

# The Relevance of Import Competition to Merger Assessment in Australia

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## ABSTRACT

The Australian Competition and Consumer Commission has been criticised for failing to take due account of the impact import competition has on domestic firms when assessing whether or not a proposed merger will be likely to substantially lessen competition. This paper reviews the approach taken by the Commission to import competition in its merger assessments. Consideration is given to both the policy adopted by the Commission and the statistical relevance that has, in fact, been placed on import competition in merger assessment. A conclusion is then drawn as to the appropriateness of the Commission's current policy and practice.

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## Introduction

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Mergers and acquisitions between firms can achieve efficiencies and economies of scale which may ultimately benefit consumers and enhance the ability of Australian business to compete internationally.<sup>1</sup> On the other hand, mergers between competing businesses, by their nature, may reduce the level of competition in the market. Where the level of concentration in a market resulting from a merger is such that the merged entity's conduct will not be effectively checked by competitive forces, a merger may deprive consumers of the key benefits of competition: high quality, low prices and continuing product innovation.<sup>2</sup>

Merger law in Australia is regulated by the Trade Practices Act 1974 ('TPA')<sup>3</sup> which seeks to balance these competing interests. In determining whether a merger contravenes the TPA, an important consideration will be the extent to which the merging firm will be constrained by import competition, both actual and potential. Imports can, and often will, provide a check on the ability of a merged entity to exercise any resulting market power. However, the value that should be placed on import competition in merger analysis is a subject of great contention.

This paper examines the extent to which the Australian Competition and Consumer Commission ('the Commission') has considered import competition in its merger assessments in the 10 years since the current

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<sup>1</sup> Note, however, that it is widely recognised that it is not always the case that 'simply by entering a collaborative arrangement like a merger, a company's ability to compete internationally is enhanced' and that 'in many cases, domestic rivalry rather than national dominance is more likely to breed companies that are internationally competitive': ACCC, *Exports and the Trade Practices Act: Guideline to the Commission's approach to mergers, acquisitions and other collaborative arrangements that aim to enhance exports and the international competitiveness of Australian industry*, AGPS, Canberra, 1997, p 36 ('Exports and the TPA'). See also Commonwealth, *Mergers, Monopolies and Acquisitions: Adequacy of Existing Legislative Controls*, Senate Standing Committee on Legal and Constitutional Affairs, AGPS, Canberra, 1991, pp 25-28 ('The Cooney Report'); Michael Porter, *The Competitive Advantage of Nations* (1990); Michael Porter, *On Competition*, Harvard Business School, 1998 and D Kim and B Marion, 'Domestic Market Structure and Performance in Global Markets: Theory and Empirical Evidence from US Food Manufacturing Industries' (1997) 12 *Review of Industrial Organization* 335.

<sup>2</sup> For more information on benefits and detriments of mergers see, for example, Commonwealth, *Mergers, Takeovers and Monopolies: Profiting from Competition*, Report of the House of Representatives Standing Committee on Legal and Constitutional Affairs (May 1989) (The Griffiths Report) pp 10-16; Industry Commission, *Merger Regulation: A review of the draft merger guidelines administered by the Australian Competition and Consumer Commission*, (Information Paper, June 1996) vii and Commonwealth, *National Competition Policy: Report by the Independent Committee of Inquiry ('The Hilmer Report')*, (August 1993) p 80.

<sup>3</sup> Mergers involving certain levels of foreign investment may also be subject to the *Foreign Acquisitions and Takeovers Act 1975* (Cth). That Act is not, however, concerned with the competitive effects of a merger, but rather whether or not the foreign investment would be adverse to Australia's national interest.

merger test was introduced.<sup>4</sup> After reviewing the Commission's policy guidelines and analysing public information on the Commission's practical assessment of mergers a conclusion will be drawn as to the appropriateness of the Commission's consideration of imports.

## The Regulation of Mergers in Australia

### Legislative regulation

The TPA prohibits mergers that would, or would be likely to, substantially lessen competition in a substantial market.<sup>5</sup> If a merger does this, it may nevertheless proceed if the ACCC accepts court enforceable undertakings by the parties that address the competitive concerns associated with the proposed merger<sup>6</sup> or, if authorisation is granted on the grounds that the merger, while lessening competition, nevertheless leads to public benefits that outweigh the likely anticompetitive detriments.<sup>7</sup> This is consistent with the express objective of the TPA, to 'enhance the welfare of Australians through the promotion of competition ...',<sup>8</sup>

<sup>4</sup> The current test came into operation on 21 January 1993 as a result of the recommendations of the Cooney Committee: Commonwealth, *Mergers, Monopolies and Acquisitions: Adequacy of Existing Legislative Controls*, Senate Standing Committee on Legal and Constitutional Affairs (December 1991) (The Cooney Report) recommendations 1-4. The statistics discussed will begin from 1 July 1993. For a brief discussion of the assessment of imports prior to that date see Stephen Corones, 'Substantial Lessening of Competition - Twenty Years On' (1994) 22 *Australian Business Law Review* 239, at 249-250.

<sup>5</sup> Section 50 TPA. The market must be a substantial market in Australia, or in a state or territory or region of Australia: Section 50(6). When the TPA was first introduced in 1974 it prohibited mergers which substantially lessened competition. Criticism of this test led the legislature to replace it with a dominance test in 1977. Under this test, mergers that created or substantially strengthened a position of 'control or dominance' in a 'substantial' market were prohibited. In 1986 this test was amended to prohibit acquisitions if they would result in the corporation being, or being likely to be 'in a position to dominate a market for goods or services' or mergers that would 'substantially strengthen' an existing position of dominance. The 'substantial lessening of competition' test was re-introduced in 1993 following recommendations of the Cooney Committee (see above n 1). For more detail on the history of the provision see the Cooney Report, above n 1, chapter 5. There is current speculation about whether the test may return to one of dominance, with an inquiry into the TPA to take place this year, chaired by Sir Daryl Dawson.

<sup>6</sup> This is not really an alternative to the substantial lessening of competition test, as it provision of such an undertaking will result in the merger no longer substantially lessening competition and therefore not infringing section 50 of the TPA.

<sup>7</sup> As Maureen Brunt has noted, Australia has a: 'unique "dual adjudication system" in competition law, comprising a three-tiered institutional structure of court, commission and tribunal, requires: ... the courts [to] decide whether a practice lessens competition ... and the *administrative bodies* [are] required to decide whether, exceptionally, a particular proposed practice would likely result in a benefit to the public that would outweigh any likely detrimental anti-competitive effects. ... in part it is to shift some subject matter, especially efficiency considerations, out of the ordinary courts. This is especially important for merger law': Maureen Brunt, 'The Use of Economic Evidence in Antitrust Litigation: Australia' (1986) 14 *Australian Business Law Review* 261 at 265 (as cited in Industry Commission, above n 2, at 2).

<sup>8</sup> Section 2 of the *Trade Practices Act 1974* (Cth) ('TPA'), as inserted by section 3 of the *Competition Policy Reform Act 1995*.

In determining whether a merger or proposed merger has, or will be likely to, substantially lessen competition in a market, the TPA requires that several factors be taken into account.<sup>9</sup> The first factor that *must* be considered is the *actual and potential* level of import competition in the market.<sup>10</sup> Other factors include height of barriers to entry, concentration in the market and ‘the dynamic characteristics of the market’.<sup>11</sup>

## The Australian Competition and Consumer Commission (‘Commission’)

The Commission is charged with the duty of ensuring compliance with the TPA. In relation to mergers, the Commission’s role involves advising parties in relation to proposed mergers; accepting and administering legally binding undertakings to address anti-competitive concerns; seeking injunctions to prevent anti-competitive acquisitions; seeking remedies, such as divestiture of assets and penalties, where it considers an anti-competitive merger has taken place; and assessing authorisation applications.

### **Informal assessments**

There is no statutory notification regime in Australia requiring the parties to notify and seek approval from the Commission before merging.<sup>12</sup> However, parties can, and frequently do, notify the Commission in advance of a proposed merger to obtain an opinion about its legality.<sup>13</sup> In

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<sup>9</sup> Section 50(3) TPA. Other factors *may* also be taken into account.

<sup>10</sup> Section 50(3)(a) TPA. It has been suggested that the legislature included this specific requirement to emphasise a ‘business concern that the Commission may not, in the past, have given enough credence to claim of market entry through imports’: Russell Miller, *Miller’s Annotated Trade Practices Act 2000* (21st ed, 2000). See also Corones, ‘Substantial Lessening of Competition’, above n 3, at 249-250.

<sup>11</sup> Section 50(3) requires the following to be considered:

(a) the actual and potential level of import competition in the market; (b) the height of barriers to entry to the market; (c) the level of concentration in the market; (d) the degree of countervailing power in the market; (e) the likelihood that the acquisition would result in the acquirer being able to significantly and sustainably increase prices or profit margins; (f) the extent to which substitutes are available in the market or are likely to be available in the market; (g) the dynamic characteristics of the market, including growth, innovation and product differentiation; (h) the likelihood that the acquisition would result in the removal from the market of a vigorous and effective competitor; [and] (i) the nature and extent of vertical integration in the market.

<sup>12</sup> Most jurisdictions that regulate mergers have a compulsory notification regime. Approximately 51 require pre-notification of mergers, 12 have compulsory post-notification requirements and Australia is one of 9 with a voluntary scheme of notification. In 1992 the Cooney Committee recommended a mandatory pre-notification scheme be introduced in Australia, but the recommendation never came to fruition: Cooney Report, above n 3, recommendation 3, at pp xviii and 48-51.

<sup>13</sup> See, for example, Corones: ‘The ACCC relies on an informal consultative process. The parties to a proposed merger generally approach the ACCC in advance for its views’: Stephen Corones, ‘The Strategic Approach to Merger Enforcement by the ACCC’ (1998) 26 *Australian Business Law Review* 64 at 67. The majority of mergers assessed by the ACCC in 2001 were notified to the ACCC by the parties. Of the 146 non-confidential

this way the parties obtain a view about whether or not the merger is likely to be challenged by the Commission as contrary to section 50. Such advice from the Commission has no legal force<sup>14</sup> but, as it is only the Commission that may bring an action for an injunction restraining the merger,<sup>15</sup> advice that the Commission will not oppose the merger means that the parties can proceed with great confidence that their conduct will not be challenged.<sup>16</sup>

There are important incentives for parties to seek such a clearance and to follow any advice received by the Commission: if the parties proceed with a merger and the Commission is subsequently successful in an action alleging a breach of section 50, the parties will be liable for fines of up to \$10 million<sup>17</sup> in addition to orders for divestiture.

Consequently, while it is the courts who are ultimately charged with the duty of determining whether or not a merger substantially lessens competition, in the vast majority of cases, whether a merger will or will not proceed will depend upon an informal indication by the Commission as to whether or not it is likely to oppose the proposed merger.<sup>18</sup> Thus, in form,

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mergers considered (this figure includes only those mergers published on the ACCC's Merger's Public Register), 110 had been notified to the ACCC by the parties (the remainder were notified to the ACCC from a variety of sources, including the FIRB (16), the Press (17), a complaint (10), privatisation (1), other (14) and in one case the source was not indicated. This amounts to more than 146 because notification at times came from more than one source: see ACCC, Mergers Public Register <<http://www.accc.gov.au/pubreg/s50/MainIndex.htm>>). Notably in every case in which the merger was opposed by the ACCC (whether or not resolved) the merger had been notified by the parties (either alone or together with notification from elsewhere). These statistics are consistent with the figures published for the 1996-97 financial year: ACCC, *The ACCC's Approach to Mergers: A statistical summary*, AGPS, Canberra, 1998, p 27.

<sup>14</sup> See, for example, *TPC v Santos Ltd* (1992) 38 FCR 382.

<sup>15</sup> Section 80(1) of the TPA permits the court to award an injunction in 'such terms as the court deems appropriate' for breaches of, inter alia, section 50 of the TPA. However, section 80(1A) provides that 'A person other than the Commission is not entitled to make an application under subsection (1) for an injunction [in relation to] section 50 ...'. See, for example, *TPC v Australian Meat Holdings P/L* (1988) ATPR 40-876. Private parties may, however, bring actions for divestiture (section 81) or damages.

<sup>16</sup> However, see, for example, *TPC v Santos Ltd* (1992) 38 FCR 382 where the ACCC initially indicated it would not object to a proposal but subsequently brought an action for an injunction to prevent the merger proceeding, having formed the view it was likely to create a position of dominance.

<sup>17</sup> The maximum pecuniary penalty for a corporation that infringes section 50 of the TPA is \$10 million (section 76(1A)(b)). A "person" (other than a corporation) involved in a contravention will be liable to pay pecuniary penalties of up to \$500,000 (s 76(1B) TPA).

<sup>18</sup> Corones has noted that because only the 'ACCC and the Minister responsible for the TPA ... have the statutory power to seek to enjoin mergers that are likely to substantially lessen competition pursuant to s. 80(1) of the TPA. ... control over mergers has passed from the courts to the ACCC': Corones, 'The Strategic Approach to Merger Enforcement', above n 13 at 67. The Merger Guidelines indicate that only five cases had proceeded to litigation at the time of the guidelines were produced: ACCC, *Merger Guidelines* (June 1999) 1. They included: *Trade Practices Commission v Rank Commercial Limited & Ors* (1994) ATPR 41-331 (interim injunction granted); *ACCC v The Adelaide Steamship Company Limited & Ors* (1996) ATPR 41-462 (interim injunction refused); *ACCC v Pioneer Building Products (Qld) Pty Ltd* (1996 (unreported) (pecuniary penalties ordered for contravention): ACCC, *Merger Guidelines* (June 1999) 83 (endnote 2).

if not legal effect, an 'informal clearance' by the Commission represents a green light for a merger in Australia.

### **Section 87B enforceable undertakings**

In many cases any concerns held by the Commission may be addressed by enforceable undertakings,<sup>19</sup> rather than a complete abandonment of the proposal. The Commission may advise the parties that it will accept certain undertakings which, if provided, will address the anticompetitive concerns it has with the proposal. In this respect, the Commission 'favours structural undertakings that replicate the competitive dynamics otherwise lost by the merger.'<sup>20</sup> Once given, an undertaking is binding on the parties:

The person may withdraw or vary the undertaking at any time, but only with the consent of the Commission.<sup>21</sup>

In many cases providing the undertakings will be a more attractive option to the parties than abandoning the proposal altogether, or risking divestiture and fines following a successful legal challenge. Parties have shown a general willingness to provide the undertakings requested by the Commission, with almost 50% of all mergers opposed between mid-1993 and mid-2001 being resolved in this way.<sup>22</sup>

### **Authorisation**

If the Commission indicates it will oppose a proposed merger and undertakings are not appropriate,<sup>23</sup> parties who wish to proceed with a merger have little choice but to request that the Commission authorise their conduct, notwithstanding its anticompetitive effects.<sup>24</sup> Section 88(9)

<sup>19</sup> These undertakings are legally binding and, if breached, the ACCC may enforce them in the courts. The ACCC may also request that the parties 'repay any financial benefit, and seek financial compensation for any loss or damage, resulting from a breach of the undertakings': Industry Commission, above n 2, at p 68. The use of section 87B undertakings and their value in addressing the ACCC's concerns are at the discretion of the ACCC, 'which cannot be compelled by merger parties to accept an undertaking. Nor is it the policy of the ACCC to demand such undertakings': Industry Commission, above n 2, 69.

<sup>20</sup> ACCC, *ACCC Annual Report*, (1999-2000) 39. 'Structural undertakings which relate to proposed mergers involve the sale of assets or parts of the business being acquired. ... Most of the undertakings it has accepted in relation to mergers have been primarily structural. ...': ACCC, 'The ACCC's Approach to Mergers', above n 13, at p 15

<sup>21</sup> Section 87B(2) TPA.

<sup>22</sup> Between 1 July 1993 and 30 June 2001, of the 87 mergers opposed, 42 (just over 48%) were resolved by way of undertakings given by the parties: (figures obtained ACCC, *ACCC Annual Report*, (2000-2001). This figure appears to be rising. In the 2000-2001 financial year, of 13 mergers opposed, 10 (or approximately 77%) were resolved by way of enforceable undertakings.

<sup>23</sup> They may not be appropriate because the parties refuse to give them or because the ACCC refuses to accept an undertaking because it does not believe any undertakings would be sufficient to address anticompetitive concerns.

<sup>24</sup> The full range of options available to the parties are to: 'abandon the proposal; modify the proposal to address any of the likely anti-competitive consequences, either informally or informally by way of undertakings pursuant to s. 87B of the Act ...; apply for authorisation if the acquirer considers it may be able to establish that the proposal would result in a net

gives the Commission the power to grant such authorisations, provided they are 'satisfied in all the circumstances that the proposed acquisition would result, or be likely to result, in such a benefit to the public that the acquisition should be allowed to take place.'<sup>25</sup>

In determining what amounts to such a benefit, section 90(9A) requires the Commission to have regard to, amongst other things, the following:

- a significant increase in exports;
- 'a significant substitution of domestic products for imported goods;' and
- 'all other relevant matters that relate to the international competitiveness of any Australian industry.'

The relevance of imports to authorisation assessments will not be considered further, as the primary assessment of imports takes place as part of an initial assessment of the anti-competitive effects of a proposed merger.<sup>26</sup>

## **Guidelines for parties considering a merger**

Parties considering a merger are assisted in determining whether or not their proposal is likely to infringe the section 50 prohibitions by the Commission's Merger Guidelines 1999 ('**Merger Guidelines**').<sup>27</sup>

The Merger Guidelines, which do not have any legislative force, detail how the Commission will approach a competitive analysis of a proposed merger. In particular, they establish a five stage process in assessing mergers:

**Step one** involves a determination of the relevant market in which the merger is taking place. As the market definition will affect all

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public benefit ...; take their own risk and seek to complete the acquisition; or seek a declaration that the proposed acquisition does not contravene the Act.': ACCC, 'Merger Guidelines', above n 18, 19. In reality, as Corones has indicated, if the ACCC opposes the merger the parties will have 'no choice but to apply the ACCC for authorisation': Corones, 'The Strategic Approach to Merger Enforcement', above n 13, at p 68. Otherwise the parties risk a legal challenge after the merger has taken place.

<sup>25</sup> Section 90(9) TPA.

<sup>26</sup> As the level of import competition is an inherent element of a substantial lessening of competition analysis this paper considers it in that context rather than in the context of authorisation. However, as the TPA has a distinct focus on international competitiveness factors in authorisation of mergers, import competition may also be considered by the ACCC as part of an authorisation assessment.

<sup>27</sup> In relation to the relevance of imports, parties may also be guided by the following publications: ACCC, 'Exports and the TPA', above n 1 and ACCC, 'The ACCC's Approach to Mergers', above n 13. Parties may also be assisted by information contained in the ACCC's annual reports and may be guided by information about recent mergers that is made publicly available on the ACCC's Merger Public Register, above n 13.

other analysis it is undertaken with care.<sup>28</sup> In defining the market, the Commission will consider imports<sup>29</sup> that are substitutable with the product of the parties to the merger proposal.

**Step two** requires the Commission to determine the market share held by the parties to the proposed merger. In this respect, the Guidelines provide for a 'safe harbour' below which the Commission is unlikely to be concerned about a merger:<sup>30</sup>

'If the merger will result in a post-merger combined market share of the four (or fewer) largest firms (CR4) of 75 per cent or more and the merged firm will supply at least 15 per cent of the relevant market, the Commission will want to give further consideration to a merger proposal before being satisfied that it will not result in a substantial lessening of competition.

In any event, if the merged firm will supply 40 per cent or more of the market the Commission will want to give the merger further consideration. The twofold thresholds reflect concerns with the potential exercise of both coordinated market power and unilateral market power.' [footnotes omitted]<sup>31</sup>

**Step three**, which is relevant only where the concentration threshold has been met, requires separate assessment of the level of **import competition** in the market. The Guidelines ask if

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<sup>28</sup> The Commission looks to the 'product, functional, geographic and time dimensions' of the market. See ACCC, 'Merger Guidelines', above n 18, at pp 28 and 31-42 for more information about the specific approach taken by the ACCC to market definition.

<sup>29</sup> See, for example, ACCC, 'Exports and the TPA', above n 1, at p 14: 'It is important to note that competition in a market includes competition from imports where they constitute a substitution possibility'.

<sup>30</sup> The Industry Commission claims that the existence of 'safe harbours' 'serves to reduce uncertainty and compliance costs ...': Industry Commission, above n 2, at p viii. However, there will be exceptional cases in which the ACCC may deviate from this rule. Consequently, the 'parties cannot conclude without reference to the Commission whether or not an acquisition will be opposed': ACCC, 'Merger Guidelines', above n 18, at p 28 (para 5.27).

<sup>31</sup> ACCC, 'Merger Guidelines', above n 18, 44 (para 5.95). The thresholds have not changed since the ACCC issued its first Draft Merger Guideline after the re-instatement of the substantial lessening of competition test in 1992, despite recommendations by Industry Commission that they be increased: Industry Commission, above n 2, at pp 37-38. The potential for an increase in both concentrated and unilateral exercise of market power as a result of a merger has been widely recognised. For a more detailed assessment of the ways in which increased concentration resulting from a merger may raise competition concerns, see: Rhonda Smith, 'The Economic Theory of Competition Law', paper, presented at the APEC Partners for Progress Competition Policy Seminar, Bangkok, 18-21 March 1997, extracted in Philip Clarke and Stephen Corones, *Competition Law and Policy: Cases and Materials* (1999) 534 and Garry Goddard and Greg Walker, *Bank Mergers in Australia: Competition Assessment of the Commonwealth Bank of Australia's Acquisition of Colonial Limited*, Working Paper, April 2001, p 9.



imports are an effective check on the exercise of domestic market power.<sup>32</sup> If so, then the Commission is unlikely to intervene.

**Step four** involves a consideration of whether barriers to entry effectively constrain market power.

**Finally**, if all other considerations do not combat the anticompetitive concerns, the Commission considers the other factors listed in section 50(3), including countervailing power, substitutes, vertical integration and dynamic characteristics of the market.

### The relevance of import competition in the Merger Guidelines

Import competition will be a relevant factor in markets involving tradable goods and services. While technological advances have increased the number of goods and, in particular, services which are internationally tradable, a large number of goods and the vast majority of services are not, in fact, tradable.<sup>33</sup> Consequently, there will be no threat of import competition in the non-tradable sector that can operate as an effective deterrent to domestic business.

In relation to the tradable industries, however, import competition will be considered as part of market definition and market share analysis, but also as a separate factor in determining the competitive effects of a merger. In the separate analysis of import competition the Commission will consider

arguments that the market share of imports is not indicative of their competitive role. ... in some markets, market share may understate the competitive constraint provided by imports, because of the potential to expand the supply of imports rapidly in response to higher prices.<sup>34</sup>

Specifically, the Guidelines provide that the Commission will consider the following types of information in assessing the relevance of import competition:

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<sup>32</sup> ACCC, 'Merger Guidelines', above n18, at p 46 (para 5.105). Specifically, the Guidelines ask if imports are an 'effective antidote to the exercise of market power': *ibid*, p 29.

<sup>33</sup> The Australian Bureau of Statistics estimates that only about one quarter of our GDP is made of tradable goods and services (that is, products and services able to be traded internationally), leaving approximately 3/4 of our product and services market free from international competition: see, for example: Gittins, R. 'Hitting the interest rate brakes will check growth's speed limit', *smh.com.au*, 19 February 2000, <http://old.smh.com.au/news/002/19/business/business12.html> (accessed 8 August 2002)

<sup>34</sup> ACCC, 'Merger Guidelines', above n 18, at p 46 (paras 5.106-5.107).

- ❑ information that domestic suppliers are consistently inhibited in their pricing by the pricing of actual or potential import supplies;
- ❑ the extent to which imports are independent of domestic suppliers or the extent to which they are brought in under the licence of the merging firms and/or other domestic suppliers;
- ❑ whether existing import supply routes could accommodate a significant expansion of supply, without the need to invest in sunk costs of distribution, advertising and promotion;
- ❑ the extent to which imports are closely substitutable for the products of the merging firms from the perspective of their customers, without the need for supply substitution by the overseas producers;
- ❑ tariff levels and non-tariff barriers to trade, including industry standards;
- ❑ changes to tariff levels and other forms of protection which are likely to occur over the next two or three years;
- ❑ information that overseas corporations have concrete plans to enter the Australian market;
- ❑ data on the impact of exchange rate changes on the viability and market share of imports;
- ❑ information about the availability and potential availability and influence of imports in different parts of Australia; and
- ❑ practical difficulties in importing versus local supply in relation to the nature of the product and its demand, e.g. perishability (both physical and fashion related), the importance of rapid supply response and the costs of holding inventories.<sup>35</sup>

No specific 'safe harbour' threshold is set down for import assessment, but the Guidelines indicate that the Commission

... has not objected to any merger where comparable and competitive imports have held a sustained market share of 10 per cent or more for at least three years, and – as an indicative guideline – is unlikely to do so.<sup>36</sup>

This position was recently reiterated by the Chairman of the Commission, Professor Allan Fels, who stated:

The potential, or real, import competition is considered an important factor because of the globalisation of markets. If import

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<sup>35</sup> ACCC, 'Merger Guidelines', above n 18, at pp 47-48 (para 5.112).

<sup>36</sup> ACCC, 'Merger Guidelines', above n 18, at p 47 (para 5.111). This position has been repeated on several occasions (although notably not in the 2000-2001 Annual Report of the ACCC). See, for example, ACCC, 'The ACCC's Approach to Mergers', above n 13, at pp 13-14. See also ACCC, 'Exports and the TPA', above n 1, 16, where the ACCC notes that the ACCC is unlikely to be concerned where 'comparable and competitive imports have held a sustained market share of 10 per cent or more for the last five years'.

competition is an effective check on the exercise of market power, it is unlikely the Commission will intervene in a merger. It has not rejected any merger where imports, independent of the merged parties, have been sustained at more than 10 per cent of the market.<sup>37</sup>

Consequently, despite a lack of a set 'safe harbour' where imports have reached a certain level, parties can be confident that in *most* cases sustained imports of above 10% will allay Commission concerns about the anticompetitive effects of a merger. Nevertheless, there will be exceptions to the general position and, therefore, imports must be considered on a case by case basis taking account of any factors unique to the particular market involved.

## **Statistical analysis of the relevance of imports**

### **General merger assessment statistics**

The Commission has opposed relatively few mergers in the past ten years. Of the 1328 merger considered by the Commission between 1993 and 2001<sup>38</sup> only 100 (or 7.5%) have been opposed by the Commission. Of these, 42 were resolved through undertakings, leaving only 4.4% opposed and not resolved. This number appears to be dropping, as indicated by the graph below. Between 1997 and 2001 on average only 2.35% of mergers were opposed and not resolved and, in the last financial year (2000-2001), the figure was as low as 1.1%.<sup>39</sup>

These figures are consistent with the Commission's statement that

'most mergers do not raise competition concerns and therefore do not raise problems under the Act.'<sup>40</sup>

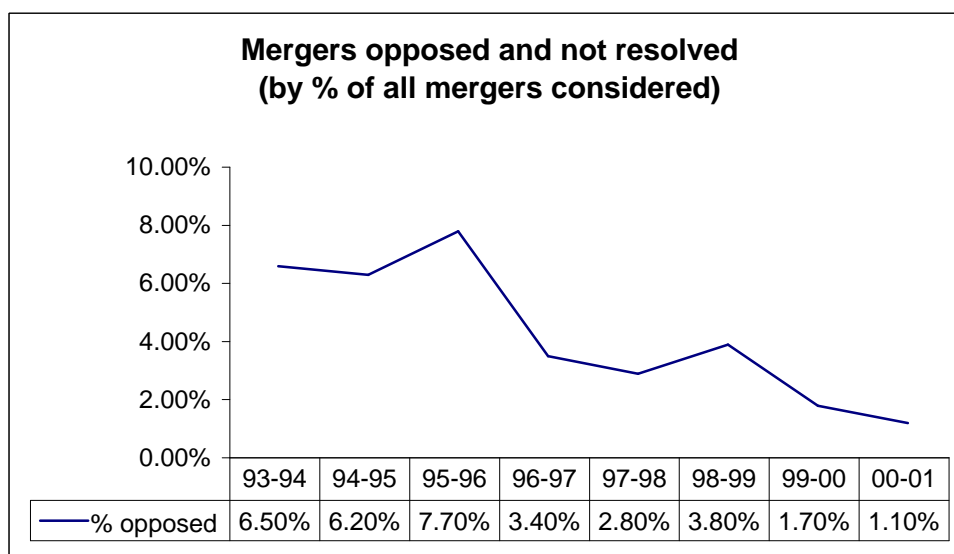
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<sup>37</sup> Allan Fels, speech, Australian Financial Review Conference, CFO 2001 Summit, *Mergers and Market Power*, 7 June 2001 <[http://www.accc.gov.au/speeches/2001/pdf/Fels\\_AFR\\_CFO\\_Summit\\_7\\_5\\_01.pdf](http://www.accc.gov.au/speeches/2001/pdf/Fels_AFR_CFO_Summit_7_5_01.pdf)>. Similarly, Professor Fels has recently commented: 'Where local companies have faced significant import competition the Commission has not opposed mergers: Allan Fels, 'Mergers and Market Power', Speech, 15 March 2001, Australia-Israel Chamber of Commerce, Boardroom Lunch ([http://www.accc.gov.au/speeches/2001/fels\\_Israel\\_15\\_3\\_01.htm](http://www.accc.gov.au/speeches/2001/fels_Israel_15_3_01.htm)) (30 May 2002)

<sup>38</sup> See ACCC, 'Annual Report 2000-2001', above n 22. Note that these statistics refer only to mergers that were notified to the ACCC and not withdrawn by the parties prior to the ACCC providing a final opinion.

<sup>39</sup> According to the ACCC, since the 'adoption of the [SLC] test in 1993 the Commission has considered, on average each year, about 160 mergers and acquisitions. Of these an average of eight were challenged .... On average a third of the mergers challenged ... were resolved by the parties putting in place alternative arrangements to allow the mergers to proceed': ACCC, 'Exports and the TPA', above n 1, at p 6.

<sup>40</sup> ACCC, 'Exports and the TPA', above n 1, at p 5.



The following table highlights the Commission's consideration of mergers from 1993-2001. It demonstrates that while the number of mergers assessed each year is rising, approximately the same percentage of mergers have been opposed, resolved and not opposed each year:<sup>41</sup>

Year	Examined	Not opposed	Resolved	Opposed
1993-94	77	71 (92.2%)	1 (1.3%)	5 (6.5%)
1994-95	113	101 (89.4%)	5 (4.4%)	7 (6.2%)
1995-96	117	105 (89.7%)	3 (2.6%)	9 (7.7%)
1996-97	147	140 (95.2%)	2 (1.4%)	5 (3.4%)
1997-98	176	165 (93.8%)	6 (3.4%)	5 (2.8%)
1998-99	185	168 (90.1%)	10 (5.4%)	7 (3.8%)
1999-00	235	226 (96.2%)	5 (2.1%)	4 (1.7%)
2000-01	265	252 (95.1%)	10 (3.8%)	3 (1.1%)

## The assessment of import competition

There is no judicial interpretation of section 50(3)(a) relating to the relevance of import competition. Parties usually address Commission concerns prior to merging or withdraw their proposal rather than risk an adverse finding in the courts. Consequently, the only real guidance on the relevance that is, in practice, attached to import competition comes from

<sup>41</sup> Statistics from ACCC, 'Annual Report 2000-2001', above n 22, at p 69. These statistics do not include cases in which the ACCC did not reach a final decision because parties withdrew their application after the ACCC raised preliminary informal concerns. "Resolved" means that the parties provided the ACCC with s. 87B undertakings that addressed competition concerns to the ACCC's satisfaction. Note that these figures are in some respects inconsistent with other published statistics. For example, the 1999-2000 Annual Report states that there were 200 mergers examined in 1998-1999 and 234 in 1999-2000 (ACCC, 'Annual Report 1999-2000', above n 20, 38). For a list of major acquisitions opposed and not opposed by the ACCC to end 1996-7 financial year see ACCC, 'The ACCC's Approach to Mergers', above n 13, at pp 6-8.

a combined assessment of the Merger Guidelines and published results of informal assessments conducted by the Commission.

The Merger Guidelines provide that where the Commission's concentration threshold has been met, the Commission will be particularly interested in information that shows there is, or is potential for, 'a significant, sustained, and competitive level of independent imports.'<sup>42</sup> In assessing the historical value that has, in fact, been placed on import competition the following statistics are significant:

- import analysis in cases where mergers were approved despite the concentration thresholds being exceeded; and
- import analysis in all cases where mergers were opposed.

These statistics are not readily available.<sup>43</sup> The limited published information states that between January 1993 and mid-1997 the Commission did not oppose 'a total of 78 proposals where import competition was relevant, or 16 per cent of matters it did not oppose'.<sup>44</sup> However, no specific statistics as to the level of imports in those cases, or the existence (or otherwise) of other factors mitigating the Commission's concerns over these particular proposals is provided. Nevertheless, it does, on its face, suggest that the Commission considers import competition of considerable importance.

The only other sources of information relating to import statistics are the Commission's Mergers Public Register<sup>45</sup> ('**Merger Register**') and the details published by the Commission about a few key cases.<sup>46</sup> However, the Merger Register is deficient in many respects in assisting any import analysis. In particular, it does not include confidential matters<sup>47</sup> and, for

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<sup>42</sup> ACCC, 'Exports and the Trade Practices Act', above n 1, at p 15.

<sup>43</sup> While statistics regarding mergers considered and opposed are published annually, the ACCC's annual reports do not provide statistics about the number of cases in which import competition was relevant. In this respect the ACCC has been criticised, for example, by the Business Council of Australia which has claimed that '... in many cases, the evidence isn't public. I think in many cases it's the possible mergers, or possible acquisitions that didn't take place, didn't reach the light of day, because it was determined that the process was one, too long and then secondly, too uncertain.': A. Moore, Interview with John Schubert, Business Council of Australia. *Business Sunday Transcript*, 25 February 2001, p 1. (in Commonwealth, 'Competing Interests: Is There a Balance? Review of the Australian Competition and Consumer Commission Annual Report 1999-2000', House of Representatives, Standing Committee on Economics, Finance and Public Administration, Canberra, September 2001 para 2.7)

<sup>44</sup> ACCC, 'The ACCC's Approach to Mergers', above n 13, at p 13.

<sup>45</sup> This is a voluntary register established by the ACCC in 1996 following a recommendation of the Griffiths Committee in 1989: Commonwealth, 'The Griffiths Report', above n 2, at p 85 (recommendation 10). The Public Register includes brief details of a proposed merger, (including the names of the acquirer and target, a product description and brief reasons for the ACCC's response) but 'does not include confidential or other sensitive information': ACCC, Mergers Public Register, above n 13.

<sup>46</sup> This information is available within the Public Register, in annual reports of the ACCC, in the *ACCC Journal* and on the ACCC web site <<http://www.accc.gov.au>>.

<sup>47</sup> ACCC, Mergers Public Register, above n 13. This limits the value of statistics gained from the Register as it removes a considerable number from the public domain. For example,

the matters it does include, only very limited information about the competition analysis undertaken is provided and, in many cases, pertinent information is missing completely. For example, the word 'unknown' regularly appears in relation to whether concentration thresholds and/or imports above 10% have been achieved.<sup>48</sup> This apparently indicates that this information has simply been omitted from the Register.<sup>49</sup>

Nevertheless, some conclusions may be drawn from the limited information that is available. The Register details 146 merger investigations in 2001 that were not confidential.<sup>50</sup> As a result of the investigations only 8 mergers were opposed and 5 of these were resolved by the parties giving undertakings. This leaves 3, or 2% of mergers opposed and withdrawn by the parties. This is consistent with full statistics published for previous years.

In relation to imports, the Merger Register indicates that in 22 cases imports were assessed as above 10%.<sup>51</sup> In 33 cases imports were assessed as below 10% and in 90 cases the register represents the level of imports as 'Unknown' or 'N/A'.<sup>52</sup>

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between 2000-2001 only 150 mergers are listed on the Mergers Public Register, but the annual report for the year indicated 265 mergers had been considered by the ACCC.

<sup>48</sup> 'Unknown' appears in 74 of the 146 mergers listed on the Register for 2001 (more than 50% of cases).

<sup>49</sup> For example, for the proposed merger between The Independent Order of Odd Fellows Ltd and Ancient Order of Forestry (WA District) Friendly Society Ltd, decided by the ACCC on 24 October 2001, the Mergers Public Register states, in relation to whether or not the concentration thresholds have been met, that it is 'unknown'. However, in the brief summary of the competition analysis undertaken in relation to this merger, the phrase 'the Commission decided not to oppose this merger on the basis that it did not cross any of the Commission's market concentration thresholds ...' appears. An inquiry to the ACCC about the meaning of 'unknown' in relation to this merger revealed this part of the Register document had simply not been completed, so that 'unknown' appeared by default. When queried about whether this was the most likely explanation for the appearance of the word 'unknown' in other parts of the Register it was suggested that that was 'probably' the case: Interview with ACCC representative (by phone, 28 May 2002).

<sup>50</sup> It may be expected that there were well in excess of 146 mergers actually considered by the ACCC in 2001 (see above n 47).

<sup>51</sup> The register does not indicate whether this means 10% at the time of analysis or consistently 10% or more over three years (or five years). In response to an inquiry the ACCC indicated that it was 'likely' that this reference to 'Imports above 10%' meant sustained imports for 3 years of over 10%, as anything less than this would be of limited value, but no firm response could be obtained: Interview with several representatives from the ACCC (by phone, 28 May 2002, 3 June 2002 and 4 June 2002).

<sup>52</sup> In at least 16 of these cases the concentration threshold was not met, so a separate assessment of imports was not required. In 61 cases it is not indicated whether the concentration thresholds were met and in 13 cases they were. The level of imports will not be applicable where, for example, the concentration threshold has not been met, so that no further analysis is required by the ACCC. However, the Register is not consistent on this point. In some cases an assessment is made of imports despite thresholds not being met and in some cases the term N/A appears in the register in relation to imports, despite the fact that imports or the lack thereof were relevant because competition thresholds were met.

**Imports above 10%**

In 3 cases where imports were represented as being above 10% the merger was, nevertheless, opposed by the Commission, but ultimately resolved through undertakings.<sup>53</sup> In no cases were mergers involving imports above this level opposed and not resolved.

In the other 19 cases in which the Register indicates imports were above 10% the merger was allowed to proceed unopposed. In 5 of these cases the threshold was not met, rendering a separate import analysis essentially irrelevant; in 9 cases the threshold was clearly met, so import analysis was of significance; and in 5 cases the Register failed to indicate whether or not the concentration threshold had been met. However, in at least 9 cases mergers were not opposed where imports were above 10% despite the fact that market concentration thresholds were met.<sup>54</sup> In all of these cases imports were a relevant factor in the Commission's decision not to oppose the merger.

**Imports stated as below 10%**

Where imports were stated as below 10%, there was 1 merger opposed and subsequently withdrawn, 1 opposed but resolved through undertakings and 32 not opposed.

In 15 of the cases in which mergers were not opposed the concentration threshold was not met, so that separate analysis of imports was

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<sup>53</sup> The cases involved proposed acquisitions by Paperlinx Ltd <<http://www.accc.gov.au/pubreg/s50/17m01.pdf>> (decided 30 January 2001), Smorgon Steel Group Ltd <<http://www.accc.gov.au/pubreg/s50/25m01.pdf>> (decided 22 February 2001) and SPC Ltd <[http://www.accc.gov.au/pubreg/s50/nov\\_dec\\_2001/141m01.pdf](http://www.accc.gov.au/pubreg/s50/nov_dec_2001/141m01.pdf)> (decided 30 November 2001). Note, however, that in SPC Ltd the Register indicates that imports were not above 10% in relation to one of the markets identified by the ACCC. It was only in respect of this market the ACCC opposed the merger. In respect of the other relevant markets, imports were above 10% and the ACCC did consider that the imports allayed their concerns with the merger. In Smorgan, the Register contains only limited information. However, in response to an inquiry the ACCC indicated that while imports were generally high in the industry, in the area of greatest concern to the ACCC – the distribution of metal products within Australia – imports were not significant enough to overcome ACCC concerns about the effects on post-merger competition: Interview with representative from the Mergers and Assets Sales Branch, ACCC (by phone, 3 June 2002). In Paperlinx the ACCC raised concerns despite the existence of import competition, primarily because 'anti-dumping applications' by Paperlinx had constrained the benefits of import competition in the market. However, the ACCC has indicated that 'independent' imports may not have made up 10% or more of the market: see below n 72.

<sup>54</sup> These proposals were: American Greetings Inc (acquirer) and The Ink Group Pty Limited (target) (decided 8 January 2001); Illinois Holdings Proprietary (acquirer) and Siddons Ramset Limited (target) (decided 16 January 2001); Metso Corporation (acquirer) and Svedala Industri AB (target) (decided 13 February 2001); Pacific Dunlop Limited (acquirer) and Sara Lee Apparel (Australasia) Pty Ltd (target) (decided 6 June 2001); bioMerieux Australia Pty Ltd (acquirer) and Oranganon Teknika Pty Ltd (target) (decided 14 June 2001); Howard Smith Limited (acquirer) and OPSM Protector Limited (target) (decided 22 June 2001); Chr Hansen Pty Ltd (acquirer) and New Zealand Dairy Meats (target) (decided 9 October 2001); Avery Dennison Australia Group Holdings Pty Ltd (acquirer) and Jackstaedt Holdings Pty Ltd – JAC Australia Pty Ltd (target) (decided 19 November 2001) and Fenner plc (acquirer) and UniPoly SA (target) (decided 18 December 2001); ACCC Mergers Public Register 2001 <<http://www.accc.gov.au/pubreg/s50/Index01.html>>.

irrelevant. In 6 cases the Register does not indicate whether the concentration threshold was met. In the remaining 10 cases the concentration threshold was met. In 9 of these cases imports were not of any relevance, indicating factors other than import competition were relevant in determining that the merger would not substantially lessen competition. However, in one case, while existing imports were below 10%, the Commission considered the *potential* for imports of considerable significance in their decision not to oppose the merger.<sup>55</sup>

## Case studies

Because of the limited number of useful statistics relating to the relevance of import competition, it is necessary to look in more detail at a few specific cases in which imports have been considered relevant. In this respect two classes of case will be considered:

1. Cases in which the level of imports into the market have allayed Commission concerns about a merger, despite a high post-merger market concentration;
2. Cases in which imports have not been considered sufficient to allay concentration concerns.

### ***Cases where imports have allayed Commission concerns***

There are several examples of cases in which sustained imports have allayed initial concerns that a substantial lessening of competition would result from a merger.<sup>56</sup> Generally, the Commission has indicated that, for the 2000-2001 financial year:

Most mergers in the resource sector raised little concern given its global nature. High levels of imports or internationally set prices mitigated many of the concerns about increased concentration.<sup>57</sup>

The following are specific examples of recent cases in which import competition has been a significant factor in the Commission's decision to oppose a merger. Unfortunately only limited detail about the precise level of import competition in the market is available in each case. In most cases the Register also fails to indicate the significance the Commission attached to imports specifically, as opposed to other factors, such as barriers to entry, that may also address competition concerns.<sup>58</sup>

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<sup>55</sup> The merger involved was between Cesco Australia Ltd (acquirer) and Forbes Engineering Holdings (Aust) Pty Ltd (target) (decided 31 October 2001). It is discussed further below.

<sup>56</sup> See, for example, ACCC, 'Exports and the TPA', above n 1, 16-17 and Allan Fels, 'Mergers and Market Power', Speech, 15 March 2001, Australia-Israel Chamber of Commerce, Boardroom Lunch <[http://www.accc.gov.au/speeches/2001/fels\\_Israel\\_15\\_3\\_01.htm](http://www.accc.gov.au/speeches/2001/fels_Israel_15_3_01.htm)> (30 May 2002).

<sup>57</sup> ACCC, 'Annual Report 2000-2001', above n 22, at p 70.

<sup>58</sup> The Register will indicate (in some cases) where imports surpass 10% but does not indicate the precise level of imports. Other recent examples include: Pacific Dunlop Limited's proposed acquisition of Sara Lee Apparel (Australasia) Pty Ltd, where, although merger thresholds were crossed, the ACCC noted that 'the market appears to be characterized by a high level of imports and ... there are a large number of available



□ **Email Limited and Southcorp Limited**

The proposed merger of these companies, involving various whitegoods product markets, clearly crossed the Commission's concentration thresholds. The Commission also found that there was a high level of brand recognition for the merging parties' products, that they were strong competitors and that there were high barriers to entry. Nevertheless, the Commission allowed the merger to proceed on the basis that a 'significant competitor' in the domestic market, combined with existing and potential import competition was likely to ensure the merger would not substantially lessen competition.<sup>59</sup> It is extremely unlikely that this merger would have been allowed to proceed unchallenged if not for the considerable weight placed on the constraining effects of imports in the relevant product markets.

□ **American Greetings Inc and The Ink Group Pty Limited**

The proposed merger crossed the Commission's concentration thresholds and barriers to entry were considered high. However, the Commission determined that '... the level of imports are high at around 23% for greeting cards manufactured entirely outside of Australia and around 35% for calendars offered for sale in Australia'<sup>60</sup> and did not object to the merger.<sup>61</sup>

□ **Illinois Holdings Proprietary and Siddons Ramset Ltd**

In this case merger concentration thresholds were clearly met and the fact that imports were above 10% was a key in the Commission's decision not to oppose the merger.

'Whilst it appears that the merged entity would gain a high level of market concentration in both the relevant markets and that the merger guideline thresholds would be crossed ..., it appeared that

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substitutes': Mergers Public Register 2001: <[http://www.accc.gov.au/pubreg/s50/May\\_June2001/70m01.pdf](http://www.accc.gov.au/pubreg/s50/May_June2001/70m01.pdf)> (the precise level is not stipulated); and Fenner plc and UniPoly SA where, despite the fact the proposed merger would result in the merged entity holding a 'significant market share' the ACCC did not oppose it, taking particular account of imports which accounted for 'a sizeable share of the market': Mergers Public Register 2001: <[http://www.accc.gov.au/pubreg/s50/nov\\_dec\\_2001/144m01.pdf](http://www.accc.gov.au/pubreg/s50/nov_dec_2001/144m01.pdf)>.

<sup>59</sup> Email Limited and Southcorp Limited (decided 11 March 1999): Mergers Public Register 1999: <<http://www.accc.gov.au/pubreg/s50/docs/113m99.pdf>>. See also ACCC, 'Email Acquisition of Southcorp's Whitegoods Not Opposed', Media Release 24/99, 11 March 1999, <<http://www.accc.gov.au/media/mr1999/mr-024-99.html>>. Despite the presence of 'existing and potential import competition', and the weight placed upon this in assessing the merger, the Mergers Public Register does not indicate whether 'imports' crossed the 10% indicative threshold.

<sup>60</sup> American Greetings Inc (acquirer) and The Ink Group Pty Limited (target) (decided 8 January 2001): Mergers Public Register 2001: <<http://www.accc.gov.au/pubreg/s50/2m01.pdf>>.

<sup>61</sup> See American Greetings Inc (acquirer) and The Ink Group Pty Limited (target) (decided 8 January 2001): Mergers Public Register 2001: <<http://www.accc.gov.au/pubreg/s50/2m01.pdf>>. There were other relevant factors in this case. For example, the market shares of The Ink Group were considered relatively small so that the effect on competition was unlikely to be substantial in any event.

both of the relevant markets were characterized by a high level of imports.<sup>62</sup>

- ❑ **Howard Smith Ltd and OPSM Protector Limited (2001)**  
 In Howard Smith Commission the Commission considered that, although merger would result in market share of about 42% ‘the market is characterised by substantial levels of imports and the barriers to entry are not high.’<sup>63</sup>
- ❑ **BioMerieux Australia Pty Ltd and Oranganon Teknika Pty Ltd**  
 The merger would have resulted in the merged entity holding a share of approximately 42% in the relevant market for ‘microbiology diagnostic equipment’. However, the fact that the majority of microbiological diagnostics were imported into Australia’ together with some other market considerations led the Commission to conclude the merger would not substantially lessen competition.<sup>64</sup>
- ❑ **Avery Dennison Australia Group Holdings Pty Ltd and Jackstaedt Holdings Pty Ltd JAC Australia Pty Ltd**  
 In this case, the merger concentration thresholds were significantly exceeded but the merger was not opposed because:

‘while the merger combines the two largest domestic manufacturers of labelstock, customers have indicated that their ability to import, or vertically integrate their operations by manufacturing labelstock, will constrain price levels in the market post merger. ... the Commission notes that imports have constituted at least 10% of the Australian market for labelstock for at least the last 3 years.’<sup>65</sup>
- ❑ **Cesco Australia Ltd & Forbes Engineering Holdings (Aust) Pty Ltd**  
 The proposed joint venture between these parties would have resulted in ‘the two largest manufacturers and services of concrete mixers combining their operations’. However, the Commission considered that despite the fact that existing imports *did not exceed 10%*, there was a ‘potential for imports ... particularly from NZ’ and that this was a key factor in not opposing the merger.<sup>66</sup>

<sup>62</sup> Illinois Holdings Proprietary (acquirer) and Siddons Ramset Limited (target) (decided 16 January 2001): Mergers Public Register 2001: <<http://www.accc.gov.au/pubreg/s50/5m01.pdf>> The relevant market was defined as ‘The national market for the manufacture and construction of a particular type of construction fastening system, namely self-drilling fasteners; and the national market for the supply of a range of garden and other tools and equipment’. Unfortunately what constituted ‘high level of imports’ is not indicated.

<sup>63</sup> ACCC, ‘Annual Report 2000-2001’, above n 22, at p 76. For more information see: Howard Smith Limited (acquirer) and OPSM Protector Limited (target) (decided 22 June 2001): Mergers Public Register <[http://www.accc.gov.au/pubreg/s50/May\\_June2001/81m01.pdf](http://www.accc.gov.au/pubreg/s50/May_June2001/81m01.pdf)>

<sup>64</sup> bioMerieux Australia Pty Ltd (acquirer) and Oranganon Teknika Pty Ltd (target) (decided 14 June 2001): Mergers Public Register 2001: <[http://www.accc.gov.au/pubreg/s50/May\\_June2001/71m01.pdf](http://www.accc.gov.au/pubreg/s50/May_June2001/71m01.pdf)>

<sup>65</sup> Avery Dennison Australia Group Holdings Pty Ltd (acquirer) and Jackstaedt Holdings Pty Ltd – JAC Australia Pty Ltd (target) (decided 19 November 2001): Mergers Public Register 2001: <[http://www.accc.gov.au/pubreg/s50/nov\\_dec\\_2001/138m01.pdf](http://www.accc.gov.au/pubreg/s50/nov_dec_2001/138m01.pdf)> .

<sup>66</sup> Cesco Australia Ltd (acquirer) and Forbes Engineering Holdings (Aust) Pty Ltd (target) (decided 31 October 2001): Mergers Public Register 2001: <[http://www.accc.gov.au/pubreg/s50/sep\\_oct\\_2001/128m01.pdf](http://www.accc.gov.au/pubreg/s50/sep_oct_2001/128m01.pdf)>

These cases, while not providing sufficient detail for thorough analysis, are consistent with the Commission's stated approach to the consideration of imports in a competition analysis. In particular, in Cesco, where imports did not meet the 10% the Commission normally considers will constrain domestic prices, the limited existing imports combined with the 'potential' for imports was sufficient to temper Commission concerns with the merger.<sup>67</sup> This highlights the 'case by case' approach of the Commission and its willingness, in practice, to consider not only existing imports, but also potential imports in their competition assessment.

### **Cases in which imports were not sufficient to allay Commission concerns**

□ **Qantas Airways Limited (PCC) (Frequent flyer) and Hazelton Airlines Limited**

Not surprisingly, in this case the merger guidelines were met and there was no import competition to allay concerns of the Commission about the lessening of competition likely to result. The relevant market was 'for regional air passenger transport in NSW, assessed on a route by route basis'.<sup>68</sup> Qantas withdrew its merger proposal as a result of the Commission's concerns.<sup>69</sup>

□ **Paperlinx Limited and Spicers Paper Limited**

In this case the merger guidelines were exceeded and imports were above 10%, but the Commission nevertheless expressed concerns over the merger. Despite the fact there were sustained imports of greater than 10% in the relevant market,<sup>70</sup> the Commission noted concerns that 'previous anti-dumping applications lodged by PaperlinX had had a negative effect on competition' and had limited the effectiveness of import competition as a constraint on the conduct of PaperlinX.<sup>71</sup> The Commission originally opposed the merger but the matter was resolved by way of enforceable undertakings pursuant to which PaperlinX is required to 'obtain an opinion from an independent

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<sup>67</sup> See also Tim Grimwade, Warwick Anderson, Jill Walker and Luke Woodard, 'Merger Misconceptions: the Industry Commission's Paper on the ACCC's Draft Merger Guidelines' (1996) 4 *Competition and Consumer Law Journal* 132.

<sup>68</sup> Qantas Airways Limited (PCC) (Frequent flyer) (acquirer) and Hazelton Airlines Limited (target) (decided 22 January 2001): Mergers Public Register: <<http://www.accc.gov.au/pubreg/s50/12m01.pdf>>

<sup>69</sup> There was a subsequent attempt by Bodas Pty Ltd to acquire Hazelton Airlines that was opposed by the ACCC, but ultimately resolved through undertakings on 8 March 2001: <[http://www.accc.gov.au/pubreg/s50/mar\\_apr\\_2001/33m01.pdf](http://www.accc.gov.au/pubreg/s50/mar_apr_2001/33m01.pdf)>

<sup>70</sup> The ACCC has, however, indicated that in this case Paperlinx was vertically integrated as both manufacturer and producer and itself imported much of the paper that came from foreign sources. This restricted the ability of imports to act as a competitive constraint. Imports other than via the parties to the proposed merger were significantly smaller, though it is not clear whether they exceeded 10%. In any event the ACCC indicated that in this case a realistic evaluation of the imports – their source and destination in particular – revealed that they did not impose sufficient competitive constraint on the parties to allay competitive concerns: Interview with representative of the Mergers and Assets Sales Branch, ACCC (by phone, 4 June 2002).

<sup>71</sup> Paperlinx Limited (acquirer) and Spicers Paper Limited (target) (decided 30 January 2001): Mergers Public Register: <<http://www.accc.gov.au/pubreg/s50/17m01.pdf>>.

adviser regarding the prospect of success of a proposed anti-dumping application prior to lodging such an application' and a certification from the adviser that 'the proposed anti-dumping application is made bona fide and not frivolously or vexatiously.'<sup>72</sup>

□ **Smorgon Steel Group Ltd and Email Limited**

The merger of these two corporations would have resulted in an increase in concentration above the merger thresholds in the market for 'metal distribution in Australia'. Import levels were above 10% and the Commission indicated that imports were readily available.<sup>73</sup> However, the Commission opposed the merger. Unfortunately limited information is given in the Register as the matter was ultimately resolved through enforceable undertakings.

The PaperlinX and Smorgon mergers, at least on their face, represent a departure from the position frequently re-iterated by the Commission that it has not and is not likely to, oppose mergers where sustained imports represent 10% of the market share.<sup>74</sup> The PaperlinX case, in particular, provides evidence that the Commission will give due consideration (on a case by case basis) to unique circumstances that may indicate imports are not as effective as they might first appear at constraining domestic conduct. At the least, it demonstrates the Commission will not, in practice, automatically clear mergers where imports appear to be above 10%, but will assess, on a case-by-case basis, whether imports do in fact operate to constrain the conduct of domestic firms.

## The appropriateness of the Commission's approach to import competition

With the growing internationalisation of trade and substantial reduction of tariffs in the last decade, the likelihood that Australian producers may face effective import competition, constraining their ability to exercise

<sup>72</sup> Paperlinx Limited (acquirer) and Spicers Paper Limited (target) (decided 30 January 2001): Mergers Public Register: <<http://www.accc.gov.au/pubreg/s50/17m01.pdf>>. See also ACCC, 'Mergers' (2001) 32 *ACCC Journal* at 31.

<sup>73</sup> However, while the Register contains only limited information about the Smorgon merger, in response to an inquiry the ACCC indicated that while imports were generally high in the industry, in the area of greatest concern to the ACCC – the distribution of metal products within Australia – imports were not significant enough to overcome ACCC concerns about the effects on post-merger competition: Interview with representative from the Mergers and Assets Sales Branch, ACCC (by phone, 3 June 2002). See also Smorgon Steel Group Ltd (acquirer) and Email Limited (target) (decided 22 February 2001) Mergers Public Register: <<http://www.accc.gov.au/pubreg/s50/25m01.pdf>> and ACCC, 'Mergers', above n 72, at p 31.

<sup>74</sup> Note, however, the suggestion by the ACCC in relation to the Smorgon and Paperlinx cases that imports may not have exceeded 10% in relation to the aspect of the proposed merger that it expressed concerns about. See above n 70 and 73. See also Grimwade, Anderson, Walker and Woodard, 'Merger Misconceptions', above n 67 where the authors provide that 'cases referred to the ACCC which would apparently exceed the import threshold, but where the ACCC felt there was a substantial competition issue to be consider, include: Alcan/Comalco; Amcor/APPM; Simsmetal/Affinity Metals; and Gillette/Wilkinson Sword'.

market power, has dramatically increased.<sup>75</sup> The Industry Commission<sup>76</sup> has noted that competition 'from imports, or the threat of it, can be a powerful means of ensuring competitive outcomes, even where current imports are low.'<sup>77</sup> Consequently, the Industry Commission has suggested that:

... an inappropriate treatment of imports would miss the most pronounced current change in the nature of competition in many Australian markets<sup>78</sup>

It is, therefore, of considerable importance that this factor be given appropriate consideration by the Commission and the courts in any merger analysis.

However, what constitutes an appropriate consideration is the subject of much debate. Not surprisingly, the Commission has received criticism from business groups that it has unreasonably obstructed mergers in Australia.<sup>79</sup> The Commission has defended its conduct, insisting that

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<sup>75</sup> The ACCC has stated that the 'growing internationalisation of trade and commerce is [relevant] to mergers in trade-exposed sectors of the economy [because] it reduces concern at the level of domestic concentration in trade-exposed sectors, given the presence of overseas sources of competition': ACCC, 'Exports and the TPA', above n 1, at p 22. It has also been noted that '[r]eduction in tariff protection and changes in transport and communications have increasingly exposed domestic markets to the constraints of import competition. However, this is not universally the case': Grimwade, Anderson, Walker and Woodard, 'Merger Misconceptions', above n 67. The Industry Commission has claimed that '... [r]eductions in tariffs to a maximum of 5 per cent by 1 July 1996 [with some exceptions] and removal of quotas, mean that imports are now far less likely to be restricted sufficiently to enable merged firms to set anti-competitive prices': Industry Commission, above n 2, at p xii. However, Ergas has noted that 'the linkages involved [in relation to the effect of import competition on domestic producers] are considerably more complex than the [Industry Commission's] information paper recognises': Henry Ergas, 'Are the ACCC's Merger Guidelines Too Strict? A Critical Review of the Industry Commission's Information Paper on Merger Regulation' (1996) 6 *Competition and Consumer Law Journal* 171 at 176. See also Corones, 'Substantial Lessening of Competition', above n 3, at p 249.

<sup>76</sup> The Industry Commission merged with the Bureau of Industry Economics and the Economic Planning Advisory body in 1998 to form the Productivity Commission, which has the role of advising the Commonwealth Government in 'all aspects of microeconomic reform': Productivity Commission Home Page: <http://www.pc.gov.au/commission/index.html> (5 June 2002).

<sup>77</sup> Industry Commission, above n 2, xii. For a more theoretical economic-based analysis of relevance of imports on domestic markets see: Aileen Thomson, 'Import Competition and Market Power: Canadian Evidence', Carleton Economic Papers, Issue 99-14, 20 December 1999 <<http://www.carleton.ca/economics/cep/cep99-14.pdf>>, Kiyoshi Matsubara, 'Import Penetration and Domestic Process Innovation' (March 2002) <<http://www.econ.nagoya-cu.ac.jp/~matubara/Matsubara.pdf>>, Clark, Kaserman and Mayo, "Barriers to Trade and the Import Vulnerability of US Manufacturing Industries" (1990) 38 *Journal of Industrial Economics* 433 and See also Luigo Esposito and F.F. Esposito, 'Foreign Competition and Domestic Industry Performance' (1971) 4 *Review of Economics and Statistics* 343 and P Geroski and A Jacquemin, 'Imports as a Competitive Discipline' (1981) 47 *Recherches Economiques de Louvain* 197 (cited in Ergas, above n 75 at 176).

<sup>78</sup> Industry Commission, above n 2, at p 42.

<sup>79</sup> For example, the Business Council of Australia has claimed that the ACCC has unnecessarily obstructed mergers and takeovers in Australia. The Business Council points to the fact that not all mergers make it to the ACCC in the first place and those that do are sometimes withdrawn before a final decision of the ACCC and released statistics do not take account of this: see Commonwealth, 'Competing Interests: Is There a Balance?'

‘proposals are only opposed if there is likely to be an anti-competitive effect in the market.’<sup>80</sup>

In assessing the appropriateness of the Commission’s approach to assessing imports, the validity of treating imports as a separate consideration will first be considered. This will be followed by an assessment of the appropriateness of the Commission’s case-by-case approach and, finally, the question of whether the Commission has, in practice, applied too great, or too little emphasis on imports as a constraining factor on domestic laws will be evaluated.

## The separate assessment of imports

The appropriateness of considering import competition separately when conducting a competition analysis has not been the subject of much criticism. It also accords with approaches taken in several other jurisdictions.<sup>81</sup> It is widely recognised that simply considering import competition as a component of market concentration may distort the true value of imports,<sup>82</sup> by either understating or overstating their value as a competitive constraint on domestic firms.

### ***Imports levels overstating the level of competitive constraint***

A simple assessment of the level of imports based on market share may overstate the relevance of imports in providing a competitive check on the conduct of the merged entity.<sup>83</sup> In particular, this may occur where:

- the imports would not have the capacity to ‘expand in response to the exercise of market power by the merged firm’;<sup>84</sup>

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above n 43, at para 2.7. The Industry Commission has also recommended that the concentration threshold be increased: Industry Commission, above n 2, at pp 37-38.

<sup>80</sup> Fels, A. Global need or market greed? *Business Review Weekly*, 15 March 2001, quoted in Commonwealth, ‘Competing Interests: Is There a Balance?’, above n 43, at para 2.7.

<sup>81</sup> See, for example, the Canadian *Competition Act 1986*, which provides that the Competition Tribunal, in assessing if a merger will prevent or lessen (or be likely to prevent or lessen) competition substantially, may have regard to ‘(a) the extent to which foreign products or foreign competitors provide or are likely to provide effective competition to the businesses of the parties to the merger or proposed merger ...’: section 93.

<sup>82</sup> As the Industry Commission has noted, ‘[w]hile the ACCC will treat the market share of imports as an initial indication of their competitive role in the market, it recognises that the current market share of imports offers only ‘a partial picture’ of their impact on domestic competition’: Industry Commission, above n 2, at p 40. Ergas notes, ‘... empirical studies find: (1) that the effects of import competition vary substantially from industry to industry; ... and (2) that intensified competition from imports does not invariably result in lower prices in the domestic market.’: Ergas, above n 75 at 176. See also Ian Stewart, ‘Mergers and Competition: An Analysis of Section 50 of the Trade Practices Act’ (2000) 74 *The Australian Law Journal* 533 at 543 and *Fletcher Challenge Ltd* [1988] ATPR (Com) 50-077 at 57,381 (preference for local sourcing) and *Wattyl (Aust) Pty Ltd; Courtaulds (Aust) Pty Ltd* [1996] ATPR (Com) 50-232 at 56,598-99 (transport costs high).

<sup>83</sup> See, for example, Grimwade, Anderson, Walker and Woodard, ‘Merger Misconceptions’, above n 67: ‘It is necessary to examine factors such as non-tariff barriers to trade, transport costs, perishability, the arms length nature of imports, whether imports occupy particular market niches, whether distribution systems can accommodate a significant increase in imports and the relationship between import parity and competitive market prices.’

- there is insufficient consideration given to the interdependence of domestic and foreign suppliers;<sup>85</sup>
- the imports are not at 'arms length' because, for example, Australian manufacturers have located part of their production offshore;<sup>86</sup>
- there is uncertainty or fluctuations in the current exchange rates;<sup>87</sup>
- there is high product differentiation, whether because of a 'buy Australia' policy or otherwise, that would inhibit the ability of imports to expand into the market – at least rapidly;<sup>88</sup>
- there are tariff barriers; or
- there are effective non-tariff barriers, for example, in the form of domestic industry standards or import quotas.<sup>89</sup>

Consequently, all these factors need to be considered, in addition to the current level of imports, if a true picture of the value of imports is to be developed.

### ***Imports levels understating the level of competitive constraint***

The current level of imports may also understate their value as a constraint on anticompetitive conduct of domestic firms. This may be the

<sup>84</sup> ACCC, 'Merger Guidelines', above n 18, at p 46 (para 5.109): 'The fact that imports have established a small market share does not necessarily imply that they could expand in response to the exercise of market power by the merged firm. This is particularly the case where 'imports occupy a niche market or there are significant costs associated with imports.' See also Ray Steinwall, 'Developments and Events: ACCC's 1996 Merger Guidelines' (1996) 4 *Competition and Consumer Law Journal* 1 at 3.

<sup>85</sup> See Ergas, above n 75 at 176: '... an increase in foreign supply (say, as a result of more rapid productivity growth overseas) may increase domestic prices if domestic producers: (1) accommodate the increase in imports by reducing their own output; and (2) in the process forego economies of scale. Even more plausibly, foreign firms, faced with a domestic merger which increases prices in the domestic market, may themselves simply go along with the price rise, especially as this is by no means inconsistent with some increase in the market share accounted for by imports.'

<sup>86</sup> See B Johns, 'Threshold Tests for the Control of Mergers: the Australian Experience', in D Round (ed), *The Australian Trade Practices Act: Proscriptions and Prescriptions for a More Competitive Economy* 192-212 (cited in Industry Commission, above n 2 at p 40).

<sup>87</sup> This is specifically identified as a relevant factor in the Merger Guidelines (above n 18, 47-48 (para 5.112)). See also Ergas, above n 75, at pp 177-178.

<sup>88</sup> The 'extent to which imports are closely substitutable' is specifically identified as a relevant factor in the Merger Guidelines (above n 18, at pp 47-48 (para 5.112)). See also Industry Commission, above n 2, at p 40. However, also note Ergas: '...even in the presence of substantial imports, a merger of two domestic suppliers, producing goods close to each other in the chain of substitution, can still result in significant unilateral price effects' (Ergas, above n 75, 176). See also H Bloch 'Pricing in Australian Manufacturing' 68(202) *Economic Record* 365 at 374, cited in Industry Commission, above n 2, at p 40.

<sup>89</sup> See ACCC, 'Merger Guidelines', above n 18, at pp 46-48 (para 5.109-112). The United States guidelines similarly recognise the constraint quota's may have on the ability of imports to expand: 'The constraining effect of the quota on the importer's ability to expand sales is relevant to the evaluation of potential adverse competitive effects.' (Department of Justice, *Horizontal Merger Guidelines*, para 1.43 fn 16). See also Ergas, above n 75 at 178. However, it has also been claimed that sustained imports of 10% or higher may indicate an absence of any such substantial barriers: see Prices Surveillance Authority, *Inquiry into Tampons Declaration*, (Report No 55 September 1994) 12-13; Industry Commission, above n 2 at 43; and W Landes and R Posner 'Market Power in Antitrust Cases' (1981) 94 *Harvard Law Review* 937 at 963- 968.

case, for example, where supply elasticity is high,<sup>90</sup> so there is a 'potential to expand the supply of imports rapidly in response to higher prices',<sup>91</sup> or where goods are homogeneous,<sup>92</sup> or where there are no, or limited, tariff or non-tariff barriers to trade.

It has also been recognised that risk of collusion is not as high between foreign and domestic firms, so the Commission's concerns about that firm of post-merger collusion will be lower in relation to foreign competitors than domestic ones.<sup>93</sup>

### **The Commission's case-by-case approach to assessing imports**

The Commission has stated that it will not oppose mergers where imports, actual or potential,<sup>94</sup> provide an effective discipline on domestic business.<sup>95</sup> It has further indicated that this is likely to occur where imports can be shown to have been sustained in excess of 10% for three years or more. However, the Commission does retain the ability to consider each case on its merits. It has not, as it has in relation to market concentration, provided a formal 'safe harbour' below which the Commission is unlikely to have any competition concerns.

In 1996 the Industry Commission called for a 'safe harbour' of this nature to be established in respect of imports. In particular, the Industry Commission claimed that

an import penetration ratio of 10 per cent or more for three years is a reasonable indication that, in the absence of quotas or other special factors restricting imports, foreign suppliers have established a sufficient market presence.<sup>96</sup>

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<sup>90</sup> The Merger Guidelines recognise that 'import competition can be a highly effective constraint even at low levels of market penetration if supply elasticity is high': Anderson, Grimwade, Walker & Woodward, above n 67, 35. 'Conventionally, imports are seen as imposing a substantial constraint on domestic price-setting [because]: first, at least for small countries, the elasticity of supply of imports can usually be taken to be high; ...': Ergas, above n 75 at 176.

<sup>91</sup> ACCC, 'Merger Guidelines', above n 18, at p 46 (para 5.108).

<sup>92</sup> See, for example, Industry Commission, above n 2, at p 41.

<sup>93</sup> See, for example, Ergas: '... it is likely to be more difficult for importers to collude with domestic producers than for domestic producers to collude amongst themselves.': Ergas, above n 75 at 176.

<sup>94</sup> For an example of a case in which imports have been below 10% but the potential for imports has factored in the ACCC's decision not to oppose the merger see Cescio Australia Ltd (acquirer) and Forbes Engineering Holdings (Aust) Pty Ltd (target) (decided 31 October 2001: Mergers Public Register 2001: <[http://www.accc.gov.au/pubreg/s50/sep\\_oct\\_2001/128m01.pdf](http://www.accc.gov.au/pubreg/s50/sep_oct_2001/128m01.pdf)>. See also discussion in Grimwade, Anderson, Walker and Woodard, above n 65, 132.

<sup>95</sup> See ACCC, 'Annual Report 2000-2001', above n 22, chapter 4: 'The Commission takes full account of real and potential import competition and does not oppose mergers when imports can be shown to provide an effective discipline on domestic businesses.' See also ACCC, 'Exports and the TPA', above n 1, at p 19.

<sup>96</sup> Industry Commission, above n 2, at p 45.



Based on this theory the Industry Commission proposed that an additional ‘safe harbour’ rule should be created ‘such that where total *arms length* imports have accounted for at least 10 per cent of sales for three years, the merger will be free from scrutiny.’<sup>97</sup>

The Industry Commission’s proposal was, however, subject to heavy criticism by several commentators. For example, Ergas writes:

‘... even the smallest step away from the assumptions of traditional models of oligopoly leads to the conclusion that mergers may lead to substantial increases in prices even when industry concentration is low and the merged firms have low market shares. This is now well-recognised in the literature, and even those experts who support the use of market share screens and “safe harbours” accept that these do not apply in markets where firms are extensively differentiated. Given that these are surely far more common than markets involving homogenous goods supplied by homogeneous firms, the Industry Commission’s recommendation that the ACCC’s “safe harbours” – which are already far more generous than those applied in the United States or Canada – be made even broader, is nothing if not surprising.’<sup>98</sup> [footnote omitted]

The recommendations of the Industry Commission were not incorporated in the Commission’s 1996 Guidelines, nor do they appear in the current Guidelines. While this proposal would have appealed to corporations and their advisers,<sup>99</sup> there are several reasons such a proposal should not be adopted.

First, for the reasons described above, data on the level of imports has a far greater potential to mislead than data on the level of concentration resulting from a proposed merger, by over-estimating (or under-estimating) the ‘impact of import competition in constraining the exercise of domestic market power’.<sup>100</sup> Specifically, *it is clear* that, barring exceptional cases, where a merged entity will have less than 40% of the market share, or less than 15% where 75% of the market is held by 4 parties, competition is unlikely to be substantially effective. On the other hand, *it is not clear* that imports of 10% will, in all cases, effectively constrain the market power of domestic entity. For example, a safe harbour of 10% would effectively mean that ‘a firm which has a 50% market share should be permitted to merge with a firm with a 40% market share so long as imports account for the remainder of the market.’<sup>101</sup> It has been observed that it is hard to take such a suggestion seriously.<sup>102</sup>

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<sup>97</sup> Industry Commission, above n 2, at p ix.

<sup>98</sup> Ergas, above n 75 at 175-6.

<sup>99</sup> See, for example Steinwall, above n 84 at 3.

<sup>100</sup> Ibid.

<sup>101</sup> Ergas, above n 75 at 176.

<sup>102</sup> See Ergas, above n 75 at 176.

Second, a safe harbour would not necessarily increase business certainty. The Industry Commission, in its proposal, acknowledges that imports must be 'comparable and at arms length', and establishing this criteria would

require case by case analysis of customer preferences, licensing and distribution arrangements, undermining the effectiveness of a "safe harbour", which could be quite misleading. ...<sup>103</sup>

Consequently a threshold is unlikely to do much (if any) more to assist business than the current indicative guides provided by the Commission.

Third, there does not appear to be any practical need for such a 'safe harbour' to increase business certainty. The vast majority of mergers considered by the Commission do not raise anti-competitive concerns, even absent an import analysis. In 1996-1997, for example, of the 202 mergers notified to the Commission, only 84 (less than 42%) triggered the concentration thresholds. Thus, there is not the same need for a benchmark as exists in relation to concentration thresholds, the latter of which much be considered as an inherent part of any merger competition analysis.

It is suggested, therefore, that the current 'case-by-case' approach adopted by the Commission should be retained, without specific provision for a 'safe harbour'. As Ergas has observed:

...imports are no panacea for the harm which mergers can cause. Rather, as with domestic competition, their impacts need to be assessed on a case-by-case basis, taking account of the nature and extent of producer differentiation, the pattern of interaction between domestic and foreign producers, and the likelihood of competition being distorted by resort to trade protection.<sup>104</sup>

### **Has the Commission's practical application been appropriate?**

If it can be accepted that the Merger Guidelines is appropriate, the next step is to determine if, in fact, the Commission has approached import analysis in the way outlined in those Guidelines. As noted earlier, there is insufficient public information available to reach confident conclusions about the quality and appropriateness of the Commission's consideration of imports. However, the information that is available suggests that the Commission has approached imports in a manner consistent with its Guidelines; in particular, it has considered the relevance of imports on a case-by-case basis.

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<sup>103</sup> Grimwade, Anderson, Walker and Woodard, above n 67.

<sup>104</sup> Ergas, above n 75 at 176.

The recent example of PaperlinX, in particular, demonstrates that the Commission will not automatically clear any merger solely on the basis that imports exceed 10% of the market. The Commission's treatment of this proposal gave due recognition to the limits that existed on the ability of imports to constrain PaperlinX's conduct.

Similarly, in Cesco, the Commission gave appropriate consideration to the fact that existing and *potential* imports acted as an effective constraint on the exercise of domestic market power, despite the fact that the indicative level of 10% actual imports over 3 years had not been met.

The statistics and cases available suggest that, in practice, the Commission does appear to be considering imports, where relevant, on a case-by-case basis to ensure that levels indicated by the proportion of market share held by imports does not over or under-estimate their role as competitive constraints. This is appropriate and, despite protestations to the contrary, does not unduly constrain the ability of firms to merge where they are faced with significant import competition.

## Conclusion

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The Commission exercises enormous power over the ability of firms to merge in Australia. As such, it is important that the approach it takes to evaluating the constraints on the exercise of post-merger market power is appropriate. With rises in the levels of international trade and a lowering, in recent years, of tariff barriers, levels of actual and potential import competition are increasingly likely to be a significant consideration in this respect.

The Commission Merger Guidelines recognises that sustained imports of above 10% will normally address competitive concerns, while leaving room for the possibility that, in some cases, an apparently high level of imports will not, for a variety of reasons, provide an effective constraint on the exercise of domestic market power.

This approach to import competition, in terms of the policy established in the Merger Guidelines, is appropriate should be retained. While the Commission's approach to informal assessments appears to be consistent with these policy guidelines the lack of reliable statistical evidence on this issue makes it difficult to determine with any certainty whether, in fact, this is the case. It is suggested that this should be rectified by a requirement that the Commission maintain a more accurate and detailed mergers public register to replace the existing voluntary register so that there can be greater public scrutiny of the application of their guidelines in individual cases. While such public scrutiny may reveal a lack of due consideration to imports, it is suggested that it is more probable that it would demonstrate a high – perhaps too high – level of

consideration placed on import competition in merger assessment in Australia. Regardless of the results of such scrutiny, the legislature and the Commission should resist any pressure to create a 'safe harbour' for imports.