



COMMERCE COMMISSION

Decision No. 433

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

HOWARD SMITH LIMITED

and

OPSM PROTECTOR LIMITED

The Commission: PR Rebstock
PJM Taylor
DF Curtin

Summary of Application: The acquisition by Howard Smith Limited, or any of its interconnected bodies corporate of up to 100% of the shares in or assets of any interconnected body corporate of OPSM Protector Limited that is part of, or used in conjunction with, OPSM Protector Limited's Protector Supply Group, including, in particular, Protector Safety Supply Pty Limited and Protector Safety Supply Limited (both wholly owned subsidiaries of Protector Safety Industries Pty Limited, which is in turn a wholly owned subsidiary of OPSM Protector Limited) and/or any of their interconnected bodies corporate.

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

Date of Determination: 28 June 2001

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THE PROPOSAL

1. On 7 May 2001 Howard Smith Limited (Howard Smith) registered a notice with the Commission seeking clearance under s66 (1) of the Commerce Act 1986 for it or any of its interconnected body corporates, to acquire up to 100% of the shares in or assets of any interconnected body corporate of OPSM Protector Limited that is part of, or used in conjunction with, OPSM Protector Limited's Protector Supply Group, including, in particular, Protector Safety Supply Pty Limited and Protector Safety Supply Limited (both wholly owned subsidiaries of Protector Safety Industries Pty Limited, which is in turn a wholly owned subsidiary of OPSM Protector Limited) and/or any of their interconnected bodies corporate (Protector).

THE PROCEDURE

2. Section 66(3) of the Act requires the Commission either to clear, or to decline to clear, a notice given under section 66(1) within 10 working days, unless the Commission and the person who gave the notice agree to a longer period. Some extensions in time were agreed to by the applicant and the Commission. Accordingly, a decision on the application was required by Friday 28 June 2001.
3. The applicant initially requested confidentiality as to fact for the proposed acquisition until 20 days after the Commission's determination but after discussions with Commission staff, agreed to amend the request to one of fact confidentiality up until and including Monday 21 May 2001. The applicant also requested confidentiality for specific information contained in the notice, and a confidentiality order was made in respect of this information for a period of 20 working days from the Commission's determination of the notice. When the confidentiality order expires, the provisions of the Official Information Act 1982 will apply.
4. The Commission's determination is based on an investigation conducted by its staff and their subsequent advice to the Commission.

THE PARTIES

Howard Smith

5. Howard Smith is an Australian domiciled company, listed on the Australian Stock Exchange. Its business is divided into two operating groups: Hardware Retail Distribution and Industrial Distribution. It has a number of subsidiaries through which it conducts its operating groups. Its relevant New Zealand subsidiaries are as follows:
 - NZ Safety Limited (NZ Safety) (Howard Smith's 100% ownership in NZ Safety is via its 100% shareholding in Danlan Pty Limited, which in turn owns 100% of the shares in HSL Safety Holdings New Zealand Limited, of which NZ Safety is a wholly owned subsidiary);
 - Benchmark Building Supplies Limited (Benchmark) (100% owned by Valley Investments Limited, which in turn is 100% owned by Howard Smith); and

- J Blackwood & Son (New Zealand) Limited (Blackwood) (100% owned by Benchmark).
6. Howard Smith distributes industrial clothing, protective footwear, hand protection, personal protective safety equipment such as hearing protection and safety glasses, respiratory protection products, hygiene, janitorial and medical products, hazard control equipment, and signage products and systems through NZ Safety, Blackwood and Benchmark. NZ Safety supplies safety products either directly to industry, or to the end user by means of 22 retail outlets or to resellers such as Wrightsons and Anchormart.

Protector

7. OPSM Protector Limited, which is listed on the Australian Stock Exchange, is the ultimate parent company of the Protector Supply Group. Its business is separated into manufacturing (through the Protector Technology Group, which is not being acquired in this acquisition) and distribution (through the Protector Supply Group).
8. Protector Supply Group operates as a separate division of OPSM Protector Limited. It supplies a complete range of protective equipment and workwear direct to the end user.
9. The New Zealand subsidiaries of OPSM Protector Limited are as follows:
- Protector Safety Supply Limited (100% owned by Product Safety Industries Pty Limited which in turn is 100% owned by OPSM Protector Limited);
 - Protector Technologies Limited (100% owned by Protector Safety Supply Limited);
 - Wild Weather Clothing Limited (100% owned by Protector Safety Supply Limited);
 - Pomposa Enterprises Limited (100% owned by Protector Safety Industries Pty Limited);
 - Archer Properties Limited (100% owned by Pomposa Enterprises Limited – Archer Properties holds 45% of OPSM Limited, Optique Limited and Budget Eyewear Limited).
10. In New Zealand, Protector distributes all of the industrial safety products distributed by Howard Smith. Protector supplies safety products either directly to industry or to the end user through its 23 retail outlets throughout New Zealand. It also supplies some products to resellers such as Wrightsons and Anchormart.

INDUSTRY BACKGROUND

11. The applicant and Protector are both involved in the retail of various industrial safety products including:
- *Industrial clothing:* Includes waterproof gear, overalls, workwear, high visibility clothing, specialist clothing (cold and freezer clothing) and disposable clothing. These products between themselves are often substitutable from the demand side, as although one type may be preferable than another for a particular industry or job specific requirement, consumer behaviour shows that employers and individual consumers readily substitute one “type” of clothing for another. From the supply

side, nearly all industrial clothing manufacturers manufacture at least several types of clothing, and distributors stock all types.

- *Protective footwear:* Includes all leather, PVC and other footwear, both steel toe cap and non safety.
 - *Hand protection:* Includes all industrial and safety gloves, such as chemical resistant gloves, cotton gloves, cut and abrasion resistant gloves and disposable gloves.
 - *Personal Protective Equipment:* Includes hearing protection equipment (ie: earmuffs and ear plugs), safety eyewear (ie: spectacles, goggles, welding protection, faceshields and visors) and all other head, eye and face protection. Consumers often require a product for more than one area of the face/head (ie: hard hats/bump caps, goggles and earmuffs) and some of the products now are “combos” for both the ears and eyes. Many of the manufacturers produce all, or at least two or three, of the product types in this market.
 - *Respiratory Protection:* includes all products designed to protect the respiratory system from damage from airborne contaminants that are used in the industrial environment, including systems to supply respirable air to a wearer of a respirator and all types of medical/surgical masks. There are five types of respiratory products sold in this market: disposable; half/full reusable; powered air; air line and self-contained breathing apparatus (“SCBA”). To a certain degree, some of these products are substitutable for each other from an end-users perspective. All distributors that retail respiratory products need to supply all products to meet consumer demand. Further, most manufacturers make or privately label some, if not all, the five types of products.
 - *Hazard Control Equipment:* includes fire extinguishers, fire equipment, gas detection products, lights, sirens, beacons, fall protection, height safety materials and spills control equipment.
 - *Signage Products:* includes warning/hazard/directional/information signs and systems for applying these signs.
12. These products are purchased by a range of customers from large industrial companies to the home handyperson. Many purchasers, particularly the larger industrial companies, purchase safety products as a package including most types of products from a sole supplier, rather than buying individual products from separate suppliers.
13. The three suppliers of safety packages to large industrial companies are NZ Safety, Protector and BOC Safety, a division of BOC Gases NZ Ltd. Other retailers such as Tasman Safety Ltd and Kaipara Workwear Ltd which are members of a group of safety retailers owned by members of the Closed Brethren Church which operating as a buying group and to a certain extent as a selling group (Brethren Group), focus more on selling to medium and smaller sized companies. A number of small safety product retailers, stock and station agents, garden centres, and retail stores such as The Warehouse, hardware stores and other retail outlets sell safety product to the agricultural sector, very small businesses and to individuals.

14. Some manufacturers such as Lynn River Ltd (hand protection), Yakka NZ Ltd (industrial and protective clothing), and Drager Ltd (respiratory products), sell partly through resellers such as NZ Safety and Protector, and, particularly those with specialist products such as self contained breathing apparatus (SCBA), partly directly to industry.
15. The larger suppliers of safety products generally also provide assessment of workplace hazards, advice as to appropriate solutions, and training on the use of safety equipment.
16. The applicant and Protector are also involved in the retail of janitorial, hygiene and medical products including cleaning products, toilet tissue, mops/brooms/wipes and rags and first aid kits (and all individual medical products sold separately).
17. These products are sold by a large numbers of suppliers including laundry companies, cleaning companies and supermarkets.

MARKET DEFINITION

Introduction

18. The purpose of defining a market is to provide a framework within which the competition implications of a business acquisition can be analysed. The relevant markets are those in which competition may be affected by the acquisition being considered. Identification of the relevant markets enables the Commission to examine whether the acquisition would result, or would be likely to result, in the acquisition or strengthening of a dominant position in any market in terms of section 47(1) of the Act.
19. 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.”
20. Relevant principles relating to market definition are set out in *Telecom Corporation of New Zealand Ltd v Commerce Commission*,¹ *Commerce Commission v Carter Holt Harvey Building Products Limited*,² and in the Commission’s *Business Acquisition Guidelines* (“the Guidelines”).³ A brief outline of the principles follows.
21. Markets are defined in relation to three dimensions, namely product type, geographical extent, and functional level. A market encompasses products that are close substitutes in the eyes of buyers, and excludes all other products. The boundaries of the product and geographical markets are identified by considering the extent to which buyers are able to substitute other products, or across geographical regions, when they are given the incentive to do so by a change in the relative prices of the products concerned. A market is the smallest area of product and geographic space in which all such substitution possibilities are encompassed. It is in this space that a hypothetical, profit maximising, monopoly supplier of the defined product could exert market power, because buyers, facing a rise in price, would have no close substitutes to which to turn.

¹ (1991) 4 TCLR 473.

² Williams J, 18 April 2000, HC, yet to be reported.

³ Commerce Commission, *Business Acquisition Guidelines*, 1999, pp. 11-16.

22. A properly defined market includes products which are regarded by buyers or sellers as being not too different ('product' dimension), and not too far away ('geographical' dimension), and are therefore products over which the hypothetical monopolist would need to exercise control in order for it to be able to exert market power. A market defined in these terms is one within which a hypothetical monopolist would be in a position to impose, at the least, a "small yet significant and non-transitory increase in price" (the "ssnip" test), assuming that other terms of sale remain unchanged.
23. Markets are also defined in relation to functional level. Typically, the production, distribution, and sale of products takes place through a series of stages, which may be visualised as being arranged vertically, with markets intervening between suppliers at one vertical stage and buyers at the next. Hence, the functional market level affected by the application has to be determined as part of the market definition. For example, that between manufacturers and wholesalers might be called the "manufacturing market", while that between wholesalers and retailers is usually known as the "wholesaling market".

Relevant Markets

Product Markets

24. The applicant has submitted that either a single inclusive product market, or at most, industry specific markets encompassing all safety items used by a particular industry would be the proper approach to market definition. However, for the purpose of the notice, it states it has adopted a conservative approach to market definition and, to the extent that products are not substitutable from a demand supply perspective for other safety products, adopted the following market definition set out below and has defined products according to their product groups:
- Industrial clothing
 - Protective footwear
 - Hand protection
 - Personal protective safety equipment
 - Respiratory protection equipment
 - Hygiene, janitorial and medical products
 - Hazard control equipment
 - Signage products and equipment.
25. Industry participants advise that although the different product groups are not substitutable for each other, there is in practice one safety product market, which does not include janitorial, hygiene and medical products, which can be referred to as safety products. Although the manufacturers who supply safety products directly to end users tend to supply only one type of product, all suppliers of safety products, which are responsible for the majority of sales, deal in most if not all types of products and frequently supply bundles of varying types of products to end users.
26. [] has submitted that the correct product market is industrial safety products, ie safety products used by the industrial sector. However, the safety products that are relevant to this application are used not only by industry, but also by the agricultural sector and by individuals such as home handypersons and gardeners. Such a definition

would be too restrictive, as these users are potentially exposed to the market power of the merged entity. To the extent that major industrial users have particular requirements, these will be considered as part of the competition analysis below.

27. Several of the safety product suppliers do not supply janitorial, hygiene and medical products, Most purchasers of safety products do not bundle janitorial, hygiene and medical products with them and regard these products as being quite separate. Furthermore the suppliers of these products are diverse and most do not supply safety products as well. Many of these products are supplied by such firms as New Zealand Towel Supply which hire cleaning products to businesses, and cleaning companies which provide cleaning products as part of their cleaning contract.
28. The Commission therefore concludes that for the purpose of assessing the competition implications of the proposed acquisition, the appropriate product markets are:
- Safety products; and
 - Janitorial, hygiene and medical products.

Function Market

29. The applicant submits that the relevant functional market is the retail level. Although in New Zealand the applicant carries out some manufacturing, Protector does not. The manufacturing function is therefore not relevant to this application.
30. Although the applicant and Protector make the majority of their sales to end users directly or through their specialist safety outlets, there are some sales by the applicant and Protector to other safety product suppliers, and by many safety product suppliers to retail outlets such as hardware stores, stock and station agents, and garden centres. Accordingly, it would be more accurate to describe the function market as the supply of safety products.
31. [] submitted that the function market is the direct supply of industrial safety products. Such a definition would exclude supply through the merged entity's specialist safety outlets, and wholesale supply to other retail outlets. [] argues that competitors which operate at the retail level alone would provide little or no constraint on direct suppliers to industry, because of the special requirements of such users. The majority of industry participants supply safety products both directly to industry and through retail outlets and regard both methods of sale as belonging to one function market. Accordingly, the Commission is of the view that there is a single function market which includes both methods of supply. However, the Commission will examine the effect of the transaction on direct supply to industrial users in its competition analysis.
32. The Commission therefore concludes that the appropriate functional levels for assessing the competition implication of the proposed acquisition are:
- the supply of janitorial, hygiene and medical products; and
 - the supply of safety products.

Geographic Market

33. The applicant submits that each market is, geographically, a New Zealand national market. The information gathered by the Commission supports this conclusion. Accordingly, the geographic markets are national.

Conclusion on Markets

34. The Commission concludes that the relevant markets are:

- the national market for the supply of safety products; and
- the national market for supply of janitorial, hygiene and medical products.

COMPETITION ANALYSIS

Introduction

35. The competition analysis assesses competition in the relevant markets in order to determine whether the proposed acquisition would result, or would be likely to result, in an acquisition or strengthening of **dominance**.

The Dominance Test

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

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

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

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

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

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

38. The test for dominance has been considered by the High Court. McGechan J stated:⁴

⁴ Commerce Commission v Port Nelson Ltd (1995) 6 TCLR 406, 441.

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

...

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

39. Both McGechan J and the Court of Appeal, which approved this test,⁵ stated that a lower standard than “a high degree of market control” was unacceptable.⁶ The Commission has acknowledged this test:⁷

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

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

40. The role of the Commission in respect of an application for clearance of a business acquisition is prescribed by the Commerce Act. Where the Commission is satisfied that the proposed acquisition would not result, or would not be likely to result, in an acquisition or strengthening of a dominant position in a market, the Commission must give a clearance. Where the Commission is not so satisfied, clearance must be declined. The dominance test is applied in the following section.

National Market for Supply of Safety Products

Market Concentration

41. An examination of concentration in a market is often an indicator of whether a merged firm may or may not be constrained by others participating in the market, and thus the extent to which it may be able to exercise market power.

42. The *Business Acquisitions Guidelines* specify certain market share “safe harbours” which can be used to screen out those acquisitions that are unlikely to breach the dominance thresholds in terms of s 47 of the Act –

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

- the merged entity (including any interconnected or associated persons) has less than in the order of a 40% share of the relevant market;
- the merged entity (including any interconnected or associated persons) has less than in the order of a 60% share of the relevant market and faces competition from at least one other market participant having no less than in the order of a 15% market share.” (p 17)

⁵ *Commerce Commission v Port Nelson Ltd* [] 3 NZLR 554, 573.

⁶ *Commerce Commission v Port Nelson Ltd* (1995) 6 TCLR 406,440.

⁷ *Business Acquisition Guidelines*, Section 7, p. 21.

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

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

44. Although, in general, the higher the market share held by the merged firm, the greater the probability that dominance will be acquired or strengthened (as proscribed by s 47 of the Act), market share alone is not sufficient to establish that a dominant position would exist in a market. Other factors intrinsic to the market structure, such as the extent of rivalry within the market and constraints provided through possible market entry, also typically need to be considered and assessed.
45. Although statistics are available for sales of some types of safety products it has not been possible to obtain accurate figures for all products and therefore for the total safety product supply market. The applicant supplied estimates of market shares in each of the product categories, based on its calculation of the overall size of the safety products market and the various segments of that market. The figures assume that occupational health and safety legislation requires each employee in an industry to have access to safety equipment. It then identified the proportion of that market supplied by itself and the other larger suppliers of safety products. The balance of the total market was then assigned to an “other” category made up of numerous smaller suppliers. It approached the estimation of the size of the market from two perspectives - a demand side view being an estimate of the requirements for safety equipment from the range of industries where such equipment is used, and a supply side view being an estimate from data on production, imports and exports of various items of safety equipment. The estimates supplied by the applicant are shown in Table 1.

Table 1: Market Shares in National Market for Supply of Safety Products as Estimated by Applicant

Participant	Annual \$ Sales	% Market Share
NZ Safety	[]	[]
Protector	[]	[]
Blackwoods	[]	[]
Benchmark	[]	[]
Merged Entity	[]	[]
BOC Safety	[]	[]
Brethren Group	[]	[]
Lynn River	[]	[]
Drager	[]	[]
MSA	[]	[]
Other	[]	[]
Total	[]	[]

46. The applicant submits, therefore, that the merged entity would have a []% market share which would fall within the Commission's safe harbour guideline. However, although the fact that the figure for total market size produced by both the supply side and demand side approaches are similar would appear to support the validity of the applicants' estimate of market size, it has not been possible to check the validity of some of the information the calculations are based on.
47. Furthermore, information obtained by the Commission places some doubt on the accuracy of some of the figures. The estimated annual sales figure for [], for example, is substantially higher than the actual sales which were [] for the last financial year, the sales figure for Drager is higher than the actual sales direct to users which were [] and MSA advised the Commission []].
48. [] provided estimations of market shares in the market it describes as the direct supply of industrial safety products which are shown in Table 2.

Table 2: Market Shares in National Market for Supply of Safety Products as Estimated by []

Participant	Annual \$ Sales	% Market Share
NZ Safety	[]	[]
Protector	[]	[]
Merged Entity	[]	[]
BOC Safety	[]	[]
Other	[]	[]
Total	[]	[]

49. The significant differences between the estimates of market share appear to be attributable to different views of what constitutes the core market. The [] estimate is likely to exclude supplies through retail outlets and to the rural sector. However, the actual retail sales figures obtained by the Commission suggest that the applicant's figures are likely to overstate the size of the market.
50. There are a large number of smaller suppliers in the relevant markets, and the Commission has not been able to verify sales figures across the whole industry. The information provided by other industry participants regarding their annual sales is set out below in Table 3. It gives the merged entity a share of between [].

Table 3: Market Shares in National Market for Supply of Safety Products as Estimated by Commerce Commission

Participant	Annual \$ Sales	% Market Shares
NZ Safety	[]	[]
Protector	[]	[]
Blackwoods	[]	[]
Benchmark	[]	[]
Merged Entity	[]	[]
BOC Safety	[]	
Tasman	[]	
Kaipara	[]	
Haverstock	[]	
The Warehouse	[]	
Lynn River	[]	
Wrightsons	[]	
Anchormart	[]	
Paykels	[]	
Drager	[]	
Other	[]	
Total	[]	100.00

51. The Commission notes the difficulty in obtaining accurate market share data. Nonetheless, virtually all of the market participants spoken to believed that the proposed acquisition would result in the merged entity acquiring a large market share. On the basis

of the information currently available, the Commission is of the view that the merged entity's share is likely to be outside safe harbours.

Existing Competition

52. The applicant claims that the merged entity would be significantly constrained by the conduct of existing competitors in the same way that NZ Safety, Blackwoods, Benchmark and Protector are currently constrained. In particular, it points to BOC Safety as a competitive constraint. In contrast, [] claims that in the market segment where large buyers purchase all of their requirements from a single supplier, [

]

53. The contracts that [] referred to are those with the large industrial companies, many of which are tending to purchase a package of products from a sole supplier rather than purchase the same individual items from a range of different suppliers. Several large purchasers of safety products such as [] have recently entered into sole supplier agreements with []. They have confirmed that they will continue to purchase safety products in this way as it enables them to obtain lower prices, reduce transactional costs, and increase efficiencies.

54. [

]

55. [

]

56. Not all large companies purchase safety products by means of sole supply contracts. Some, such as [] purchase from several suppliers, according to price and quality of products. These companies will purchase not only from NZ Safety, Protector and BOC Safety, but also directly from manufacturers such as Yakka NZ Ltd, Deans Ltd, 3M, Drager and Lynn River Ltd. Nonetheless, [

]

57. Moreover, [] stated that if the acquisition were to proceed, the merged entity would place pressure on manufacturers to grant them even greater discounts. Some manufacturers spoken to by the Commission confirmed their concern that this may occur while others stated that they would not be able to offer greater discounts.

58. Several of the manufacturers of safety products advised [

]

59. It would appear that the larger a firm becomes, the larger the associated discounts and rebates from manufacturers; and the greater the relative size differential over smaller firms, the more difficult it becomes for other firms to compete with it. This is exacerbated by their inability to expand in a market such as the safety product market which is experiencing little growth. A “chicken-and-egg” problem may arise, in which a small firm needs volume discounts in order to gain market share, and yet cannot qualify for volume discounts without a sufficient volume of sales.
60. Although BOC Safety already has a national distribution infrastructure and has developed a reputation in the safety business, []].
61. []]
62. BOC Safety contends that even if the merged entity were to take advantage of any market power it might gain by raising prices in the ‘bundled product’ segment of the market to a higher level than current prices, and [] Large purchasers would likely play off one bidder against the other, so the merged entity would quickly become aware of any attempt by [] to tender for the large contracts again. By this means, a large incumbent could nip in the bud any attempt by a rival to secure a large contract.
63. The Commission is of the view that this would be a concern if the purchasers had no countervailing power. This is, however, not the case and is addressed by paragraphs 87 to 94 below.
64. Other safety product suppliers such as Tasman Safety Ltd, Haverstock Safety & Environmental Ltd, Kaipara Workwear, and Paykel Engineering, compete successfully with NZ Safety, Protector and BOC Safety in supplying safety products to smaller companies, primarily because of the personal service provided by these companies. Small companies also purchase safety goods from small safety product retailers, The Warehouse, and hardware stores.
65. In addition, stock and station agents such as Wrightsons (which has 77 retail outlets throughout the country), Anchormart, Farmlands and Williams and Kettle sell safety products to the agricultural sector.
66. There is, therefore, considerable existing competition in all areas outside of the large, bundled product contract segment of the supply of safety products market. In the latter, it is the Commission’s view that there will be limited constraint from existing competitors. Industry participants have advised that this segment comprises between 70% and 80% of the entire market.

Potential Competition

67. A business acquisition is unlikely to result in the acquisition or strengthening of dominance if there is a credible threat of market entry. Potential competition can act as a constraint on market power, and so an examination of the nature and extent of this constraint is part of the Commission's assessment of competition.
68. Entry conditions, including the nature and height of any entry barriers, must be considered before the threat of new entry, which might constrain the conduct of a merged entity, can be evaluated.
69. There are various standards that apply in respect of industrial safety equipment. These are:
- Hard Hats AS/NZS1801;
 - Eyewear AS/NZS1337;
 - Hearing AS/NZS1269/70;
 - Respiratory AS1716; and
 - Footwear AS/NZS22102.
70. Generally, the standards recognised in Australia are recognised in New Zealand. It depends on the particular product as to whether other overseas accredited standards will be recognised in New Zealand.
71. These standards do not impose significant barriers to entry for expansion in, or entry into, the markets. This is because:
- The majority of products that are imported are from the USA/Europe. Most of these products would have to meet certain product standards in the USA/Europe (ANSI or CE), which generally means they will be likely to meet the AS/NZS standards; and
 - As it is the manufacturers of products that must have regard to regulatory standards when manufacturing products for sale in New Zealand, it will only be those competitors that wish to operate at both the manufacturing and retail levels of the market that may find that regulatory standards impose a slight barrier to entry. However, the fact that there are already a number of manufacturers that sell direct into the markets demonstrates that regulatory standards do not impose a significant barrier to entry.
72. A new entrant would also need to set up a distribution infrastructure. The applicant stated that this need only consist of an office in each of the three main centres staffed by one or two persons. Industry participants, however, advised that any company that is to compete successfully with the merged entity should have at least 10 to 12 retail outlets nationally and a network of sales agents. The cost of setting up such an infrastructure has been estimated as costing \$5 million which should not be a prohibitive barrier for any sizeable company, particularly an established safety company operating overseas.
73. Another key requirement of entry is the ability to obtain known safety products as branding is important in most of the product categories. There appear to be no barriers to obtaining such products.

74. Industry participants have advised that a particularly important requirement is an established reputation in the safety field, and the technical expertise to back that reputation, particularly if a new entrant is to deal with the larger industrial companies. This could prove to be a barrier to a company that is completely new to the safety market. It would not be a barrier, however, for a company which has an established reputation in the safety industry overseas.
75. The main barrier to entry would be the purchasing power of the merged entity. A new entrant would need to be of a considerable size and have a significant market share in order to be able match the buying power of the merged entity and thus compete effectively.
76. It is the Commission's view, based on information received from industry participants, that only a sizeable, established and reputable offshore firm already involved in the sale of safety products to large industry companies would be in a position to successfully overcome all of the barriers to entry and compete effectively with the merged entity. However, the competitiveness of such a firm would depend on it being able to obtain a significant market share so that it would have the same purchasing power as the merged entity.
77. The applicant provided the names of firms both within New Zealand and offshore which they submitted were possible new entrants. None of the New Zealand firms spoken to had any intention of competing with the merged entity. Paykels Engineering Supplies Ltd [] Ideal Electrical [] Repco Auto Parts [] Weldwell (NZ) Ltd [].
78. Jackson Products Inc which is based in the United States advised []
79. American Allsafe advised that []
80. The applicant claimed that there was a very real likelihood that Hagemeyer, a Netherland based electronic/electrical importer which has recently entered the Australian safety product market would enter the New Zealand market. Hagemeyer advised that []
81. There is no evidence of any Australian or New Zealand firm being likely to enter the market for the supply of safety products within the next few years. Although Jackson Products expressed interest in such a possibility, the theoretical possibility of entry is an insufficient constraint on the exercise of market power to alleviate concerns about market dominance. In order to constrain market participants, entry must be likely and sustainable in commercial terms. In the Commission's view, an economically rational business

would be unlikely to enter a market unless it has a reasonable prospect of achieving a lasting and satisfactory return on its investment.⁸

82. The threat of market entry must also be at a level that is likely to cause market participants to react in a significant manner if it is to constrain market participants. The Commission does not consider entry which might occur only at relatively low volumes or in localised areas, to represent a sufficient constraint to alleviate concerns about market dominance.⁹
83. To effectively constrain the exercise of market power to the extent necessary to alleviate concerns about market dominance, entry must be likely to occur before consumers or users in the relevant market are detrimentally affected to a significant extent. As a guide, the Commission considers that, for most markets, entry which cannot be achieved within two years from initial planning is unlikely to satisfy the timeliness requirement of the *lets* test. The Commission has noted, however, that the relevant time period has to be considered on a case-by-case basis.¹⁰
84. Although a company such as Jackson Products may be able enter at a level that would be likely to constrain the merged entity, provided there was a suitable distributor for it to purchase, there is some doubt as to whether, considering the likely market share and buying power of the merged entity, it would have a reasonable prospect of achieving a lasting and satisfactory return on its investment.
85. The Commission is therefore of the view that there are moderate barriers to entry.
86. It is possible that if purchasers had significant countervailing power, it would be easier for a new entrant to gain the necessary market share to make entry profitable. This is discussed below.

⁸ *Business Acquisition Guidelines 1999*, Sections 5.1 and 5.4, p 19-20

⁹ *Business Acquisition Guidelines 1999*, Section 5.2, p 19-20

¹⁰ *Business Acquisition Guidelines 1999*, Section 5.3, p 20

Countervailing Power of Purchasers

87. A firm may be constrained by any countervailing power possessed by its customers.

Buyer power is likely to be high when there is a concentration of buyers and the volume purchases of the buyers are high.

88. The applicant claimed that the buyers from the merged entity would impose very significant constraints on the merged entity, especially those at the top level of the market for a number of reasons, including:

- They can approach manufacturers direct, rather than obtaining their supplies from a wholesaler/distributor;
- They prefer to have “preferred supplier” arrangements with distributors, so that they can easily utilise another distributor’s services;
- They often have cost savings contracts, for example, a requirement for guaranteed savings throughout the life of the contract. This eliminates or reduces the ability of distributors to exploit pricing throughout the life of an agreement;
- The size and resources of many of the larger customers gives them the “power” to dictate the terms and conditions of their contracts with distributors;
- E-based procurement systems, on-line “Dutch” auctions and reverse bid auctions are being used by customers to purchase safety products. This enables acquirers to have access to a greater number of suppliers, or by-pass New Zealand distributors altogether. It also increases the likelihood of overseas manufacturers expanding their presence in New Zealand; and
- Some customers have moved to having Trans-Tasman, or even global, contracts.

89. As stated above, a considerable number of the larger customers prefer to purchase a package of products rather than approach manufacturers direct. Most of those contracts are with a single supplier. There is no evidence of any large company buying any significant amount of safety products online.

90. Air New Zealand advised that it []
Carter Holt Harvey’s []

[] Affco and Sealords advised []

Feltex Carpets advised [] Taylor Preston
said []

[] Fletcher Challenge, GRD Macraes, Kiwi Dairy and NZ Dairy Group each advised that []

[]

91. Feltex Carpets, Fletcher Challenge, Kiwi Dairy, NZ Dairy Group and Sealords advised []

]

92. The large purchasers were concerned at the possibility of there only being one source of safety product packages in the market, the merged entity, and would not be prepared to accept exercise of market power by the merged entity.
93. The purchasers have identified a number of options open to them if market power is exercised by the merged entity, including purchasing offshore and supporting local competitors through significant contractual commitments. In the view of the Commission, such initiatives would go some way to balancing the disadvantages which potential and existing competitors would otherwise face.
94. It is the Commission's view, therefore, that the merged entity would be constrained by the countervailing power of purchasers.

Conclusion on the National Market for Supply of Safety Products

95. The proposed acquisition is likely to result in the merged entity obtaining a market share which falls outside the Commission's safer harbour guidelines. The merged entity would be constrained by the countervailing power of purchasers which would significantly reinforce the constraint provided by existing and potential competitors.
96. The Commission is therefore satisfied that the merged entity would not acquire or strengthen dominance in the national market for supply of safety products.

National Market for Supply of Janitorial, Hygiene and Medical Products

Market Concentration

97. The applicant submitted estimates of market shares. These are set out in Table 4.

Table 4: Market Shares in the National Market for Supply of Janitorial, Hygiene and Medical Products as Estimated by the Applicant

Participant	Annual \$ Sales	% Market Shares
NZ Safety	[]	[]
Protector	[]	[]
Blackwoods	[]	[]
Merged Entity	[]	[]
BOC	[]	[]
Brethren	[]	[]
Other	[]	[]
Total	[]	[]

98. Although it has not been possible to obtain accurate sales figures for this market, it is clear that there are many suppliers in this market and that the merged entity's market share would be well within the Commission's safe harbour guidelines.
99. Furthermore, existing competition within the market would provide considerable constraint on the merged entity.

Conclusion on National Market for Supply of Janitorial, Hygiene and Medical Products

100. The Commission is satisfied that the merged entity would not acquire or strengthen dominance in the national market for supply of janitorial, hygiene and medical products.

OVERALL CONCLUSION

101. The Commission has considered the impact of the acquisition on the following markets:
- The national market for supply of safety products; and
 - The national market for supply of janitorial, hygiene and medical products.
102. Having regard to the various elements of section 3(9) of the Act, and all other relevant factors, the Commission is satisfied that the proposed acquisition would not result, or be likely to result, in any person acquiring or strengthening a dominant position in any market.

DETERMINATION OF NOTICE OF CLEARANCE

103. Accordingly, pursuant to section 66(3)(a) of the Commerce Act 1986, the Commission determines to give clearance for the acquisition by Howard Smith Limited, or any of its interconnected bodies corporate of up to 100% of the shares in or assets of any interconnected body corporate of OPSM Protector Limited that is part of, or used in conjunction with, OPSM Protector Limited's Protector Supply Group, including, in particular, Protector Safety Supply Pty Limited and Protector Safety Supply Limited (both wholly owned subsidiaries of Protector Safety Industries Pty Limited, which is in turn a wholly owned subsidiary of OPSM Protector Limited) and/or any of their interconnected bodies corporate.

Dated this day of June 2001

PR Rebstock
Commissioner