



COMMERCE COMMISSION

Decision No. 367

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

Kalanda Enterprises Pty Ltd

and

Swan Metal Skirtings Pty Limited

The Commission: E C A Harrison

Summary of Proposed Acquisition: The acquisition by Kalanda Enterprises Pty Ltd, of the shares of Swan Metal Skirtings Pty Limited or the assets of the Unistrut business from relevant members of the Unistrut Group.

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

Date of Determination: 13 August 1999

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CONTAINED IN SQUARE BRACKETS []**

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THE PROPOSAL

1. Pursuant to section 66(1) of the Commerce Act 1986 (the Act), Kalanda Enterprises Pty Limited (Kalanda) gave notice to the Commission on 29 July 1999 (the application) seeking clearance for it to acquire a 100% shareholding in Swan Metal Skirtings Pty Limited (SMS) or for it to acquire the assets of the Unistrut business from relevant members of the Unistrut Group. The relationship of Unistrut to SMS is explained below (paragraphs 9-11).

THE PROCEDURES

2. Section 66(3) of the Act requires the Commission either to clear, or to decline to clear, an application given under s66(1) within 10 working days, unless the Commission and the person who gave the notice agree to a longer period. No extension was sought by either party. Accordingly, a decision on the application is required by Friday 13 August 1999.
3. Kalanda sought confidentiality for the fact of the application, and a confidentiality order was made in respect of that information for a period of 5 working days from the Commission's determination of the application. Kalanda also sought confidentiality for certain information contained in the application, and a confidentiality order was made in respect of that information for a period of 20 working days from the Commission's determination of the application. When the confidentiality orders expire, the provisions of the Official Information Act 1982 will apply to the information. At the applicant's request confidentiality was also granted by the Australian Competition and Consumer Commission, which had been notified of the proposed acquisition.
4. The Commission's determination is based on an investigation conducted by its staff and their subsequent advice to the Commission.
5. In the course of their investigation of the proposed acquisition, Commission staff have discussed the application with the applicant, the Australian Competition and Consumer Commission and Unistrut New Zealand Limited.

THE PARTIES

Kalanda Enterprises Pty Ltd

6. Kalanda is owned by Tyco Group S.a.r.l. (TGS), and operates as part of the Tyco Flow Control division (TFCP Division). TGS is an indirectly wholly owned subsidiary of Tyco International Limited (TIL).
7. TFCP Division, through Tyco Flow Control Pty Limited, owns Australian Cable Supports (ACS). ACS manufactures and distributes metal framing, cable supports and pipe supports in Australia and New Zealand.
8. TIL holds the worldwide license rights for the Unistrut system of metal framing, and with the exception of the license rights held by Unistrut Australia for Australia, New Zealand and South East Asia, conducts this business direct through its own subsidiaries in the rest of the world.

Swan Metal Skirtings Pty Limited

9. SMS is a wholly owned subsidiary of Avatar Industries Limited, a company listed on the Australian Stock Exchange.
10. Through its wholly owned subsidiary, Unistrut Australia Pty Limited (Unistrut Australia), SMS owns the Australian assets of the Unistrut business and Unistrut (New Zealand) Holdings Pty Ltd. Unistrut (New Zealand) Holdings Pty Ltd owns Unistrut New Zealand Limited (Unistrut NZ) which operates the New Zealand Unistrut business.
11. SMS, through Unistrut Australia, produces metal framing, cable supports, pipe supports and various other metal products. Unistrut Australia has a production facility at Sydney and sales offices and warehouses in each major capital city in Australia and in Auckland, Wellington, and Christchurch, in New Zealand.

BACKGROUND

12. The products that are the focus of this application are manufactured and distributed for use in the construction and engineering industries.

Metal Framing

13. Metal framing refers to varying lengths of steel channel and associated fastening systems for the construction of metal framing used as adjustable brackets and support systems for electrical cabling and piping services in commercial and industrial construction. Metal framing is also used for benches, storage racks, support structures, shelving, mezzanines, partitions and fire escapes.

Metal Cable Supports

14. Metal cable supports are support systems which carry electrical cable primarily through buildings and tunnels (anywhere where it is required to run cables). Metal cable supports include cable trays and ladders, support bracket fixings and clamps.

Metal Pipe Supports

15. Metal pipe supports are used to support or clamp pipes primarily through buildings and tunnels, but includes any site where it is necessary to run pipes. Metal pipe supports include fittings, pipe clamps, pipe hangers and any other accessories used to support piping and tubing.

Non-Metal Products

16. Framing, cable supports and pipe supports are also manufactured using non-metal materials. These materials include wood, plastic, PVC and fibreglass. The decision to use non-metal products will often be dependent upon the conditions within which the product will be used. For example, non-metal products may be preferred in conditions where there is high saline, water or acid exposure. There will be other factors influencing a purchaser's choice of material, including price, the ease of installation of non-metal product, and the overall appearance of the project.
17. The Commission understands that the technological advancements being made with non-metal materials are such that non-metal products are becoming lighter than in the past,

and are also becoming stronger. The use of non-metal products is therefore increasing and, given the appropriate project, they can be seen as a viable alternative to the traditional metal products.

Distribution Channels

18. The Commission understands that metal framing, metal cable supports and metal pipe supports are distributed through sales and warehouse service centres throughout New Zealand and sold to both resellers and directly to end users.

THE MARKETS

Introduction

19. 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 s 47(1) of the Act.
20. 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.”
21. Relevant principles relating to market definition are set out in *Telecom Corporation of New Zealand Ltd v Commerce Commission*¹ and in the Commission’s *Business Acquisition Guidelines* (“the Guidelines”)². A brief discussion of the methodology follows.
22. Markets are defined in relation to product type, geographical extent, and functional level. 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, in response to a change in relative prices of the products concerned. A market is the smallest area in which all such substitution possibilities are encompassed. It is in this area that a hypothetical monopoly supplier could exert market power.
23. A properly defined market will include products which are regarded by buyers or sellers as being not too different (‘product’ dimension), and not too far away (‘geographical’ dimension). A market defined in these terms is one within which a hypothetical profit-maximising sole supplier of a product could impose at least a small yet significant and *non-transitory increase in price* (the “*ssnip*” test), assuming other terms of sale remain unchanged. 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, or offer their product to alternative acquirers.
24. Markets are also defined in relation to functional level. Typically, the production, distribution, and sale of products proceeds through a series of vertical functional levels, so the functional levels affected by the application have to be determined as part of the

¹ (1991) 4 TCLR 473.

² Commerce Commission, *Business Acquisition Guidelines*, 1999, 11-16.

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”.

Product Market

25. Kalanda submitted that the relevant market is that for the manufacture and distribution of fabricated metal products, primarily for use in the framing and support of electrical cables and lightweight pipe, tube and conduit used in commercial and industrial construction and fit-outs. Kalanda notes that the market could be seen more broadly as metal fabrication, of which framing and supports for electrical cables and piping is a niche sub-market.
26. Unistrut NZ advised that while metal frames, metal cable supports and metal pipe supports are substitutable for each other in some circumstances, they are generally specific to their particular requirement. From a demand perspective, Unistrut NZ advised that purchasers of metal frames, metal cable supports and metal pipe supports regularly source these products separately from different suppliers. With respect to the supply side, different equipment is required to manufacture the different products.
27. On occasion, metal frames, metal cable supports and metal pipe supports may be substituted with non-metal products. However as discussed earlier, a number of factors including strength, ease of installation, aesthetics, conductivity, chemical properties and price, will limit the degree of substitutability. On the information available, the Commission considers that there is insufficient substitutability between metal and non-metal products to warrant including non-metal products in the relevant product markets identified.
28. Due to the confidential nature of the application the Commission has not made specific industry inquiries, but believes that it has sufficient information available to it to give the application proper consideration. The Commission recognises that there are some arguments available that would support a broader market, such as that for metal fabrication. However, as discussed above there are also arguments to support defining markets specifically to each product. For the purposes of this application, the Commission proposes to adopt a “narrow” market definition with respect to the three products that are manufactured. In doing so it is noted that if there are no dominance concerns arising out of this narrow market, there are unlikely to be any dominance concerns within the wider market.
29. Accordingly, the Commission considers that each product, namely metal frames, metal cable supports and metal pipe supports, should be considered separately and that, for the purposes of the present application, the relevant product markets are the markets for:
 - metal frames;
 - metal cable supports; and
 - metal pipe supports.

Geographic Market

30. Based on the information available, the Commission considers that the geographic extent of the relevant markets is nationwide.

31. The products are imported regularly from Australia and other parts of the world. The feasibility of importing these products suggests that transportation within New Zealand is also feasible. Unistrut NZ advised that it tenders for contracts throughout the country. The Commission understands that it is common for manufacturers in one location to supply purchasers in other locations around the country. Likewise, purchasers buy from any location, and not necessarily the closest supplier.

Conclusion on Market Definition

32. The Commission concludes that the relevant markets are
- the national market for the manufacture and distribution of metal framing (“the national metal framing market”);
 - the national market for the manufacture and distribution of metal cable supports (“the national metal cable support market”); and
 - the national market for the manufacture and distribution of metal pipe supports (“the national metal pipe support market”).

ASSESSMENT OF DOMINANCE

Competition Analysis Overview

33. 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.
34. 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 ...
35. 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.
36. 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.*

37. 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.
38. However, as Tipping J stated in the High Court decision of *New Zealand Magic Millions Limited & Anor v Wrightson Bloodstock Limited* (1990) 3 NZBLC 99-175:
- [M]arket 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 substantial market share but all the other relevant factors must be brought to account. For example, a substantial market share without barriers to entry will seldom, if ever, be indicative of dominance.*
39. Accordingly, before a conclusion on dominance is reached, it is necessary to consider all factors listed in s 3(9) and any other relevant factors.

Estimated Market Share

40. Unistrut NZ has provided market share estimates based on its industry knowledge and experience. Given the confidential nature of this application, the Commission has not sought to confirm market shares, but is prepared to accept Unistrut NZ’s estimations as a starting point for an analysis of the acquisition.

Market Share Estimates in the National Metal Framing Market

41. Unistrut NZ’s estimation of the market share of the combined entity in the national metal framing market is shown in Table 1.

TABLE 1
Estimated Market Shares of the Suppliers
in the National Metal Framing Market

Supplier	Market Share (%)
Unistrut	[]
ACS	[]
Combined entity	[]
Multistrut	[]
Elbar	[]
Others	[]
Total	100

42. On the basis of the above figures, it would appear that the combined entity’s market share would fall outside the Commission’s “safe harbours” (refer paragraph 37). However, as earlier stated, the fact that a proposed acquisition may lead to a market

share falling outside these “safe harbours” does not necessarily mean that it will be likely to result in the acquisition or strengthening of a dominant position in the market. Additional factors must also be considered before a conclusion on dominance is reached. These factors are discussed below in paragraphs 49 to 69.

Market Share Estimates in the National Metal Cable Support Market

43. Unistrut NZ’s estimation of the market share of the combined entity in the national metal cable support market is shown in Table 2.

TABLE 2
Estimated Market Shares of the Suppliers
in the National Metal Cable Support Market

Supplier	Market Share (%)
Unistrut	[]
ACS	[]
Combined entity	[]
Multistrut	[]
Elbar	[]
Wholesalers (of products other than Unistrut)	[]
Tilley	[]
Others	[]
Total	100

44. On the basis of these figures it would appear that the combined entity’s market share would fall outside the Commission’s “safe harbours”.

Market Share Estimates in the National Metal Pipe Support Market

45. Unistrut NZ’s estimation of the market share of the combined entity in the national metal pipe support market is shown in Table 3.

TABLE 3
Estimated Market Shares of the Suppliers
in the National Metal Pipe Support Market

Supplier	Market Share (%)
Unistrut	[]
ACS	[]
Combined entity	[]
Multistrut	[]
Waihi Tool	[]
Levingtons	[]
Elbar	[]
Others	[]
Total	100

46. On the basis of these figures, the combined entity's market share falls within the Commission's "safe harbours".
47. However, as stated above, the combined entity's market share is only one of several factors which must be considered before a conclusion is reached on whether the proposal will not result, or be likely to result, in the acquisition or strengthening of a dominant position in the relevant market.
48. As the three identified markets are sufficiently similar in their characteristics, albeit targeting different product buyers, it is proposed to analyse the three identified markets together when considering other relevant factors including the constraints from existing competition, market entry and expansion, and the constraint provided by imported products.

Competitive Constraints

Constraint by Existing Competitors

49. The Commission understands that the national metal framing market is characterised by a substantial number of operators nationwide, ranging in size from small local workshops to large scale engineering firms. The equipment required to produce metal framing is not specialised to any degree and is common to many of these workshops, as are the technical skills required.
50. The Commission was provided with examples which, Unistrut NZ submitted, were evidence of the competitive nature of the metal framing market. Unistrut NZ advised that it tendered to supply metal framing for the construction of the [] Unistrut NZ was successful in gaining a contract for partial supply only, and several other contractors also gained partial supply contracts.
51. A further example is that of [] Unistrut NZ tendered for the supply of metal framing for this project. However, while Unistrut's product had been specified by the architect, another supplier was awarded the contract.
52. Similarly, there is a large range of operators in the metal cable support market. Examples of competitive activity were also offered for this market. Unistrut NZ advised that a large number of parties tendered to supply the []

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53. [

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54. The Commission further understands that existing market participants can increase metal framing production levels through reprogramming production schedules and ordering additional raw materials. There are no major obstacles involved, and it can be achieved in a timely manner.
55. Given these factors the Commission considers that, if the proposal were to proceed, there would be an effective constraint provided by existing competitors on the combined entity.

Constraint by Importers

65. Unistrut NZ advised that an importer can source metal framing from Australia within two weeks. Metal framing from elsewhere in the world will take longer, generally between four to eight weeks. The shipping schedules and frequency of sailings provide for regular services from Europe, North America, and Asia, to New Zealand. Given that the larger contracts for metal framing will generally be put to tender up to six months in advance of the project starting, any delay in receiving imported products need not affect the ability of tenderers, using imported products, to compete for the contract.
66. Kalanda advised that there are at least ten manufacturers in Australia that can supply the relevant products to New Zealand importers and that [] of its New Zealand sales are from product manufactured independently in Brisbane, Australia.
67. The Commission also understands that imports compete with domestic product on price. Unistrut NZ advised that freight costs generally constitute approximately 15% of the product price. However, due to the mass production in countries such as Australia and the United States, product can be purchased overseas at prices below New Zealand's production costs. Imports, it has been submitted, are therefore comparable as to price and quality with locally manufactured products.
68. An example of imported products being used in New Zealand is that of a []
69. Given these factors, the Commission considers that it is likely that the combined entity will be effectively constrained by the availability of imported products.

Conclusion on the National Metal Framing Market

70. The proposed acquisition will result in the combined entity attaining a market share of approximately [] in the national metal framing market, thus falling outside the Commission's "safe harbours". However, it is concluded that existing competitors exercise a significant constraint over the parties to the acquisition. It is further considered that the merged entity will also be constrained in this market by the threat of new entrants and market expansion. The availability of imports also provides a constraint upon the merged entity.
71. For these reasons, the Commission concludes that the acquisition would not result, and would not be likely to result, in any person acquiring or strengthening a dominant position in this market.

Conclusion on the National Metal Cable Support Market

72. On the available information, the combined entity's market share in the national metal cable support market falls outside the Commission's "safe harbours". However, as with the national metal framing market, it is concluded that significant constraints are provided by existing competitors, potential competitors, and the availability of imported products.
73. The Commission concludes that the acquisition would not result, and would not be likely to result, in any person acquiring or strengthening a dominant position in this market.

Conclusion on the National Metal Pipe Support Market

74. Based upon the available information the combined entity's market share in this market falls narrowly within the Commission's "safe harbours". There are constraints in this market effected by current competitors, by the threat of new entry and expansion, and by the availability of imports.
75. It is concluded that the acquisition would not result, and would not be likely to result, in any person acquiring or strengthening a dominant position in this market.

OVERALL CONCLUSION

76. The Commission has considered the impact of the proposal in the following markets:
- the national market for the manufacture and distribution of metal framing;
 - the national market for the manufacture and distribution of metal cable supports; and
 - the national market for the manufacture and distribution of metal pipe supports.
77. Having regard to the factors set out in section 3(9) of the Commerce Act and all other relevant factors, the Commission is satisfied that the proposed acquisition would not result, or would not be likely to result, in any person acquiring or strengthening a dominant position in a market.

DETERMINATION ON NOTICE OF CLEARANCE

78. Accordingly, pursuant to section 66(3)(a) of the Commerce Act 1986, the Commission determines to give clearance for the acquisition by Kalanda Enterprises Pty Limited of a 100% shareholding in Swan Metal Skirtings Pty Limited or for the acquisition by Kalanda Enterprises Pty Limited of the assets of the Unistrut business from relevant members of the Unistrut Group.

Dated this 13th day of August 1999

E C A Harrison
Member