer would not have "a reasonable prospect of achieving a satisfactory return on investment"<sup>8</sup> should it decide to enter the market, given the over capacity in the synthetic resin industry in general, the costs involved in establishing a plant of sufficient scale to generate sufficient



volumes to warrant market entry, the increasing competition from imports, and the declining demand for resins as industry rationalisation continues.

- 71 Accordingly, staff consider that entry to the markets for the manufacture and distribution of Alkyd resins and unsaturated polyesters by a new domestic manufacturer is not likely to occur, be of sufficient extent, timely or sustainable so as to constrain the combined entity.
- 72 In the cases of Alkyd resins and unsaturated polyesters, Nuplex submits that there is significant actual and potential competition from imports. For example, BASF New Zealand, Albright & Wilson, Huntsman and Anzol are involved in the importation of one or other of these products into the country. Also, ICI (Australia) exports unsaturated polyesters to New Zealand. Nuplex also submits that the major users of Alkyd resins, ICI and Wattyl, who currently source Alkyd resins from Nuplex, could easily source these resins from ICI (Australia) and Wattyl (Australia) respectively. It is stated that the “threat” of such action has acted and will continue to act as a significant constraint on domestic manufacture.
- 73 Existing importers, Norfolk Chemicals and Albright & Wilson, considered that they were able to supply world class resins at competitive prices and could increase the supply of imported resins if required. Rohm & Haas agreed that the combined entity would be constrained by the availability of imported resins.
- 74 Norfolk Chemicals, which imports Alkyd resins from Ashland (in Australia) and Dyno Industries (in Malaysia and Norway), considered that the proposal could result in resin users supporting Norfolk Chemicals in order to “keep the combined entity honest” and confirmed that imported resins are a viable alternative to locally manufactured resins. However, it was noted that there is only a relatively small volume of resins that are currently imported into New Zealand.
- 75 Norfolk Chemicals considered that resin tariffs do not constitute a barrier to importing, but that “trans-Tasman freight costs are high”, particularly in relation to Alkyd resins which are classed as dangerous goods. For example, it was estimated that it would cost approximately [ ] to ship a 15 tonne container from Australia to New Zealand, with Norfolk Chemicals importing around [ ] containers per annum.

- 76 ICI considered that it could source all its Alkyd resin requirements from an overseas supplier for a similar price to locally manufactured Alkyd resins, although it had never done so in the past. For example, ICI could increase its supply of resins from ICI/Dulux in Australia. However, it was noted that importing all of its resins would not be as convenient as sourcing product from the domestic market, as ICI would have to hold increased stocks and would require additional warehousing space. Switching between resin manufacturers would also require paint reformulation to be undertaken, which is a costly and time-consuming process, but part of any paint company's normal business activities. For example, WattyL had to reformulate its paint formulas when it switched from AC Hatrick to Nuplex in this past year. ICI estimated that reformulation of a significant portion of its Alkyd resin-based paints could cost up to [ ], but (as noted) this could happen under circumstances other than the proposal.
- 77 WattyL also believed that importing Alkyd resins was a viable alternative for the company as WattyL could source its resin requirements from its "sister companies" in Sydney and Melbourne. WattyL's General Manager, Mr John Foyle, stated that WattyL does not currently source product from its Australian resin plants as it has been more convenient, and cheaper, to buy resin from AC Hatrick and Nuplex. However, if the combined entity was to increase prices by a significant amount, WattyL would look at importing from Australia.
- 78 Resene stated that it was in a different position to that of ICI and WattyL, as it did not have access to its own resin manufacturing operation in Australia or elsewhere. Resene considered that while importing resin was "a possibility", it would be problematic for the company in terms of additional freight costs, having resin supplied in drums rather than delivered in bulk tankers, storage difficulties, and paint reformulation.
- 79 Croda stated that it could import Alkyd resins from Australia or Asia if domestic resin prices were to increase significantly. However, it was noted that this could result in a reduction in the amount of technological development and support provided to the paint company.
- 80 In general, other resin users contacted by staff also considered that imports represented a viable option. For example, Clearlite stated that although it does

not currently import unsaturated polyesters and has not fully investigated doing so, it could see no problems with importing polyester resins in the future. Englefield considered that it could easily source its polyester resin requirements from overseas if necessary, as these resins are readily available from a number of countries. It was noted however, that the high level of technical backup provided by domestic manufacturers would not be available or accessible from an overseas supplier. Alsynite and Dimond also considered that it would be possible to source their unsaturated polyester requirements from overseas suppliers such as Huntsman and Anzol. Maskell, while noting that polyester resins were available from overseas suppliers, did not consider that importing was an attractive alternative as Maskell would prefer to deal with a domestic supplier.

- 81 Generally, resin tariffs were not considered a barrier to importing, with one industry participant stating that they had more of a “nuisance value” than anything else. The normal tariff for synthetic resins is approximately 7%-8% at present, with a lower tariff applicable to resins imported from countries such as Malaysia.
- 82 Freight costs are also not prohibitive, with Nuplex submitting that freight costs have reduced substantially in the last three years, encouraging a greater volume of imported resins into New Zealand. Nuplex states that freight costs for a full container load from Australia have fallen from [ ] in 1995 to [ ] in 1997.
- 83 The time involved in sourcing product from Australia or Asia does not appear to be a major hurdle either. For example, Nuplex estimates that it takes around three weeks from the time of placing an order for product to arrive in New Zealand.
- 84 Staff have not identified any other factors which would restrict importation of either Alkyd resins or unsaturated polyesters into New Zealand.
- 85 Based on the views of the applicant and the majority of industry participants contacted, staff conclude that imports would provide an effective constraint on the combined entity in both the Alkyd resins and unsaturated polyesters markets.

### **Conclusion on Constraint from Market Entry**

- 86 Staff do not believe that new entry to the Alkyd resins and unsaturated polyesters markets by way of manufacture is likely, since a manufacturer would not have a reasonable prospect of achieving a satisfactory return on investment. However, imports would appear to provide a major potential constraint on the pricing and other behaviour of the combined entity.

### **Constraint by Buyers in the Alkyd Resins Market and the Unsaturated Polyesters Market**

- 87 Nuplex argues that the major users of Alkyd resins, paint companies such as ICI, Wattyl and Resene, have countervailing power in the market and are in a position to constrain the combined entity if it was to increase prices or reduce the quality of its products. This view was shared by most industry participants contacted by staff.
- 88 Rohm & Haas agreed that the paint companies do have “buying leverage” in the synthetic resin industry, noting that the paint companies have access to world pricing information and are in a strong position to demand competitive prices from domestic manufacturers. ICI and Wattyl were both of the view that the larger paint companies do have a degree of market power and would be able to use the threat of taking their custom off-shore to constrain the combined entity’s pricing behaviour. For example, Wattyl would be in a position to purchase its Alkyd resin requirements from its own resin plants in Sydney and Melbourne. Clearlite also believed that, as a large user of unsaturated polyesters, it would be in a position to have some constraint on the combined entity, through the threat of importing its resin requirements.
- 89 Englefield’s Chief Executive Officer, Mr Alister Lawrence, stated that [
- ] if the combined entity was to raise resin prices by a considerable amount.

### **Conclusion on Constraint by Buyers**

- 90 Staff conclude that the major users of Alkyd resins and unsaturated polyesters would provide some constraint on any exercise of market power by the combined entity so as to alleviate concerns of market dominance.

## OVERALL CONCLUSION

- 91 Although implementation of the proposal would lead to the combined entity having high market shares in the Alkyd resins and unsaturated polyesters markets, staff consider that the proposal would not result, and would not be likely to result, in the combined entity acquiring or strengthening a dominant position in those markets. There would appear to be sufficient competitive constraints from existing and potential imports into New Zealand, and from the substantial countervailing power of end users, to eliminate concerns that the combined entity would acquire or strengthen a dominant position in either of those markets.
- 92 It is also concluded that the proposal would not result in the combined entity acquiring or strengthening a dominant position in the aqueous dispersions market as it would face strong competition from Rohm & Haas, and from imports.
- 93 Having regard to the factors set out in section 3(9) of the Act and all other relevant factors, staff conclude that the proposal would not result, and would not be likely to result, in the combined entity acquiring or strengthening a dominant position in the following New Zealand markets:
- the market for the manufacture and distribution of aqueous dispersions;
  - the market for the manufacture and distribution of Alkyd resins; and
  - the market for the manufacture and distribution of unsaturated polyesters.

## RECOMMENDATION

- 94 It is recommended that, in terms of s 66(3)(a) of the Act, the Commission give clearance for the proposed acquisition.

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Jane Chilcott  
Investigator

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John Preston  
Chief Investigator

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Jo Bransgrove  
Manager

## DETERMINATION ON NOTICE OF CLEARANCE

We agree/disagree with the recommendation.

We are satisfied/not satisfied that implementation of the proposal would not result, and would not be likely to result, in any person acquiring or strengthening a dominant position in a market.

Accordingly, pursuant to s 66(3)(a) of the Commerce Act 1986, we hereby give/decline to give clearance for Nuplex Industries Limited and Nuplex (Holding) Pty Limited to acquire all the issued capital of Australian Chemical Holdings Limited.

Dated this        day of December 1997

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Peter Allport  
Deputy Chairman

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Terry Stapleton  
Member

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Kate Brown  
Member

<sup>1</sup> Shareholders as at 13 September 1997.

<sup>2</sup> Shareholders as at 17 October 1997.

<sup>3</sup> Refer Commerce Commission's Business Acquisitions Guidelines, 1996, p17.

<sup>4</sup> Estimates based on Nuplex's industry knowledge and import statistics from Statistics New Zealand.

<sup>5</sup> Above n4.

<sup>6</sup> Above n4.

<sup>7</sup> Business Acquisition Guidelines, 1996, pp19-20.

<sup>8</sup> Business Acquisition Guidelines, 1996, p19.