



COMMERCE COMMISSION

Decision No. 379

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

**Bidco (an as yet unformed company to be owned equally by
Air Products and Chemicals Inc, and L'Air Liquide S.A.)**

and

The BOC Group plc

The Commission: M J Belgrave (Chair)
E M Coutts

**Summary of
Proposed Acquisition:** The acquisition by an as yet unformed company ("Bidco") of 100% of the shares in The BOC Group plc, the wholly owned subsidiaries of which include BOC New Zealand Holdings Limited and BOC New Zealand Limited.

Determination: Pursuant to s 66(3)(a) of the Commerce Act 1986, the Commission determines to give clearance for the proposed acquisition, subject to written undertakings as given under s 69A of the Commerce Act.

Date of Determination: 23 December 1999

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CONTAINED IN SQUARE BRACKETS []**

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THE PROPOSAL

- 1 On 10 December 1999 the Commission registered a notice from Bidco (an as yet unformed company to be owned equally by Air Products and Chemicals Inc. and L'Air Liquide S.A.) seeking clearance to acquire 100% of the shares in The BOC Group plc, the wholly owned subsidiaries of which include BOC New Zealand Holdings Limited and BOC New Zealand Limited.
- 2 The current proposal includes an undertaking to divest particular assets. In accordance with section 69(A)(3) of the Commerce Act 1986 (the Act), the undertaking is deemed to form part of any clearance given to the proposal.

THE PROCEDURES

- 3 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. No such extension was sought by either party. Accordingly, a decision on the application is required by 24 December 1999.
- 4 Bidco sought confidentiality for certain information contained in the notice seeking clearance, 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 notice. When the confidentiality order expires, the provisions of the Official Information Act 1982 will apply to the information.
- 5 The Commission's determination is based on an investigation conducted by its staff and their subsequent advice to the Commission.

BACKGROUND

The Parties

Air Products and Chemicals Inc (Air Products)

- 6 Air Products is a United States company, involved in the production and supply of industrial gases, the production and supply of specialty and intermediate chemicals, and the design and manufacture of related equipment. Air Products operates internationally in over 30 countries.
- 7 In New Zealand, Air Products' only business activity is the sale of specialty and intermediate chemicals. Such chemicals include epoxy hardeners, diluents, and emulsions.

L'Air Liquide S.A. (Air Liquide)

- 8 Air Liquide is a French company, operating internationally in over 60 countries. Air Liquide specialises in the production and supply of industrial gases. It is also involved in the production of chemicals, the manufacture and distribution of welding and cutting equipment, and the manufacture of diving equipment.
- 9 In New Zealand, Air Liquide produces atmospheric gases from its facility at the Pacific Steel plant in Auckland. It also obtains carbon dioxide from the Marsden Point oil

refinery. Air Liquide distributes most of its products throughout the North Island with sales also made in the Nelson/Blenheim region. Air Liquide also distributes welding equipment. Air Liquide has approximately 40 retail outlets in the North Island, comprising service centres in the major cities, and agents appointed in other smaller locations.

The BOC Group plc (BOC)

- 10 BOC encompasses businesses trading in approximately 50 countries. BOC is involved in the production and supply of a variety of industrial and specialty gases.
- 11 BOC is active in New Zealand through two subsidiary companies, BOC New Zealand Holdings Limited, and BOC New Zealand Limited. In New Zealand, BOC is involved in the production and distribution of industrial gases, and the distribution of welding equipment, safety equipment, and wholesale refrigerants.
- 12 BOC produces a variety of gases at its plant at the Glenbrook steel mill, near Auckland. BOC also obtains carbon dioxide from the Kapuni gas field in Taranaki. These products are then distributed nationally through a retail network of 23 branches.

The Proposed Acquisition

The International Proposal

- 13 The proposed acquisition is part of an international merger. Under the international proposal, a new company “Bidco” will be formed in the United Kingdom to acquire BOC. Bidco will then divest the BOC assets to Air Liquide and Air Products. Bidco has advised that the divestment will occur in the following manner:
 - (a) all the gases operations of BOC in the United Kingdom and Ireland will be owned by Air Liquide. Air Liquide currently has no operations in the United Kingdom or Ireland of any substance;
 - (b) Air Liquide and Air Products will each own some of the operations of BOC in the United States. This may require certain limited divestitures to third parties;
 - (c) all operations of BOC in Australia and New Zealand, where Air Liquide currently has substantial operations, will be owned by Air Products;
 - (d) it is expected that Air Liquide will own substantially all of the BOC operations in Japan and Thailand while Air Products will own significant operations elsewhere in Asia, including the BOC participants in Singapore, Southern China and Malaysia;
 - (e) all other gas operations of BOC (including those in South Africa), not otherwise divested, will be owned by Air Liquide or Air Products (or operated jointly in certain limited circumstances) on a country or region by region basis; and
 - (f) Air Liquide and Air Products will review the strategic options for BOC’s distribution services and vacuum technology divisions.

The New Zealand Transaction

- 14 In New Zealand, Bidco has sought clearance of the proposed acquisition only to the extent that the acquisition affects relevant New Zealand markets.
- 15 As stated earlier, the application includes an undertaking to divest particular assets. In accordance with section 69(A)(3) of the Commerce Act 1986 (the Act), the undertaking is deemed to form part of any clearance given to the proposal.
- 16 Air Products and Air Liquide undertake, pursuant to section 69A of the Act, that Bidco will divest all its legal and equitable interest in (the New Zealand subsidiaries of) BOC to Air Products within 12 months following the acquisition of 100% of BOC. Bidco has advised that the acquisition is [].
- 17 Bidco has further advised that pending divestment, but immediately upon acquisition of BOC's shares by Bidco, all operational control over (the New Zealand subsidiaries of) BOC will be conducted strictly independently of Air Liquide by BOC's existing management and/or transferred to Air Products.

Industry Background

Industrial Gas Production and Distribution

- 18 "Industrial gases" is a term generally regarded to cover gases used in standard industrial applications such as construction (welding and fabrication), the food processing and hospitality sector (particularly beverages), and the medical sector (hospitals and patient care).
- 19 The "atmospheric" gases are the most widely produced and used of all the industrial gases. These include oxygen, nitrogen and argon. They are produced by extraction from the air, and then impurities are removed by filtration or absorption systems. Following this process, the air is separated into its various components. Carbon dioxide, a non-atmospheric gas, is also widely used in many industry applications. In addition, there is also a range of specialty gases, including neon, krypton, hydrogen and helium.
- 20 Oxygen has several applications, principally in engineering for cutting and welding purposes. It is also used for medical purposes, and in the food processing, oil refining, and chemical industries.
- 21 Nitrogen is commonly used in food processing, steel making, glass production, chemical production, and oil refining. It is also used by medical providers, where it has several applications. Argon is mainly used in steel making and in machine and metal construction.
- 22 The main industrial use for carbon dioxide is in food processing, where it is used for carbonating soft drinks, drafting beer, and for freezing applications. Carbon dioxide is also used in machine and metal construction, and in the medical sector.
- 23 In New Zealand, industrial gases are distributed to customers through three different channels. The most common method is by the delivery of compressed gas cylinders. A second supply method is delivery in "bulk", whereby customers receive gas in liquid form in large storage tanks. The third supply method is known in the industry as "tonnage". Tonnage supply refers to the situation when a high usage customer has a

manufacturing facility on site, supplying the customers gas needs directly. Examples of this “tonnage” supply in New Zealand include the NZ Steel mill at Glenbrook (which is supplied by BOC), and the Pacific Steel mill at Auckland (supplied by Air Liquide). The only other example of “tonnage” supply provided to Commission staff was that of Macraes Mining in Otago. The contract to supply Macraes was awarded to BOC, following a tender process that attracted international bids.

- 24 Gas production in New Zealand is mainly concentrated in the Auckland region, and from there gases are distributed throughout the country. The exception is Asco Carbon Dioxide Limited (“Asco”). Asco produces carbon dioxide at its own Christchurch plant, and distributes throughout the South Island only. Further, neither BOC or Air Liquide is involved in the production of carbon dioxide. As stated earlier, BOC obtains its carbon dioxide from the Kapuni gas field, and Air Liquide obtains its carbon dioxide from the Marsden Point oil refinery.
- 25 Air Liquide distributes most of its product within the North Island, although some sales are made to the Nelson/Blenheim region. The products are freighted by road and rail to “service centres” located throughout the North Island. From there, the products are “repackaged”, and distributed directly to customers.
- 26 BOC operates in a similar manner. Its products are distributed nationally from Auckland. BOC transports gases in bulk to Christchurch, where they are stored in a “tank farm”. Gases are then “repackaged” in Christchurch, for delivery to South Island customers.

Distribution of Welding Supplies

- 27 Welding supplies encompass such products as welding equipment, welding guns, and gas regulators. Other associated supplies include electrodes for arc welding, and for “mig” or “tig” welding. Arc welding is the most common form of welding and is ideally used for “outside” applications, such as fabrication on building sites. Mig welding is used for more specialist applications such as the manufacture of steel and metal related products.
- 28 Most welding equipment is manufactured overseas and imported into New Zealand. However, Weldwell (NZ) Limited (“Weldwell”) manufactures electrodes for arc welding, as well as gas regulator equipment. The products are distributed nationally from Weldwell’s manufacturing plant at Napier, to a network of distribution outlets.
- 29 In addition to welding products, a range of related safety equipment is also generally stocked by welding suppliers.
- 30 BOC, Air Liquide, and Weldwell all distribute welding and related products through a branch network. BOC is also involved in the distribution of wholesale refrigerants (Air Liquide is not).

THE RELEVANT MARKETS

- 31 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 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 terms of section 47(1) of the Act.

The Present Application

- 32 During the course of its investigation into the present application, the Commission received industry comment that, from a supply perspective, each gas “product” did not require specialised transportation requirements, and separate gases could be (and are) distributed together. However, from a “demand” perspective, the Commission received comment that each gas “product” was not substitutable for another, with regard to particular applications.
- 33 In addition, as discussed above, there appear to be different characteristics involved in the method of supply. That is, consumers requiring gas cylinders have different requirements from consumers of “bulk” gases. This suggests that there may be different “functional” levels (and perhaps different geographic regions) to be adopted with respect to industrial gases.
- 34 The Commission recognises that it may be difficult to define precise boundaries for the markets. However, the particular circumstances of this current proposal (discussed further in the “Competition Analysis” below) suggest that an in-depth consideration of the markets involved is not necessary. The result of the proposed acquisition will be to replace BOC with Air Products. There is no aggregation with regard to any New Zealand business activities. That being the case, it is not considered necessary to define the markets with any precision.
- 35 Given the circumstances surrounding the current application, the issue of market definition will not affect the Commission’s conclusions in this matter.

Conclusion on Market Definition

- 36 Therefore, for the purposes of considering the competition implications of this application only, the Commission determines to adopt the following markets:
- the national market for the production and supply of industrial gases; and
 - the national market for the distribution of welding equipment, safety products, and wholesale refrigerants.

COMPETITION ANALYSIS

- 37 The competition analysis assesses competition in the relevant markets in order to determine whether the proposed acquisition would not result, or would not be likely to result, in an acquisition or strengthening of dominance.
- 38 Competition in a market is a broad concept. It is defined in section 3(1) of the Commerce Act as meaning “workable or effective competition”. In referring to this definition the Court of Appeal said:¹

“That encompasses a market framework which participants may enter and in which they may engage in rivalrous behaviour with the expectation of deriving advantage from greater efficiency.”

¹ *Port Nelson Limited v Commerce Commission* (1996) 3 NZLR 554, 564-565

39 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.”

The Dominance Test

40 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.”

41 The test for dominance has been considered by the High Court. McGechan J stated:²

“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*.”

42 Both McGechan J and the Court of Appeal, which approved this test,³ stated that a lower standard than “a high degree of market control” was unacceptable.⁴ The Commission has acknowledged this test:⁵

“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.”

43 The Commission’s *Business Acquisitions Guidelines* state:

“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.”

...

² *Commerce Commission v Port Nelson Ltd* (1995) 5 NZBLC 103,762 103,787 (HC)

³ *Commerce Commission v Port Nelson Ltd* (1996) 5 NZBLC 104,142 104,161 (CA)

⁴ *Commerce Commission v Port Nelson Ltd* (1995) 5 NZBLC 103,762 103,787 (HC)

and *Commerce Commission v Port Nelson Ltd* (1996) 5 NZBLC 104,142 104,161 (CA)

⁵ *Business Acquisition Guidelines*, Section 7

“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.” (p21)

- 44 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 satisfied, clearance is declined.

The National Market for the Production and Supply of Industrial Gases

- 45 The main suppliers of industrial gases in New Zealand are BOC, Air Liquide, Oxyman (also trading under the “Supagas” logo), and Asco.
- 46 Oxyman, based in Hamilton, supplies a range of industrial gases to consumers in the upper central North Island (from Taupo to Auckland). Asco is primarily involved in the production and supply of carbon dioxide, which is manufactured at its own plant in Christchurch. Asco distributes only in the South Island.
- 47 The Commission received market share estimates from Bidco, based upon figures calculated by both Air Liquide and BOC. Market revenue figures were also obtained from Oxyman and Asco. It is apparent from the figures received that Oxyman and Asco are minor operators in this market. The Commission notes, [].
- 48 For the purposes of this application, the Commission proposes to adopt the market share estimates as provided by Bidco. Bidco’s estimation of the market share of the combined entity is shown in Table 1.

TABLE 1
Estimated Market Shares of Participants in the National Market for the Production and Supply of Industrial Gases

Participant	Estimated Market Share (%)
BOC	[]%
Air Liquide	[]%
Combined entity	[]%
Oxyman	Jointly
Asco	[]%
Total	100%

- 49 Given that Air Products does not currently operate any commercial business in New Zealand, Bidco submits that the net effect of the proposed acquisition is to simply transfer the market share currently held by BOC to Air Products. The result is a transfer of market position, and gives rise to no aggregation of business activities.

- 50 The Commission sought comment from a number of larger-scale gas customers. Consumers such as DB Breweries, Coca Cola Amatil, and hospitals, each seek tenders for the national supply of industrial gases, and associated supply equipment. The contracts are generally for a term of between one to three years. These customers are considered to be contestable. Major customers spoken to have stated that they consider that their supply options will not be affected by the proposed acquisition.
- 51 Therefore, the effect of the proposed acquisition would be to put Air Products in a position that mirrors the current position of BOC in the production and supply market. There is no market aggregation arising from the acquisition and there is no other reason why Air Products will have more market power in this market post acquisition than BOC has at present. The acquisition would merely replace BOC as a producer and supplier of industrial gases with Air Products.

Conclusion on the National Market for the Production and Supply of Industrial Gases

- 52 The proposed acquisition, following divestment by Bidco, will result in the transfer of market position from BOC to Air Products, a company not currently operating in this market in New Zealand.
- 53 The Commission concludes that the proposed acquisition would not result, and would not be likely to result, in the acquisition or strengthening of dominance in the national market for the production and supply of industrial gases.

The National Market for the Distribution of Welding Equipment, Safety Products, and Wholesale Refrigerants

- 54 The main suppliers of welding equipment in New Zealand are BOC and Weldwell. The principal business of Weldwell, based in Napier, is the manufacture and importation of products used in arc and gas welding. Weldwell distributes its products nationally through its nine branches.
- 55 Bidco has provided estimated market shares, again based upon calculations made by Air Liquide and BOC. The Commission obtained sales figures from Weldwell, which were separated into particular welding equipment and products. On the basis of the Bidco and Weldwell figures (and further information provided by Weldwell and other industry sources), it appears that competitive activity currently occurs in this market. Further, it is likely that the competitive nature of the market will continue following the proposed acquisition.
- 56 For the purposes of this application the Commission proposes to adopt the market share estimates as provided by Bidco. Bidco's estimation of the market share of the combined entity is shown in Table 2.

TABLE 2
Estimated Market Shares of Participants in the National Market for the Distribution of Welding Equipment, Safety Products, and Wholesale Refrigerants

Participant	Estimated Market Share (%)
BOC	[]%
Weldwell	[]%
Others (including Air Liquide)	Jointly []%
Total	100%

57 Air Products does not currently operate in this market in New Zealand. Again, the net effect of the proposed acquisition is to transfer the current share of sales of BOC to Air Products. There is no aggregation of business activities.

Conclusion on the National Market for the Distribution of Welding Equipment, Safety Products, and Wholesale Refrigerants

58 The proposed acquisition, following divestment by Bidco, will result in the transfer of market position from BOC to Air Products, a company currently not operating in this market in New Zealand.

59 The Commission concludes that the proposed acquisition would not result, and would not be likely to result, in the acquisition or strengthening of dominance in the national market for the distribution of welding equipment, safety products, and wholesale refrigerants.

OVERALL CONCLUSION

60 The Commission has considered the impact of the proposed acquisition in the following markets:

- the national market for the production and supply of industrial gases; and
- the national market for the distribution of welding equipment, safety products, and wholesale refrigerants.

61 Having regard to the various elements of section 3(9) of the Act, and all the other relevant factors, the Commission is satisfied that the proposal would not result, or would not be likely to result, in any person acquiring or strengthening a dominant position in the following markets:

- the national market for the production and supply of industrial gases; and
- the national market for the distribution of welding equipment, safety equipment, and wholesale refrigerants.

DETERMINATION ON NOTICE OF CLEARANCE

62 Accordingly, pursuant to section 66(3)(a) of the Commerce Act 1986, the Commission determines to give clearance for the proposed acquisition by Bidco (an as yet unformed company owned equally by Air Products and Chemicals Inc and L'Air Liquide S.A.) of 100% of the shares in The BOC Group plc, the wholly owned subsidiaries of which include BOC New Zealand Holdings Limited and BOC New Zealand Limited, subject to the following undertaking as given by Bidco:

[

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Dated this 23rd day of December 1999

John Belgrave
Chair