

definition<sup>50</sup> which followed the Prices Surveillance Authority's (PSA) 1994 Portland cements declaration.

4.15. In its 1994 Portland cements declaration the PSA stated:

The inquiry concludes that the appropriate market definition for the purposes of assessing competition and market power is the national cement market. This market includes Portland cement and blended cements...A key feature of the cement industry since declaration has been the evolution of a more national market. At the time of declaration, the industry was based on State or regional markets, usually with only one or two producers supplying each market. However, cement and clinker have become more widely traded, and these narrow geographic markets have been eroded<sup>51</sup>

4.16. However, in the context of the current application there is a range of material that indicates that the relevant market for cement is narrower than a national market. The Commission sees merit in the Barro Group's geographic market definition. The Barro Group submitted that 'the difficulties and costs involved in the transportation of cement suggest several regional markets as opposed to a single national market.'<sup>52</sup>

4.17. Based on the current and prospective cement distribution patterns it appears that there is not a national market for cement. A more accurate portrayal of the geographic scope of the cement market is that there are a number of regional markets. One such regional market covers Tasmania, Victoria, southern New South Wales and South Australia. It must, however, be noted that most of the cement movements are in one direction only depending on where the manufacturing facilities are located. ACH has a substantial cement manufacturing plant at Railton in Tasmania from where the product is shipped on a dedicated cement transport ship between Victoria and southern NSW. Dedicated cement ships are highly expensive and require specialised port facilities in order to transfer the cement from the ship to the storage facilities in the port. The expense of road transport, and the expense of dedicated cement ships combined with the sensitivity of cement to moisture limit the scope of the geographic market for cement.

4.18. It would also appear that the borrow and loan arrangements between the major cement manufacturers may cause confusion over the actual level of interstate trade that is occurring with cement.

4.19. In applying the SSNIP test to the Australian cement industry, it would appear that cement manufacturers operating outside of Western Australia would have little competitive influence on a hypothetical monopolist, if it decided to raise prices in that State. The most viable alternative source of supply would be from South Australia, but even in this case the transport costs involved in shipping cement to Western Australia would be likely to exclude any interstate restraint on price levels.

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<sup>50</sup> ABL Submission, para.7.31. ACH also supports ABL's market definition and submits that 'the relevant market is an Australian market for the production and distribution of all varieties of cement, both bagged and bulk cement.' ACH Submission, p.5.

<sup>51</sup> PSA *Inquiry Into the Portland Cements Declaration*, 21 December 1994, ppxi-xii.

<sup>52</sup> The Barro Group Submission, 14 April 1999, p.2.

4.20. By contrast, the only Victorian based cement manufacturer, BCSC, could not raise prices without being affected by the competitive influence of ACH, through its Railton plant, and to a lesser degree by ABL, through its Birkenhead plant. Transport costs are lower due to the shorter distances, and both the Railton and Birkenhead plants utilise efficient manufacturing processes to ensure their competitiveness. Further, the Melbourne Cement Terminal is already established which removes the cost of building an import terminal prior to importing. It is, however, unclear whether Sydney could constrain prices in Victoria due to the greater distance.

4.21. For the purposes of the current Authorisation application the Commission has focused on two key geographic markets namely a Western Australian market and a south-east Australian market. In reaching this view the Commission notes that clinker is an easier product to ship as it is less sensitive to moisture and impurities and because it is easier to unload and handle.

## Functional

4.22. Delineation of the relevant functional market requires identification of the vertical stages of production and/or distribution which comprise the relevant arena of competition. This involves consideration of both the efficiencies of vertical integration, commercial reality and substitution possibilities at adjacent vertical stages.

4.23. These issues were covered by Rhonda Smith and Neville Norman in their article 'Functional Market Definition'.<sup>53</sup> Smith and Norman suggested a two tiered test. The first test is referred to as the 'test of involvement which involves asking the question '[d]o firms or entities operating in the first defined functional domain have involvements in the extended functional domain.'<sup>54</sup> The second test looks at the sphere of influence within the competitive process which asks the question '[i]s there a significant sphere of influence as between two or more functional stages of a production and/or distribution sequence such that it is impossible to adequately explain the competitive process at one stage without knowledge of the role or influence of individual firms who also operate at adjacent or other stages?'<sup>55</sup>

4.24. ABL submits that the functional market includes cement production, bagging operations and the distribution of both bagged and bulk cement.<sup>56</sup>

4.25. QCL submitted that the functional market covers quarrying, kiln operations, grinding and distribution but not concrete supply.<sup>57</sup>

4.26. The Commission notes that cement manufacturing in Australia has historically been highly vertically integrated with imports exercising a minimal influence on the

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<sup>53</sup> (1996) 4 CCLJ 1-14.

<sup>54</sup> (1996) 4 CCLJ at 11.

<sup>55</sup> (1996) 4 CCLJ at 11.

<sup>56</sup> ABL Submission, 30 March 1999, para.7.1.

<sup>57</sup> QCL Submission, 9 April 1999, p.2.

market. In this scenario independents at the various stages have been dependent on the vertically integrated major players to obtain their inputs of clinker or cement. Consequently the functional market is likely to span the whole process including quarrying, clinker production, grinding, distribution and concrete production.

4.27. However, as noted above in the geographic market definition it is possible that clinker imports will grow. This is especially the case in Western Australia. Even if imports of clinker do not actually rise it is likely that they may increase pricing pressures on the domestic manufacturers of clinker. Consequently 'the sphere of influence' may be broken down as clinker grinders may no longer be bound to obtaining their inputs from the vertically integrated majors. An example of this is BGC's clinker-grinding plant in Western Australia. By constructing a clinker grinding facility BGC is able to apply competitive pressures to the larger players in the cement industry without incurring the prohibitive cost of establishing a clinker manufacturing plant. Consequently it is possible that in the future it may be appropriate to define separate functional markets for clinker manufacture and for cement manufacture.

## **Time**

4.28. Based on the information available at this time, the Commission does not believe that the passage of time would substantially affect substitution possibilities either in the lime or cement markets, and therefore warrant adjustments to the relevant market definitions.

## 5. Commission's assessment of effect on competition

5.1. Under s.90(9) of the Act, the Commission shall only grant Authorisation if it is satisfied in all the circumstances that the acquisition would result, or be likely to result, in such a benefit to the public that the acquisition should be allowed to take place.

5.2. The Trade Practices Tribunal<sup>58</sup> concluded in *QCMA*, that it is appropriate to commence the assessment of public benefit with an assessment of the competitive implications of the proposed acquisition, for the following reasons:

1. A merger may positively enhance the competitive process and thus give rise to a substantial benefit ...
2. ... the benefits claimed may not mention competition .... Nevertheless, our appraisal of all the listed claims must depend upon our appreciation of the competitive functioning of the industry, with and without merger ...
3. A claimed benefit may in fact be judged to be a detriment when viewed in terms of its contribution to a socially useful competitive process ....
4. ... the substantiality of benefits needs to be measured against likely anti-competitive effects (and other detriments).
5. Quite generally, the Tribunal's role is seen as forming one of the means of achieving the policy objective of the Act, namely the preservation and promotion of useful competition.<sup>59</sup>

5.3. This section explains the Commission's views as to the likely effects of the proposed acquisition on competition. As noted previously the Commission considers that it must also examine the likely effects of the proposed supply agreements between ABL and ACH.

5.4. The concept of competition in the Act is generally well understood and has been explained in decisions of the Courts and the Trade Practices Tribunal. The Tribunal said in *QCMA*:

Competition is a process rather than a situation. Nevertheless, whether firms compete is very much a matter of the structure of the markets in which they operate. The elements of market structure which we would stress as needing to be scanned in any case are these:

- (1) the number and size distribution of independent sellers, especially the degree of market concentration;
- (2) the height of barriers to entry, that is the ease with which new firms may enter and secure a viable market;
- (3) the extent to which the products of the industry are characterised by extreme product differentiation and sales promotion;
- (4) the character of 'vertical relationships' with customers and with suppliers and the extent of vertical integration; and

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<sup>58</sup> Now called the Australian Competition Tribunal.

<sup>59</sup> *QCMA and Defiance Holdings Ltd, Re (1976) 25 FLR 169; ATPR 40-012, p.17,244 - 17,245.*

- (5) the nature of any formal, stable and fundamental arrangements between firms which restrict their ability to function as independent entities.

Of all these elements of market structure, no doubt the most important is (2), the condition of entry. For it is the ease with which firms may enter which establishes the possibilities of market concentration over time; and it is the threat of entry of a new firm or a new plant into a market which operates as the ultimate regulator of competitive conduct.<sup>60</sup>

5.5. For the purposes of Authorisation, the Commission is not required to determine whether the acquisition would be likely to substantially lessen competition in breach of s.50 of the Act. Nevertheless, s. 50, and the procedures adopted in the Commission's *Merger Guidelines*, are a useful framework for assessing the likely effects on competition of the proposed acquisition.

### **Merger factors**

5.6. In assessing whether a merger will substantially lessen competition in breach of s. 50 of the Act, s.50(3) provides that the Court must have regard to a range of factors.

5.7. These factors, derived from extensive judicial and academic review of mergers, form the basis of the Commission's merger assessment procedures as set out in the *Merger Guidelines*. The analysis below follows that approach with one minor variation. Owing to the prevalence of vertical arrangements in the industry and the central importance of these arrangements to the Commission's competition analysis, vertical integration is considered immediately after market concentration, before moving onto the other merger factors.

#### **Market concentration: s.50(3)(c)**

5.8. Market concentration refers to the number and size of participants in the market. A concentrated market is a necessary but not a sufficient condition to enable the exercise of market power. If the relevant market is properly defined, a firm or firms will not normally be able to exercise market power in the absence of a significant market share.

5.9. A merger which increases the level of concentration in a market may reduce competition by increasing the unilateral market power of the merged firm and/or increasing the scope for co-ordinated conduct among remaining competitors.

#### ***Cement***

5.10. Before assessing the impact on concentration of the ABL acquisition of shares in ABCL, it is first necessary to form a view on the nature of the current and future relationships between ABL and ACH. The Commission reached the view above, that in the past ABL and ACH have not behaved as free agents, able to make business decisions independently of each others influence, owing to the vertical and horizontal ties between the companies.

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<sup>60</sup> *Re QCMA*, op cit, page 17,246.

5.11. ABL has contended that ABL and ACH will be free to compete as independent entities once ACH has exited the share register of ABCL. This increased independence will be offset to some extent in South Australia, Western Australia and the Northern Territory through the operation of the proposed supply agreements.

5.12. If considered independently of the other proposed transactions, the consequence of the ABL acquisition of shares in ABCL will be a reduction in concentration in the Australian cement industry.

5.13. On a State basis, the key impact would be in Victoria where there is significant overlap between the two companies. Essentially, the transaction would result in three independent companies servicing Victoria instead of the current two. Minor decreases in concentration would also be observed in NSW and Tasmania. In the remaining States there is currently little overlap between the activities of ABL and ACH, hence there would be little effect on concentration.

5.14. On a national basis, if the best case scenario is adopted by assuming that ABL and ACH would be completely independent following the acquisition, then the CR(4) would decrease from 82.6 per cent to 76.4 per cent.<sup>61</sup> In calculating the post acquisition CR(4), the 35 per cent market share of the combined ABCL/ACH would be split between the two companies 12.5 per cent and 22.5 per cent respectively. Further, it would be the case that four companies in the industry would have market shares greater than 10 per cent rather than just the current three.

5.15. As the ABL acquisition of shares in ABCL will lead to a small decrease in concentration in the market, the Commission considers that the acquisition in itself is unlikely to result in a competitive detriment. Rather, the acquisition is most likely to result in an increase in the level of competition.

5.16. This is also the view of ABL, who has argued that the restructuring will have a pro-competitive effect including 'the creation of a "fourth force" in the cement market, independent of the vertically integrated cement and concrete producers, Boral, CSR and Pioneer'.<sup>62</sup>

5.17. Usually after reaching such a conclusion, the Commission would not pursue its analysis further. However, as the proposed acquisition is part of a wider package of transactions, including the entering of supply agreements, it is necessary for the Commission to consider the effects of the acquisition in this broader context.

### *Lime*

5.18. Since ACH does not actively participate in the production of lime and the proposed supply agreements do not relate to the supply of lime, the Commission is satisfied that the proposed transaction will have a neutral effect on competition in the

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<sup>61</sup> The CR(4) measures the total market share of the four largest players in the market. This calculation treats ABCL and ACH as a single entity prior to the transaction.

<sup>62</sup> ABL Submission, 30 March 1999, para. 5.18.

various geographic lime markets.<sup>63</sup> Consequently, the lime market is not considered further in this determination.

**Vertical integration: s.50(3)(i)**

5.19. As described above, the Australian cement industry is characterised by extensive vertical and horizontal relationships. In the course of its inquiries, the Commission has received submissions from a number of parties suggesting that the vertical arrangements within the industry reduce competition. Importantly, ABL in its submission acknowledges this consequence:

... vertical integration can create barriers to entry, which provide a degree of protection to cement prices in regions where the vertical integration is most pronounced, particularly in New South Wales and Victoria. In contrast, the absence of vertical integration in regions such as Western Australia is a contributor to low prices.<sup>64</sup>

5.20. In addition, ABL highlights two further competitive consequences of the vertical relationships in the industry. First, the vertically integrated cement producers are able to generate efficiencies because of high utilisation and security of supply that are unavailable to the independent cement producers, placing the independent producers at a competitive disadvantage.

5.21. Second, it is in the interests of independent cement producers to foster a customer-base within the independent sector of the concrete market, as they do not have the same guaranteed sales of cement to shareholders as the vertically integrated producers.<sup>65</sup>

5.22. Other statements addressing the implications for competition of the vertical arrangements in the industry were made by:

5.23. The Barro Group:

... there is little room for entry into the cement market due to the high level of vertical integration and the supply agreements.<sup>66</sup>

5.24. On the basis of such evidence, it is difficult not to conclude that the extensive vertical arrangements in the industry may reduce competition to some extent.

5.25. However, ABL claims that the proposed supply agreements in themselves will also have pro-competitive effects because:

- The supply agreements will strengthen ABL's cement business by providing security for a substantial proportion of ABCL's sales volume.<sup>67</sup>

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<sup>63</sup> Letter from Minter Ellison, 22 April 1999, p. 1.

<sup>64</sup> ABL Submission, 30 March 1999, para. 3.6.

<sup>65</sup> ABL Submission, 30 March 1999, para. 8.31 to 8.32.

<sup>66</sup> Notes from ACCC meeting with the Barro Group, 12 April 1999, para.21.

<sup>67</sup> ABL Submission, 30 March 1999, para.5.24.

- The supply agreements are structured so that ACH can exert price pressure on ABL by the threat of importation or cheaper supply from other suppliers. It also does not prevent ACH independently competing in Western Australia in respect of other potential customers.<sup>68</sup>
- After the acquisition, ACH will have many options to supply South Australia.<sup>69</sup>
- The supply agreements will increase ABL's utilisation of its Birkenhead facility, allowing ABL to achieve lower unit cost and to be a more effective competitor.<sup>70</sup>
- The pro-competitive effects of ABL's acquisition of 100 per cent of ABCL is only commercially viable if underpinned by the supply agreements. Otherwise, ABL's position as an independent cement producer would be extremely vulnerable.<sup>71</sup>

5.26. In assessing whether the net effect of the supply agreements on competition is likely to be positive or negative, the Commission is of the view that considerable weight should be attached to the evidence concerning the fact that cement prices are lower in Western Australia. Nevertheless, the Commission accepts that the proposed supply agreements will have some pro-competitive effects.

**Import competition: s.50(3)(a)**

5.27. If import competition exists, or the potential for import competition, it is an effective check on the exercise of domestic market power, and it is unlikely that a merger will substantially lessen competition.

5.28. The Commission recognises that in some markets, market shares may understate the competitive restraint provided by imports because of the potential to expand the supply of imports rapidly in response to higher prices. This is often the case in commodity markets.

5.29. In other cases, market shares will overstate the likely role of imports in constraining the conduct of the merged firm. The fact that imports have established a small market share does not necessarily mean that they could expand in response to the exercise of market power by the merged firm. For example, imports may occupy a particular niche market, while the costs of importing may prohibit 'mass market' competition. Further, imports may be controlled by existing manufacturers who import to complement their domestic production.

5.30. An overview of the role that imports currently play in the Australian cement industry is presented above. The conclusion from that discussion is that currently imports account for only a relatively small proportion of total Australian cement sales.

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<sup>68</sup> ABL Submission, 30 March 1999, para.12.12.

<sup>69</sup> ABL Submission, 30 March 1999, para.12.31.

<sup>70</sup> ABL Submission, 30 March 1999, Executive Summary, para.5.

<sup>71</sup> ABL Submission, 30 March 1999, para.5.37.



5.31. It therefore remains to determine whether imports have the potential to constrain the exercise of market power in the Australian cement industry. Further, the Commission must also assess whether the proposed share acquisition in conjunction with the supply agreements will increase or decrease the competitive constraint posed by imports.

5.32. In its submission, ABL argues that given the continued appreciation of the Australian dollar against Asian currencies, the extent of overproduction in South East Asia, and the contraction of local Asian demand that the 'actual and potential import of cement and/or clinker to Australia remains a very strong discipline on market behaviour'.<sup>72</sup>

5.33. While the Commission considers that actual and potential imports do have an influence on the behaviour of the domestic industry, there is a range of evidence to suggest the constraint posed by imports is not as substantial as ABL has argued. In particular, information obtained by the Commission during the course of its market inquiries suggests that it is necessary to examine more closely several key factors including: differences between States; barriers to imports; the effect of vertical integration and supply arrangements in the industry; and the scope for BGC to bring imports into Western Australia.

#### *Differences between States*

5.34. As noted above there appears to be significant differences in the price of cement between the various States in Australia. In particular, the Commission has been told that prices in Western Australia are lower than in the eastern States, with prices in the Northern Territory higher again. As not all of these differences can be attributed to the differences in transport costs and economies of scale, it was concluded that these differences must in part derive from individual market circumstances. One of the market influences may be import competition.

5.35. Such a conclusion suggests that the threat of imports has not had a uniform influence on prices throughout the country. In particular, it appears to be the case that market circumstances in the eastern States and the Northern Territory are such that imports may not be as significant a threat in these areas as they are in Western Australia.

#### *Barriers to imports*

5.36. The overall impression that is obtained upon reading ABL's submission is that imports present an immediate and constant threat to the domestic industry and that it is a relatively simple process to bring imports into Australia.

5.37. Further, it is the case that players such as BGC and ICL have effectively imported or used the threat of imports in the past.

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<sup>72</sup> ABL Submission, 30 March 1999, para.8.14.

5.38. However, in the course of its market inquiries, material has been presented to the Commission suggesting that potential importers must overcome a number of obstacles before bringing product into Australia. These include:

- The available shipping for bulk cement cargoes is limited. (*Confidential material see endnote iv*)
- Obtaining access to port facilities is not a straight forward process. (*Confidential material see endnote v*)
- Warehouse and handling facilities must be established. The fixed costs associated with these facilities can be in the order of several million dollars. (*Confidential material see endnote vi*)
- It is necessary to obtain significant volumes in order to keep unit costs low. Therefore, it may not be viable for small independent concrete companies to import cement. (*Confidential material see endnote vii*)
- There is a degree of suspicion in the market in relation to the quality of imports. Consequently, users have a preference for domestically manufactured cement.
- Importers are not usually in a position to provide the degree of technical support and service afforded by the domestic cement producers.
- The potential for domestic cement manufacturers to undertake anti-dumping action is a significant threat to importers. (*Confidential material see endnote viii*)
- Some concrete tender documents specify that 'Australian manufactured cement' only may be used for the project. (*Confidential material see endnote ix*)
- It is the case that only relatively small quantities of cement have been imported into Australia in the past and to some extent these imports have been obtained by the major cement companies themselves in order to overcome occasional capacity shortages.<sup>73</sup>

#### ***Impact of vertical arrangements***

5.39. As noted above, it is the case that a large proportion of demand for cement in Australia is tied either through supply agreements or through the vertically integrated activities of companies such as Boral, Pioneer, CSR, BGC and the Barro Group. The consequence of these arrangements is that there is limited free demand available to support the activities of independent importers. Apart from the major cement companies there are limited prospects for importers to sell substantial volumes of cement.

5.40. This affects the potential impact that imports can have in two ways. First, it is difficult for importers to generate sufficient volumes to achieve economies of scale and to negotiate competitive supply arrangements with overseas manufacturers. Second,

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<sup>73</sup> Notes from ACCC meeting with Pioneer, 7 April 1999, para.13.

the market share that can be achieved by imports is limited to that which is not controlled through vertical arrangements in the industry.

***Potential for BGC to import***

5.41. In its submission, ABL has placed significant emphasis on BGC's ability to import in order to offset any detriment to competition in Western Australia. For example, ABL argues that 'Buckeridge has imported and will continue to import clinker into Western Australia'.<sup>74</sup>

5.42. The Commission has formed the view that the threat of imports from BGC is likely to be a significant constraint on the potential for the merged entity to exercise market power, particularly in view of the recent amendments to BGC's contract sought by the Commission.

***Conclusion on import competition***

5.43. Overall, the Commission is of the view that ABL's claim that imports, and potential imports, have a significant influence on the behaviour and pricing of the Australian cement industry must be discounted somewhat. Despite the threat posed by imports, the domestic industry appears to continue to possess a degree of pricing discretion. In particular:

- The threat of imports is not as effective currently in the eastern States and the Northern Territory as they are in Western Australia.
- The industry faces a number of barriers to importing. This is especially the case for small players with limited resources.
- Vertical arrangements in the industry limit the scope for imports, especially by independent importers.

5.44. In the case of the current acquisition under investigation, the Commission is of the view that imports are likely to have a moderate influence on the activities of ABL and ACH following the transaction. While the focus of ABL and ACH is likely to continue to be on domestic production, the threat of imports will influence the conduct of their activities.

5.45. The Commission believes there is some prospect that the proposed ABL acquisition of shares in ABCL is likely to increase the potential for ACH to import cement and/or clinker in the future. This is achieved because ACH will no longer have an equity holding in ABL and will no longer have a financial incentive to support ABL's domestic production.

5.46. In respect of the proposed supply agreements the Commission considers that absent these agreements ACH would be more likely to import cement and/or clinker in the future. This is the case because the agreements limit ACH's ability to import to those circumstances where certain conditions have not been met. (*Confidential material*)

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<sup>74</sup> ABL Submission, 30 March 1999, Appendix 11, para.1.2.

*see endnote x*). However, it should be noted that the proposed supply agreements are less restrictive on imports than the supply agreements they will replace.

5.47. In all the circumstances, the proposed ABL acquisition of shares in ABCL and the proposed supply agreements are likely to have the net effect of marginally increasing the likely influence of imports on the Australian cement industry.

**Barriers to entry: s.50(3)(b)**

5.48. Even if concentration is high and import competition is low, if the market is characterised by low barriers to entry, incumbent firms are likely to be constrained by the threat of potential competition, to behave in a manner consistent with competitive market outcomes. However, if there are substantial barriers to entry faced by new suppliers into the market, or significant barriers to the expansion of smaller players in the market, a significant increase in concentration in the absence of significant import competition is likely to give rise to a substantial lessening of competition.

5.49. Barriers to entry can be any feature of the market that places an efficient prospective entrant at a significant disadvantage compared with incumbent firms. Barriers to entry may consist of sunk costs; legal or regulatory barriers; access to scarce resources or cost advantages enjoyed by incumbent firms; economies of scale and scope; product differentiation and brand loyalty; and the threat of retaliatory action by incumbents.

5.50. The 'height' of barriers to entry indicates the extent to which incumbents can raise the market price above its competitive level without attracting entry. It is not necessary for a merger to raise barriers to entry for it to be anti-competitive; only that significant barriers to entry exist, providing incumbents with significant discretion over pricing and other conduct. However, if the merger also increases barriers to entry, the anti-competitive effects are likely to be more severe.

5.51. The Commission considers that effective entry is that which is likely to have a market impact within a reasonably short period, say two years; either by deterring or defeating the attempted exercise of market power by the merged firm. In some markets the threat of entry is sufficient to constrain firm conduct. In others, actual entry will be required. The latter would require entry on a sufficient scale and which offers a product sufficiently attractive to consumers in order to be effective.

5.52. In determining whether effective entry is likely to occur, it is instructive to look at the evidence of past success or failure of new entrants in establishing themselves as mainstream competitors in the relevant market.

***Recent entry***

5.53. The Commission is aware of a number of instances of new entry into the Australian cement industry in the recent past. The Commission notes that very recent entry has been in the form of imports, and it views this as the most likely form of future new entry.

5.54. In its submission, ABL cites the following examples of new entry in the cement industry:

- ICL entered in 1988 by importing bulk cement from Ubé Industries, Japan.<sup>75</sup>
- United Cement recently established as an importer of bagged and intermediary bulk container (IBC) cement into Queensland from China. IBCs are 'bulker bags' of 1.5 to 2 tonnes capacity. United decants cement from the IBCs into bulk silo storage and sells the product in bulk. This method avoids costly capital associated with handling large quantities of bulk cement. The use of bulker bags is a proven market entry method throughout Asia (involving low capital expenditure). It commenced supply to independent concrete producers in the Brisbane area, such as Hymix Concrete, Neilsen's Concrete, Nucon, Sunmix and Wagner.<sup>76</sup>

5.55. To this list can be added the following examples of new entry:

- QCL established its cement works at Gladstone in 1981.
- New grinding plants were built for Sunstate Cement at Fisherman Island in Brisbane in 1985 and by NC at Quarantine Island in Darwin in 1983.
- BGC opened its clinker grinder at Canning Vale in 1987.<sup>77</sup>

5.56. In addition to these examples, the Commission is aware of a number of groups that are investigating the feasibility of entering the industry including Jademount Investments in the Adelaide, Melbourne and Sydney markets, by establishing bulk cement terminals and using imported Indonesian cement<sup>78</sup> and others (*Confidential material see endnote xi*).

5.57. It is noteworthy that the examples of new entry cited above have occurred in the context of significant rationalisation of the industry. During the period covered above there have been a large number of plant closures with manufacturing of clinker increasingly being concentrated at four sites in Australia. It is also important to note that there has been no new entry in clinker manufacture since the Gladstone plant, 18 years ago..

### **Capital costs**

5.58. Capital costs for new entry vary greatly depending on the type of entry that is undertaken. At the upper end, the cost of a new clinker manufacturing plant is in the order of \$200 million.<sup>79</sup> More modestly, Swan Cement expended \$45 million to establish its clinker grinding facility at Kwinana in 1998.<sup>80</sup>

5.59. The capital cost of establishing import facilities has been variously estimated to the Commission at between a few hundred thousand dollars for bagged cement and \$15

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<sup>75</sup> ABL Submission, 30 March 1999, para.8.22.

<sup>76</sup> ABL Submission, 30 March 1999, para. 6.21.

<sup>77</sup> PSA *Inquiry Into the Portland Cements Declaration*, p.52.

<sup>78</sup> ABL Submission, 30 March 1999, Appendix 11, para.2.1.

<sup>79</sup> Notes from ACCC meeting with Pioneer, 7 April 1999, para.16.

<sup>80</sup> ABL Media Release, *Adelaide Brighton concludes Burswood sale*, 26 May 1998.

### ***Conclusion on barriers to entry***

5.65. Based on the material before it, the Commission largely agrees with the first half of the conclusion reached in ABL's submission as follows:

Given the overcapacity in the Australian cement market at present, there appears to be limited scope for substantial entry into cement manufacturing.

Nevertheless, it is highly likely that new entry will occur in the Australian market through import competition, rather than new manufacturing facilities ...<sup>84</sup>

5.66. In reaching this view, the Commission has taken into account the substantial capital costs involved in new entry, and the sunk nature of a large proportion of those costs. In association with the economies of scale and MES that characterise the industry, those sunk costs are likely to discourage entry to a significant extent owing to the likelihood that new entry would depress prices and returns on investment.

5.67. In respect of the second half of ABL's conclusion, it is not obvious to the Commission that new entry is 'highly likely'. In view of the reservations that were identified in the previous section concerning the feasibility of imports, there is some doubt as to whether the type of entry identified by ABL will be sufficient to constrain the behaviour of the vertically integrated cement manufacturers.

5.68. In addition, the vertical arrangements present in the industry are likely to make it difficult for a new entrant to attract significant volumes, denying the new entrant access to economies of scale resulting in higher unit costs.

### **Countervailing power: s.50(3)(d)**

5.69. Countervailing power exists where a supplier (buyer) faces a buyer (supplier) with market power or a credible threat of vertical integration or direct importing. In such cases the ability of the merged firm to increase (decrease) prices may be constrained and the likelihood of a substantial lessening of competition diminished.

5.70. In its submission, ABL contends that:

The countervailing power of large cement users (such as large concrete producers in the case of bulk cement, and hardware retail chains in the case of bagged cement) is a significant constraint on Australian cement producers.<sup>85</sup>

5.71. In support of its case ABL cites the following examples of companies that investigated importing cement, but later abandoned their plans when offered attractive supply contracts with local suppliers:

- Hymix, for its New South Wales and Queensland operations.
- James Hardie in joint venture with Rocla and Concrete.
- Western Mining Corporation, for its backfill operations at Olympic Dam.

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<sup>84</sup> ABL Submission, 30 March 1999, para.8.25 and 8.26.

<sup>85</sup> ABL Submission, 30 March 1999, para.8.27.

- Bianco Builders Hardware in South Australia for bagged cement.
- Melcann, for bagged cement.<sup>86</sup>

5.72. In general terms, the information obtained by the Commission in its market inquiries has broadly supported ABL's claims in respect of the countervailing power of the largest cement consumers: Boral, CSR and Pioneer. Boral stated that when its contract with Swan expired it explored a number of options for sourcing cement, including obtaining product from Swan or Cockburn Cement, or importing from Japan as clinker and installing a grinding facility. The Commission was told that the numbers on each of these options were close but in the end Boral decided to negotiate an agreement with Cockburn Cement.<sup>87</sup>

5.73. See confidential submission (*Confidential material see endnote xiii*).

5.74. While it may be the case that medium sized consumers of cement, such as those listed above, have been able to use the threat of imports to negotiate more attractive supply agreements, the Commission has not received sufficient information to permit it to assess whether the final negotiated prices are comparable with import parity pricing.

5.75. However, the Commission is of the view that small consumers of cement are unlikely to possess a significant degree of countervailing power. This is the case, because as discussed in the previous section, small players face significant barriers to importing that would diminish any threat such an option would pose in price negotiations. In particular, small independent cement customers in Western Australia are unlikely to possess sufficient countervailing power to overcome an exercise of market power because of the small cement volumes they control.

5.76. Therefore, in the context of the proposed transactions, the Commission is of the view that the three largest consumers of cement in the market possess a significant degree of countervailing power. The countervailing power possessed by BGC will be unaffected as a result of the ABL acquisition of ABCL. However, there is little evidence to suggest that small and medium cement users could exercise sufficient countervailing power to defeat an exercise of market power.

**Impact on prices and profit margins: s.50(3)(e)**

5.77. As the ABL acquisition of shares in ABCL will lead to a small decrease in concentration in the market, the Commission considers that the acquisition itself is unlikely to result in an increase in prices in the industry.

**Availability of substitutes: s.50(3)(f)**

5.78. The elasticity of supply, either in terms of alternative products that may be used or the capacity of existing suppliers to quickly expand output, will have a material impact on the extent to which prices may be raised post-merger.

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<sup>86</sup> ABL Submission, 30 March 1999, para.8.28 and 8.29.

<sup>87</sup> Note of ACCC meeting with Boral, 7 April 1999, para.9-10.

5.79. In conjunction with the proposed acquisition, ABL is proposing to undertake rationalisation that will reduce the level of overcapacity in the industry. In particular,

the restructuring will remove ACH as a shareholder in ABCL. ABL will become the largest independent cement producer in Australia. This will enable ABL to undertake rationalisation initiatives, including the closure of the Geelong plant to obtain greater utilisation of the Birkenhead plant.<sup>88</sup>

5.80. As noted above, this restructuring will bring capacity more in line with current demand. Especially in Victoria, excess supply capacity will be at a minimum, limiting the capacity for alternative suppliers to supply product should customers wish to change suppliers.

5.81. As a consequence, the Commission has some concerns that the removal of excess capacity from the industry could result in a reduced level of competition should demand for cement exceed current expectations.

**Dynamic characteristics: s.50(3)(g)**

5.82. According to ABL, cement manufacture is best described as a mature industry.<sup>89</sup> Yet it has been the case that the industry has been undergoing significant restructuring in recent years. In particular, this restructuring has involved a shift from older wet process technologies to more efficient dry process technologies and the concentration of production capacity at four primary sites around Australia.

5.83. Overall, the Commission considers the dynamic characteristics of the market to be neutral in respect of its competition analysis. However, if the expected decline in industry demand eventuates, it might be the case that pricing pressures in the market could increase.

**Removal of a vigorous and effective competitor: s.50(3)(h)**

5.84. Rather than removing a vigorous and effective competitor, ABL has argued that the share acquisition will maintain ABL as a strong and efficient independent cement producer which will benefit all cement and concrete users, as well as the shareholders and employees of ABL.<sup>90</sup>

5.85. The Commission accepts that it is unlikely that the share acquisition will remove a vigorous and effective competitor and that there is some merit to the claim that ABL will be a more effective competitor owing to the increased efficiency it will achieve as a result of the transaction.

5.86. ABL has claimed that the proposed supply agreements will further strengthen ABL as a competitor by guaranteeing it a minimum volume of cement production. The Commission accepts that the proposed supply agreements will have some pro-competitive effects on the proposed agreements.

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<sup>88</sup> ABL Submission, 30 March 1999, Executive Summary, para.12.

<sup>89</sup> ABL Submission, 30 March 1999, para.8.24.

<sup>90</sup> ABL Submission, 30 March 1999, para.5.2.



## **Conclusion on competitive effects**

5.87. As the ABL acquisition of shares in ABCL will lead to a small decrease in concentration in the market, the Commission considers that the acquisition in itself is unlikely to result in a competitive detriment. Rather, the acquisition is most likely to result in an increase in the level of competition.

5.88. In assessing whether the net effect of the supply agreements on competition is likely to be positive or negative, the Commission is of the view that considerable weight should be attached to the evidence concerning the fact that cement prices are lower in Western Australia. Nevertheless, the Commission acknowledges the claimed pro-competitive effects of the proposed agreements.

5.89. Since the proposed ABL acquisition of shares in ABCL will reduce ACH's financial incentive to purchase product domestically from ABL, and because the proposed supply agreements introduce an import threat, it is likely that the potential influence of imports on the Australian cement industry will increase.

5.90. In respect to barriers to entry, the Commission is of the view that there appears to be limited scope for substantial entry into cement manufacturing. Although, entry to the market by importing product is more likely.

5.91. The Commission is of the view that the three largest consumers of cement in the market possess a significant degree of countervailing power. The countervailing power possessed by BGC will be unaffected as a result of the ABL acquisition of ABCL. However, there is little evidence to suggest that small and medium sized cement users could exercise sufficient countervailing power to defeat an exercise of market power.

5.92. As the ABL acquisition of shares in ABCL will lead to a small decrease in concentration in the market, the Commission considers that the acquisition itself is unlikely to result in an increase in prices in the industry.

5.93. The Commission considers the dynamic characteristics of the market to be neutral in respect of its competition analysis. However, if the expected decline in industry demand eventuates, it might be the case that pricing pressures in the market could increase.

## 6. Commission's assessment of public benefits

6.1. ABL has argued that the proposed acquisition will generate a number of public benefits. The Act does not define the meaning of 'public benefit'. However, the Commission is required to take account of all relevant matters relating to international competition and to consider significant increases in exports or import replacement as public benefits (s.90(9A)). The explanatory Memorandum to the 1992 amendments to the Act states:

Changes in international competitiveness may be attributed to a wide range of matters which it is impossible to list exhaustively, but could include matters such as changes in the quality of inputs, improvements in technology, or better work practices. The range is qualified by the requirement that the matters looked at be 'relevant', which indicates that they should be attributable to the merger in question.

6.2. The Tribunal provided some guidance on the meaning of 'public benefit' by suggesting that the term should be given its widest possible meaning to include:

... anything of value to the community generally, any contribution to the aims pursued by the society including as one of its principal elements (in the context of trade practices legislation) the achievement of the economic goals of efficiency and progress.<sup>91</sup>

6.3. The Tribunal also pointed out that the concept of public benefit is not limited to a benefit to consumers. A private benefit can also be considered of value to the wider community.<sup>92</sup> However, the interests of the public are of primary importance in considering the public benefit.

6.4. The Tribunal also provided guidance as to the assessment of the likely public benefits:

The benefit must be 'substantial'. It must be 'considerable', 'large' or 'weighty'. It need not, it is plain, be necessarily capable of quantitative assessment; but it should be sufficiently definable - have sufficient substance - as to permit some factual judgement of its relative importance.<sup>93</sup>

6.5. In the same case, the Tribunal concluded that it is appropriate to start the assessment of public benefit with an examination of the competitive implications of the merger.<sup>94</sup> This was undertaken previously. The enhancement of competition is a substantial public benefit.

6.6. Efficiency is a public benefit and has been recognised as such in numerous matters considered by the Commission and the Tribunal. Indeed, the Tribunal has stated that:

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<sup>91</sup> *Re QCMA*, op cit, p.17,242.

<sup>92</sup> *Re QCMA*, op cit, p.17,242.

<sup>93</sup> *Re QCMA*, op cit, p.17,243.

<sup>94</sup> *Re QCMA*, op cit, pp.17,244-17,245.

..the encouragement of competition and competitive behaviour and the achievement of the economic goals of efficiency and progress will commonly be paramount.<sup>95</sup>

6.7. Rationalisation of an industry which results in lower or contained costs of production, and improves resource allocation is also a public benefit. However, if rationalisation costs are not passed through to the wider community, they will be given less weight than if such savings, or a proportion of the savings were passed through in lower supply costs.<sup>96</sup> It is relevant, therefore, for the Commission to assess whether such savings, either in whole or part, will be passed through. Further, if the benefits will not be passed on, it is worthwhile also to consider whether such savings are likely to be dissipated through managerial slackness, or by firms seeking to maintain their market share.

6.8. The phrase 'not otherwise available' previously formed part of the public benefit test. This is no longer an absolute requirement. Nevertheless, there must be a nexus between the claimed public benefit and the proposed merger. Further, the Commission considers that it is still relevant to consider whether the benefit may be available otherwise than by the proposed merger when comparing the situation which is likely to prevail with and without the merger. If a benefit may otherwise be available, it is likely to be given less weight in the Commission's analysis.

### **ABL's submission on public benefits**

6.9. ABL, in its application, claim that public benefits will result from the acquisition in the form of competition benefits arising from establishing ABL as a financially strong, independent cement producer.

6.10. The Commission must also examine statutory benefits in its assessment of public benefits. These benefits relate to the merged entity's ability to compete in international markets.

### **Statutory benefits**

#### **A significant increase in the real value of exports**

6.11. The Commission notes that currently, export opportunities are limited for Australian cement manufacturers.

6.12. The PSA report stated:

Exports are not a major feature of the Australian cement industry. Australian product has been exported to the Middle East and the west coast of the United States. However, this trade ceased following a world surplus of cement and the application of anti-dumping action in the US. The majority of exports now are to nearby Pacific Islands.<sup>97</sup>

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<sup>95</sup> *Rural Traders Co-operative (Western Australia) Ltd & Ors.*, (1979), ATPR, 40-110, p.18,123.

<sup>96</sup> *Howard Smith Industries and Adelaide Steamship Industries*, (1977), ATPR, 40-023, p.17,334.

<sup>97</sup> *PSA Inquiry Into the Portland Cements Declaration*, p.45.

6.13. There has been a recent downward trend in exports. ABL stated that the Asian financial crisis will limit the ability of ABCL to export cement.<sup>98</sup> Previously ABL's Birkenhead plant had supplied export markets including Hawaii, Malaysia, Singapore and Indonesia,<sup>99</sup> however export markets have become increasingly difficult to capture.

6.14. ABL submitted:

Export sales have been difficult to achieve and those sales that have been made have been at low prices, typically at less than full production cost.<sup>100</sup>

6.15. In 1998, ABL stated:

Adelaide Brighton had planned to export 11% of its production capacity in the financial year to 30 June 1998. Given the situation in Asia, this proposition is likely to be closer to 6% and at much reduced prices.<sup>101</sup>

6.16. The ANZ report acknowledged ABL's decline in export sales:

[ABL's] [e]xport volumes have fallen from an annual rate of 220,000 tonnes in FY97 to close to zero over the last six months.<sup>102</sup>

6.17. ABL has not made any claims regarding its improved ability to export product overseas following the transactions. Rather, ABL believes that the transaction will be beneficial by not making the company reliant on export sales to increase throughput in order to utilise capacity.

6.18. In particular, ABL submitted:

The increase of cement production at Birkenhead will mean that ABL is less dependent on export markets. Export prices have fallen significantly in the last 2 years due to surplus capacity in South East Asia. As a consequence, export markets have become difficult to find and those that have been identified have become significantly less profitable.<sup>103</sup>

6.19. The Commission does not consider that the acquisition of ACH's share in ABCL will result in a significant increase in the real value of exports.

#### **A significant substitution of domestic products for imported goods**

6.20. Sub-section 90(9A)(a)(ii) of the Act requires the Commission, in determining what amounts to a benefit to the public to regard, 'a significant substitution of domestic products for imported goods' as benefits to the public.

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<sup>98</sup> ABL Submission, 30 March 1999, para.12.26.

<sup>99</sup> Aquatech *The Cement Industry in 1998*, July 1998, p.8.

<sup>100</sup> ABL Submission, 30 March 1999, para.3.9.

<sup>101</sup> ABL press release, 26 May 1998, p.2.

<sup>102</sup> ANZ Report, September 1998, p.4.

<sup>103</sup> ABL Submission, 30 March 1999, para.5.8.

6.21. As explored above there is some prospect that imports may have an increasing impact on the Australian cement industry, although currently actual import levels are low.

6.22. The ANZ report states:

As [Asian] demand has fallen significantly, new markets are likely to be sought by Asian manufacturers; or Australian customers may use the [Asian] over capacity as a bargaining chip.<sup>104</sup>

6.23. The Commission is aware that a number of cement producers and users have imported product from Asia. Most notably in the Western Australian market, BGC has imported clinker from Japan at lower prices than that offered by Western Australian clinker manufacturers. BGC currently sources product from CCL, but is prepared to import product in the future in order to remain competitive. (*Confidential material see endnote xiv*)

6.24. The Barro Group previously imported cement into its Port Melbourne terminal. It stated:

ICL, which was formed in 1987, initially imported cement powder in bulk from Japan. After ICL had been importing from Japan for a few years, ABL joined the ICL joint venture. A year or two later ICL stopped importing from Japan and negotiated a supply contract with ABCL. ICL currently receives all of its Victorian cement requirements through ABCL.<sup>105</sup>

6.25. The Commission is aware that Australian manufacturers are increasingly attempting to match import parity prices and thereby discouraging cement users importing the product.

6.26. As stated in the ANZ report:

...the mere threat (of imports) can have an impact, as evidenced by Atlas Cement [ie: BGC] in Perth who forced cement prices in Western Australia to fall to import parity of \$95 to \$105 per tonne compared with \$125 to \$145 per tonne on the east coast of Australia.<sup>106</sup>

6.27. ABL stated:

...import pricing also has a direct effect on domestic pricing through 'meeting competition' clauses in cement supply contracts. This has led to domestic prices tending towards import parity pricing. This has been particularly evident in Western Australia.<sup>107</sup>

6.28. Currently, it is the case that imports constitute a small proportion of cement used in Australia. It therefore cannot be argued that the ABL acquisition of ABCL will lead to the replacement of a substantial volume of current imports. However, ABL has argued that the volume of imports coming into Australia is likely to increase in the

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<sup>104</sup> ANZ Investment Bank Equities Research *The Australian and New Zealand cement industry*, September 1998, p. 1.

<sup>105</sup> Notes from meeting with the Barro Group, 12 April 1999, p.1.

<sup>106</sup> ANZ Investment Bank Equities Research *The Australian and New Zealand cement industry*, September 1998, p. 1.

<sup>107</sup> ABL Submission, 30 March 1999, para.8.23.

future, and hence, by improving its efficiency and competitiveness through the acquisition ABL will be in a better position to compete with these imports.

6.29. On the basis of the material above, the Commission considers that the volume of imports into Australia may increase in the future. However, owing to a range of industry circumstances, any increase in import volumes is likely to be minimal. Nevertheless, the Commission accepts that following the ABL acquisition of ABCL, ABL will be a financially stronger and more efficient producer of cement which is likely to place it in an improved competitive position. Consequently, if the import threat becomes a reality ABL will be in a position to compete more effectively with the imported product.

#### **International competitiveness**

6.30. The Commission understands that ABL has some international business interests, however its most significant is ABCL in Australia. The Commission believes that the acquisition of the remaining shares in ABCL will not result in any major improvement in ABL's international competitiveness.

#### **Other benefits**

6.31. ABL claims that rationalisation benefits flowing from the acquisition of ACH's shares in ABCL, and the related acquisition of CCL by ABL, will lead to cost reductions of about \$22.6 million per annum. These savings will be as a result of the closure of the Geelong plant, and elimination of production and management overlap in Western Australia. ABL claims that this rationalisation is necessary for ABL to be competitive.

6.32. The ANZ report stated:

In the centre of the Australian cement industry is Adelaide Brighton, with a clear inability to optimally utilise its plants. The share price is now the lowest in ten years, and with the threat of cheap Asian cement, rationalisation of the industry is now possibly a reality rather than just good in theory.<sup>108</sup>

#### **Rationalisation in Victoria**

6.33. Following ABL's acquisition of the remaining shares in ABCL, ABL intend to close the Geelong cement plant. ABL claims that the Geelong plant, which uses the energy intensive wet process technology, is inefficient. The high operating costs makes it difficult for this plant to produce cement at a cost which is competitive in international markets. In addition, ABL's Birkenhead plant currently operates at below capacity and therefore incurs higher unit production costs than a plant operating at full capacity.<sup>109</sup>

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<sup>108</sup> ANZ Investment Bank Equities Research *The Australian and New Zealand cement industry*, September 1998, p.1.

<sup>109</sup> ABL Submission, 30 March 1999, para.5.5.

6.34. Upon the closure of the Geelong plant, ABL intend to supply the Victorian market through its Birkenhead plant. The increased volume produced at Birkenhead will allow that plant to operate at full capacity, thereby improving its efficiency. In addition, the closure of the Geelong plant will eliminate the fixed costs associated with its operation.<sup>110</sup> ABL also claims that by replacing the Geelong plant's production with the efficient dry process of the Birkenhead plant, energy cost savings and environmental benefits will result.<sup>111</sup> ABL expects that the Geelong plant closure will lead to a net reduction in ABL's costs of at least \$11.2 million per annum.

6.35. The ANZ report states:

The threat of Asian imports in the short term is likely to be a catalyst to drive the industry towards rationalisation, therefore leading to the closure of inefficient plants and better utilisation of bigger more efficient plants.... There are clear cost benefits in closing older plants such as Adelaide Brighton Cement's Geelong plant ... and utilising more efficient plants.<sup>112</sup>

6.36. ABL stated in 1998:

There are ten fully integrated clinker/cement plants in Australia, supplying a market of around 7.5 million tonnes per year. Adelaide Brighton through its affiliates controls three of them; Birkenhead, Angaston, and Geelong. There is over capacity in the market, which is aggravated by major surpluses in Asia. Five old plants have been closed in Australia over the last few years, and it is inevitable that further old capacity will have to be retired in the next few years.<sup>113</sup>

6.37. ABL claims that the acquisition, and resulting restructuring of the industry is necessary to strengthen ABL's ability to compete against the vertically integrated producers.<sup>114</sup>

6.38. The Geelong plant currently produces about 489,000 tonnes of cement per annum. This production is used to meet demand within Victoria. Other producers which supply a significant proportion of Victoria's total cement demand of 1.5 million tonnes, include ACH's Railton plant (435,000 tonnes) and BCSC's Waurm Ponds plant (494,000 tonnes). Removing the Geelong plant's capacity from the market will result in higher imports of cement from interstate and possibly overseas, with only one third of cement demand produced in Victoria.

6.39. ABL stated:

once the Geelong plant is closed, the Birkenhead plant will primarily produce cement and clinker for customers in: South Australia; Victoria; through Independent Cement and Lime; Queensland through Sunstate Cement; and Western Australia (top up amounts only). Based on current sales

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<sup>110</sup> ABL Submission, 30 March 1999, para.5.5-5.6.

<sup>111</sup> ABL Submission, 30 March 1999, para.5.17.

<sup>112</sup> ANZ Investment Bank Equities Research *The Australian and New Zealand cement industry*, September 1998, p.9.

<sup>113</sup> Address by Richard Hammond, ABL, 1 April 1998, p.1.

<sup>114</sup> ABL Submission, 30 March 1999, para.12.6.

levels, the Birkenhead plant would be fully utilised meeting these requirements. This will allow maximum efficiency and reduction of fixed costs per unit of production.<sup>115</sup>

6.40. Due to the fact that the Birkenhead plant will be operating at full capacity once the Geelong plant is closed, the Commission has considered whether the removal of the plant's capacity from the Victorian market may affect future supply if demand were to exceed expected levels.

6.41. ABL has advised the Commission that it is progressing the upgrade of the Port Melbourne facilities to ensure there will be sufficient capacity to facilitate the shipment of cement from Birkenhead to Victoria. ABL do not expect that its market share in Victoria will decline as a result of the plant closure. ABL has assured the Commission that it has sufficient capacity at Birkenhead to supply the Victorian market.

6.42. Shadow Assistant Treasurer, Kelvin Thomson submitted:

The impact of the proposal in Victoria is that because of Victoria's substantially reduced production capacity it will be much more difficult in future to keep cement prices down. Victoria will be captive and dependent on interstate producers who will have local consumer's captive on issues such as price, delivery times and frequency of supply.<sup>116</sup>

6.43. The Commission accepts that it is feasible for cement to be transported from interstate by rail or truck, or possibly imported from overseas to the Port Melbourne terminal in the case of excessive demand in Victoria.

6.44. It would appear that BCSC's Berrima plant, which currently has some excess capacity,<sup>117</sup> could be used to supply increased amounts of cement if demand were to exceed expectations.

6.45. Accordingly, the Commission does not expect that Victoria's supply of cement and clinker would be restricted in the future, as a result of the closure of the Geelong plant. Therefore the Commission does not believe that the closure of the plant will have a negative impact on competition. The Commission also accepts that ABL will enjoy efficiency gains from closure of the Geelong plant and increased capacity utilisation of the Birkenhead plant. However, as it is the case that the Geelong plant will most likely close whether or not the ABL acquisition of ABCL proceeds, these rationalisation benefits must be discounted somewhat.

6.46. The Commission has also considered why it is that the Geelong plant should close, when the CCL plant which uses the same technology as the Geelong plant will remain operating.

6.47. Shadow Assistant Treasurer, Kelvin Thomson stated:

I would say that there is a basic inconsistency in the applicant's case before the ACCC. On the one hand, the applicant ABL is arguing that the Geelong plant must close because it is outmoded technology, that is, it is a 'wet' kiln not a 'dry' kiln. On the other hand, the applicant ABL is

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<sup>115</sup> ABL Submission, 30 March 1999, para 5.6.

<sup>116</sup> Shadow Assistant Treasurer, letter to ACCC, 19 April 1999, p.5

<sup>117</sup> ABL Submission, 30 March 1999, Table 7.



arguing that it will retain the Cockburn plant that it has just purchased notwithstanding the fact that it is a 'wet' kiln and no new investment has occurred on the plant since the 1970's...If ABL intend to keep the Cockburn plant then a case can be made for retaining the Geelong plant, namely that it is a 'wet' plant that has and will continue to have an integral role to play in the Victorian cement market.<sup>118</sup>

6.48. The Commission accepts that the 'wet' process technology needs to be replaced in most instances to ensure the long term competitiveness of the Australian cement industry. CCL's Western Australian 'wet' plant has a significant advantage over the Geelong plant by virtue of its lower input costs. Shell sand used in CCL's kiln is priced competitively as it is dredged from Cockburn Sound and piped directly into the clinker plant.

### **Employment**

6.49. The Commission places serious weight on employment issues in its consideration of applications for Authorisation as was evidenced in *ACI Operations Pty Ltd* (1991) ATPR (Com) 50-108. In the ACI Authorisation the Commission considered the potentially serious consequences of its decision on employment, where denial of the authorisation would almost certainly mean the loss of jobs. In the *ACI Case*, the Commission decided to 'examine broader employment consequences flowing from the authorisation.'<sup>119</sup>

6.50. In its analysis of the *ACI* matter, the Commission weighed the consequences on employment under the scenario that the Authorisation proceeded, against the consequences for employment if the Authorisation was denied. The Commission concluded that on balance, allowing 'the Authorisation would be likely to lead to a slightly smaller loss of jobs', and therefore found this to be a public benefit.<sup>120</sup>

6.51. In regard to the ABL matter, the Commission must weigh the job losses caused by the closure of the Geelong plant, against job creation expected from the immediate and potential expansion of ABL's assets. In addition, the Commission must consider what may happen to employment if the Authorisation is denied.

6.52. It is expected that about 135 jobs will be lost as a result of the Geelong plant closure. The Commission is aware of the considerable concerns expressed by the Australian Workers Union (AWU), and the City of Greater Geelong about these job losses.

6.53. The AWU stated that 111 ABL employees and about 30 contractors will lose their employment as a result of the closure of the Geelong plant. The AWU consider this to be a public detriment, in a community which already has difficulties with unemployment.

6.54. The AWU submitted:

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<sup>118</sup> Shadow Assistant Treasurer, letter to ACCC, 19 April 1999, p.5

<sup>119</sup> *ACI Operations Pty Ltd* (1991) ATPR (Com) 50-108.

<sup>120</sup> *ACI Operations Pty Ltd* (1991) ATPR (Com) 50-108.

Geelong unemployment rates are gloomy....Youth unemployment is around 46.5% in the area.

6.55. Similar concerns were expressed by the City of Greater Geelong who submitted:

The City of Greater Geelong is home to a population of over 175,000 with a workforce of more than 81,000 people. The region currently has an unemployment rate of 8.3%, which has declined from 10.8% in August 1998, but it still remains almost 1% higher than the Victorian average. the region's unemployment level has consistently exceeded the Victorian average over the past five years.<sup>121</sup>

6.56. The AWU examined the likely financial and economic consequences of the plant's closure, on the Geelong, Victorian, and Australian community. In particular the AWU stated:

...we estimate the public detriment of closure in foregone revenue is at least \$4.517 million (in taxes to local, State and Federal governments) and increased welfare transfer payments of \$5.4 million per year.<sup>122</sup>

6.57. The Commission understands that these expected job losses will be offset, to some extent, by expansion in other areas.

6.58. For example, following the acquisitions, the Port Melbourne cement terminal will be expanded to receive greater quantities of cement. This expansion will take about twelve months to complete and is expected to involve the employment of a number of construction staff. Additional staff would be expected to operate the completed terminal.

6.59. The terminal expansion will require a significant financial injection which will flow on to the Victorian economy.

6.60. The Barro Group stated that:

Further expansion of [the Port Melbourne] terminal would involve additional capital expenditures of approximately \$15 million.<sup>123</sup>

6.61. The Commission considers that increased cement production at the Birkenhead plant may also lead to further employment opportunities, including staff necessary to manage and undertake the transport of product to Victoria.

6.62. ABL has also expressed an interest in penetrating new cement markets, including NSW. ABL's potential entry into new markets may create some employment opportunities in these areas.

6.63. ABL stated:

ABL is well advanced in initiatives to expand its presence in the New South Wales market sector.<sup>124</sup>

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<sup>121</sup> City of Greater Geelong Office of the Mayor Submission, 20 April 1999, p.1.

<sup>122</sup> AWU Submission, 20 April 1999, p.7.

<sup>123</sup> The Barro Group Submission, 14 April, 1999, p.5.

<sup>124</sup> ABL Submission, 30 March 1999, para.5.23.

6.64. However, even after taking into account employment growth in other areas, the Commission considers that the closure of the Geelong plant will result in net reduction in employment in the short to medium term. The Commission also understands that the plant closure may result in a short term loss in government revenue, especially for the City of Geelong.

6.65. In accepting that there is likely to be some detrimental effect on employment following the acquisition, the Commission must also examine what would happen to employment if the authorisation was denied.

6.66. ABL submitted:

The Geelong plant is an inefficient wet process plant which is no longer competitive.<sup>125</sup>

6.67. ABL claims that due to their vulnerable financial position they have not been able to absorb the costs involved in closing the Geelong plant, although it has been a proposition for the company for some time. ABL submitted:

...the closure of the Geelong plant has been inevitable for many years; the only unknown has been the timing of the closure, and the ability of ABL and ABCL to absorb the costs of the closure, and ensure continued supply to Victoria.<sup>126</sup>

6.68. It is recognised by industry observers that the cement industry must become efficient to compete in international and domestic markets.

6.69. The ANZ report stated that:

The threat of Asian imports in the short term is likely to be a catalyst to drive the industry towards rationalisation, therefore leading to the closure of inefficient plants and better utilisation of bigger more efficient plants.<sup>127</sup>

6.70. The Aquatech Report indicates that wet process technology needs to be replaced by dry process if the cement industry is to remain internationally competitive:

The industry realised that production technology based on old wet process kilns and small dry process kilns would continue to leave them vulnerable to imports. As they invested in more efficient technology and retired old kilns, they also focused on the need to be more competitive in terms of price.<sup>128</sup>

6.71. ABL have advised the Commission that the closure of the plant is necessary to ensure the financial stability of ABL. In particular ABL stated:

the closure of the Geelong and the transactions generally will better ensure the financial stability and viability of ABL into the future, protecting the employment prospects throughout the Group.<sup>129</sup>

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<sup>125</sup> ABL, Letter to Commission, 22 April 1999, p.4.

<sup>126</sup> ABL, Letter to Commission, 22 April 1999, p.4.

<sup>127</sup> ANZ Investment Bank Equities Research *The Australian and New Zealand cement industry*, September 1998, p.1.

<sup>128</sup> Aquatech *The Cement Industry in 1998*, p.viii.

<sup>129</sup> ABL, Letter to Commission, 22 April 1999, p.4.

6.72. ABL have stated that it intends to close the Geelong plant whether the buy out of ACH's share in ABCL, and the ABL acquisition of CCL proceeds or not.

6.73. ABL submitted:

Even if the transactions could not proceed for any reason, it would not be possible for ABL to keep the Geelong plant open given its competitive position. ABL would be forced to find an alternative means of funding the costs of closure of the plant to ensure that it remains competitive.<sup>130</sup>

6.74. Therefore, the Commission considers that in the absence of this set of transactions, rationalisation or closure of the Geelong plant appears to be inevitable in the short to medium term to ensure the long term competitiveness of ABL. If the authorisation did not proceed, it is questionable whether current employment and future employment within the company would not suffer. Accordingly, the Commission is of the view that while the job losses in Victoria are regrettable, the closure of the Geelong plant appears to be unavoidable.

#### **Competition benefits**

6.75. ABL claim that the acquisition will lead to enhanced competition in the Australian cement industry and have a neutral impact in the Australian lime market<sup>131</sup>. ABL claims that this benefit is the result of the independence of ABL and its strengthened financial position following Rugby's acquisition of a controlling interest in ABL.

6.76. The acquisitions will remove ACH as a shareholder of ABCL, making ABL the largest independent cement producer in Australia. ABL stated:

Until now, ABCL's strategic direction has been influenced, to some extent, by the location of ACH's other cement plants.<sup>132</sup>

6.77. ACH stated:

...the transaction would increase the level of competition. ACH has been restrained from expanding its operations in Victoria due to the arrangement with ABL. Now ACH can fully compete in Victoria. ABL has also said that they will compete in NSW. Consequently it is likely that competition will increase in both of these states.<sup>133</sup>

6.78. Pioneer support the view that the acquisitions would result in an increase in competition. In particular:

Adelaide Brighton would get complete control of its own facilities and would no longer be constrained by the influence of ACH as a major shareholder.

6.79. The ANZ report stated:

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<sup>130</sup> ABL, Letter to Commission, 22 April 1999, p 4.

<sup>131</sup> ABL Submission, 30 March 1999, para.5.18.

<sup>132</sup> ABL Submission, 30 March 1999, para.5.22.

<sup>133</sup> Note from ACCC meeting with ACH, 12 April 1999, p.2.

Adelaide Brighton Limited is between a rock and a hard place. It has 51 % shareholding in Adelaide Brighton Cement which has one of the biggest and efficient plants (Birkenhead) in Australia, however, it does not have access to Australia's biggest market NSW which would allow it to optimally operate the Birkenhead plant...As long as Adelaide Brighton remains only a 51 % shareholder in Adelaide Brighton Cement and is unable to ship product to NSW, and exports remain low, returns are likely to remain below par.<sup>134</sup>

6.80. ABL claims that the restructuring will allow ABL to expand its presence in NSW. In particular, ABL submitted:

These initiatives will have a substantial competitive effect in the New South Wales region of the cement market which, to date, has been dominated by Boral and ACH. In turn, these initiatives are likely to cause competitive retaliation in other regions, particularly South Australia.<sup>135</sup>

6.81. ABL claims that cement markets have already seen an increase in competition between ABL and ACH. (*Confidential material see endnote xv*)

6.82. The Commission acknowledges that the proposed restructuring, by removing ACH as a 49 per cent shareholder of ABCL, is a significant public benefit to the Australian cement industry. It will have a pro-competitive effect by creating an independent cement manufacturer in an industry which is largely vertically integrated. However, the Commission is also aware that this benefit will be offset to some extent, in the medium term, in Western Australia, South Australia, and the Northern Territory, by supply arrangements to be in place between ABL and ACH. However, the Commission accepts that the removal of ACH from the ABCL share register and Rugby's investment in ABL are likely to result in an increase in competition in the industry.

### **Strengthening of ABL**

6.83. ABL claims that the acquisition will strengthen ABL's cement business, improving its ability to compete with other Australian cement producers.

6.84. ABL claims that the closure of the Geelong plant, increased capacity utilisation at Birkenhead, and the proposed supply contracts with ACH will provide financial strength to ABL. In particular the supply contracts will substantially underpin ABL's sales volumes.<sup>136</sup>

6.85. ACH stated:

ABL had sought the supply contracts as they had felt that they needed the guaranteed cash flows that the supply contracts provided.<sup>137</sup>

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<sup>134</sup> ANZ Investment Bank Equities Research *The Australian and New Zealand cement industry*, September 1998, p.4.

<sup>135</sup> ABL Submission, 30 March 1999, para.5.23.

<sup>136</sup> ABL Submission, 30 March 1999, para.5.18, 5.24-5.26.

<sup>137</sup> Note from ACCC meeting with ACH, 12 April 1999, p.1.

6.86. ABL claims that the restructuring will allow ABL to become a 'fourth force' in the Australian cement industry, independent from the vertically integrated cement users; CSR, Pioneer and Boral.

6.87. BGC submitted:

As to the "fourth force" argument put forward by ABL, the fact that the merged entity was not a vertically integrated entity like the other players could be positive for the market.<sup>138</sup>

6.88. The Commission accepts that ABL is likely to be in a stronger financial position as a result of Rugby's involvement in the company, and the supply agreements. Further, the Commission expects that an increase in financial strength could lead to greater competition in Australian cement markets.

### **Passing on rationalisation benefits**

6.89. As mentioned above, the Commission places more weight on rationalisation benefits where these benefits are passed on to consumers in the form of lower prices.

6.90. According to the Aquatech Report, the cement industry has a history of passing on rationalisation benefits. The Report states:

Largely as a result of improved productivity, the average cost of cement production decreased by 9 per cent in real terms between 1989 and 1996. It appears that much of the cost savings achieved were passed on to consumers as lower real prices. The average real unit value of cement sold decreased by 9 per cent between 1992 and 1996. Given the importance of cement to building and construction activity, the Australian economy has benefited significantly from efforts to improve the efficiency of cement production.<sup>139</sup>

6.91. This was supported by Boral which stated:

Prices have fallen in recent years, in part it is because the industry had improved its efficiency and the gains had been passed back to customers in the form of lower prices.<sup>140</sup>

6.92. In addition, Pioneer stated:

Based on past evidence, the improved financial position of Adelaide Brighton will benefit customers since efficiencies in the cement industry had a history of being passed on to final customers.<sup>141</sup>

6.93. ACH stated:

the [efficiency] savings probably could and should be passed on. But prices are dropping as it is.<sup>142</sup>

6.94. The Commission has, however, received submissions, in which market participants expressed doubts over whether ABL would pass on the benefits of

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<sup>138</sup> Note from ACCC meeting with BGC, 8 April 1999, para 17.

<sup>139</sup> Aquatech *The Cement Industry in 1998*, p.vii.

<sup>140</sup> Note from ACCC meeting with Boral, 7 April 1999, para.7.

<sup>141</sup> Note from ACCC meeting with Pioneer, 7 April 1999, para.22.

<sup>142</sup> Note from ACCC meeting with ACH, 12 April 1999, para.20.

rationalisation voluntarily, however any increase in price competition may force them to do so.

6.95. Maxi-mix stated it:

was sceptical that any cost reductions would be passed on to consumers but stated that this would really depend on BGC's pricing behaviour.<sup>143</sup>

6.96. ABL estimate the cost of implementing the rationalisation initiatives to be significant (*Confidential material see endnote xvi*). However, history illustrates that these benefits can, and are often passed on to consumers, particularly at times of increased competition.

### **Can benefits be achieved otherwise**

6.97. The Commission notes that the fact a public benefit may be available otherwise is to be taken into account in the general weighing process, but it is not an absolute prohibition to authorisation.<sup>144</sup>

6.98. The Commission is aware that the current ABCL share contract between ABL and ACH contains a 'poison pill'. In the event that there is a change of control in ABL, ACH will automatically gain control of ABCL, which contains the key production assets. This has made ABL an unattractive proposition for potential purchasers. The Commission considers this arrangement a limitation to the potential rationalisation strategies for ABL.

6.99. ABL submitted that it:

has explored a number of alternatives relating to rationalisation in the Australian cement industry. All of those alternatives involved competitive detriment.<sup>145</sup>

6.100. ABL has not provided the Commission with details of offers considered by the company. However, the Commission is aware that ABL had at least one offer which would have provided some financial assistance to ABL. (*Confidential material see endnote xvii*)

6.101. Industry specialists and the media have speculated on the possible rationalisation opportunities available to ABL.

6.102. The ANZ report states that there are two possible options for ABL to rationalise. The first scenario put forward by the ANZ report is:

The lowest cost option for CSR and Pioneer would be to merge Australian Cement Holdings with Adelaide Brighton, in return for equity. This would enable Pioneer and CSR to maximise the value

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<sup>143</sup> Note from ACCC meeting with Maxi-mix, 6 April, 1999, para.17.

<sup>144</sup> Information Circular No 20 ATPR 55-020.

<sup>145</sup> ABL Submission, 30 March 1999, para.5.38.

of Australian Cement Holdings, minimise the merger cost and obtain a greater interest in the new merged company while the Adelaide Brighton share price is at its historical low.<sup>146</sup>

6.103. The second scenario involves a takeover of ABL by ACH. This would:

...enable both CSR and Pioneer to be extremely active in the rationalisation process, achieving the same benefits but realising 100% of the upside. However, to obtain control both CSR and Pioneer will be required to pay a premium for Adelaide Brighton.<sup>147</sup>

6.104. Both of the above scenarios involve removing ABL as a potential independent cement manufacturer from the Australian cement industry.

6.105. The Commission is of the view that in the event that ABL's applications for authorisation were denied by the Commission, the most likely rationalisation strategy available to ABL is a merger with ACH. It is likely that any such acquisition or merger would create a number of competition concerns and may lead to greater competition issues than the current transactions.

6.106. The Commission accepts that all proposed transactions are interdependent and therefore it is unlikely that the competitive benefits associated with both transactions (this Authorisation application and those considered in relation to Authorisation application A90683) could be achieved through other offers by Australian cement or concrete market participants. Most notably, the severing of ACH's share ownership of ABCL, is unlikely to occur in another set of rationalisation proposals given the current arrangement between ACH and ABL.

## Conclusion

6.107. In terms of statutory public benefits, the Commission considers that there is not likely to be a significant increase in the real value of exports, nor an improvement in ABL's international competitiveness following the acquisition of ACH's shares in ABCL. However, the Commission is of the view that, taking into account the improved manufacturing efficiencies of ABL, if the threat of imports becomes a reality for the Australian cement industry, ABL will be in a position to compete more effectively with the imported product.

6.108. ABL intends to close the inefficient Geelong plant following the acquisition. The Commission accepts that ABL will enjoy efficiency gains from closure of the Geelong plant and increased capacity utilisation of the Birkenhead plant. The Commission is also of the view that the closure of the Geelong plant will not have a negative impact on competition. However, as it is the case that the Geelong plant will most likely close whether or not the ABL acquisition of ABCL proceeds, these rationalisation benefits must be discounted somewhat.

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<sup>146</sup> ANZ Investment Bank Equities Research *The Australian and New Zealand cement industry*, September 1998, p.5.

<sup>147</sup> ANZ Investment Bank Equities Research *The Australian and New Zealand cement industry*, September 1998, p.5.



6.109. The Commission expects job loss will occur as a result of the closure of ABL's Geelong plant. The Geelong plant uses inefficient 'wet' process technologies, and ABL claim that the closure is necessary to ensure its long term competitiveness. ABL intend to close the plant irrespective of the acquisition proceeding. The Commission is also aware that there will be job growth in other areas, including from the \$15 million development of the Port Melbourne facilities. Accordingly, the Commission is of the view that while the job losses in Victoria are regrettable, the closure of the Geelong plant appears to be unavoidable in order to ensure the long term viability of ABL and employment stability and growth within the ABL Group.

6.110. The Commission acknowledges that the proposed restructuring, by removing ACH as a 49 per cent shareholder of ABCL, is a significant public benefit to the Australian cement industry. It will have a pro-competitive effect by creating an independent cement manufacturer in an industry which is largely vertically integrated. However, the Commission is also aware that this benefit will be offset to some extent, in the medium term, in Western Australia, South Australia, and the Northern Territory, by supply arrangements to be in place between ABL and ACH.

6.111. The Commission expects that ABL's financial strength will be enhanced following the restructure. This strength will flow from the closure of the Geelong plant and the proposed supply contracts with ACH. The Commission expects that an increase in financial strength could lead to greater competition in Australian cement markets.

6.112. The Commission is of the view that in the event that ABL's applications for authorisation were denied by the Commission, the most likely rationalisation strategy available to ABL is a merger with ACH. It is likely that any such acquisition or merger would create a number of competition concerns and may lead to greater competition issues than the current transactions.

6.113. The Commission accepts that all proposed transactions are interdependent and therefore it is unlikely that the competitive benefits associated with both transactions (that is, this Authorisation application and those considered in relation to Authorisation application A90683) would be achieved through other offers by Australian cement or concrete market participants. Most notably, the severing of ACH's share ownership of ABCL, is unlikely to occur in another set of rationalisation proposals.

6.114. The Commission is therefore of the view that there will be significant public benefits flowing from the transaction. Most notably, the independence of ABL from ACH is likely to have a positive effect on competition in all Australian markets.

## 7. Conclusion

7.1. In considering the likely implications for the industry with and without the ABL acquisition of ABCL, the Commission acknowledges that the proposed acquisition is part of a wider restructuring proposal that is dependent on the ABL acquisition of ABCL.

7.2. Therefore, the Commission considers that it must take into account the likely effects of the wider restructuring proposal when deciding whether or not to grant the Authorisation. The wider proposal is described below.

### The wider proposal

7.3. ABL has made two applications for Authorisation in respect of the following transactions:

1. ABL proposes to acquire all the issued capital of CCL (**Authorisation A90682**); and
2. ABL proposes to acquire the 49 per cent shareholding in ABCL currently held by ACH, which is owned by CSR and Pioneer (**Authorisation A90683**). ABCL holds the key production assets of ABL including the Birkenhead, Angaston and Geelong cement plants.

7.4. In addition to these two acquisitions, it is proposed that RHL will in turn acquire approximately 55 per cent of ABL.

7.5. Before RHL can acquire ABL it is necessary for ABL to acquire ACH's shares in ABCL because of a 'poison pill' contained in the share contract between ABL and ACH. Under this 'poison pill', if there is a change of control in ABL, then ACH's 49 per cent holding in ABCL will automatically revert to a controlling interest.

7.6. In addition to these acquisitions:

- ABL intends to enter into new cement supply contracts with ACH for the supply of cement in South Australia and Western Australia; and
- ABCL's subsidiary, NC, proposes to enter into new cement supply contracts with CSR and Pioneer for the supply of cement in the Northern Territory.

7.7. The parties have advised that each of the transactions listed above are interdependent and that if any element of the package of transactions does not proceed then all other elements of the package will not take effect. To confirm this interdependence, ABL and Rugby have offered the Commission, and the Commission has accepted, s.87B undertakings which require that the ABL acquisition of CCL will not be concluded without the ABL acquisition of ABCL and the RHL acquisition of ABL taking place contemporaneously.

7.8. Specific Authorisation of the supply agreements has not been sought.

## **Key detriments**

7.9. In its examination of the proposal, the Commission has identified a number of public detriments. In particular:

- The supply agreements proposed between ACH and ABL may deter new entry and constrain competition to some degree in Western Australia, South Australia, and the Northern Territory to some extent. Nevertheless, the Commission accepts that the proposed supply agreements will have some pro-competitive effects.
- The merger of ABL and CCL in Western Australia significantly raises concentration in the Western Australian cement market, decreasing the number of competitors in the market from 3 to 2. However, the Commission is confident that amendments to BGC's clinker supply contract will enable it to compete aggressively with the merged entity and any competitive detriment will be minimal.
- The south-west Western Australian lime market will be left with a monopoly. The Commission has received submissions stating concerns about this situation but it does not appear that the ABL acquisition of CCL will result in a substantial detriment in the lime market.
- The closure of the Geelong plant will result in the direct loss of about 110 jobs. These losses will be offset to some extent by employment growth in other areas. Also, it is likely that these jobs would be lost eventually even if this proposal does not proceed.

7.10. The Commission has examined the above detriments very closely and has sought contractual adjustments from ABL in order to minimise any competitive detriment.

## **Key benefits**

7.11. In addition to the detriments noted above the package of transactions will also result in significant public benefits including:

- The ABL acquisition of ACH's shares in ABCL, will result in significant public benefits. Most notably, the independence of ABL from ACH is likely to have a positive effect on competition in all Australian markets.
- The RHL acquisition of ABL will provide ABL with access to Rugby's international experience and financial strength, improving ABL's competitiveness in the Australian cement industry.
- ABL will achieve rationalisation benefits through the closure of the Geelong plant and rationalisation between CCL and ABL in Western Australia. In particular, the closure of the Geelong plant and the subsequent increase in production at ABL's Birkenhead plant will lower unit production costs improving ABL's competitiveness. Over time, these rationalisation benefits are likely to be passed through to customers in the form of lower prices. However, as it is the case that the Geelong plant will most likely close whether or not the ABL acquisition of ABCL proceeds, these rationalisation benefits must be discounted somewhat.

7.12. On balance, the Commission is of the view that the public benefits flowing from the package of transactions are likely to outweigh the detriments. In particular, the existence of the 'poison pill' in the ABL/ACH shareholder agreement severely limits the scope for alternative restructuring proposals.

7.13. Therefore, the Commission is satisfied in all the circumstances that the proposed ABL acquisition of ABCL would result, or be likely to result, in such a benefit to the public that it should be allowed to take place.

## **8. Determination**

8.1. For the reasons contained herein, the Commission grants Authorisation to application A90683 made under s. 88(9) of the Act.

8.2. This Determination is made on 30 April 1999. On 29 April 1999, the Commission declared the two applications by ABL for Authorisation of the acquisitions of CCL and shares in ABCL to be 'complex' under s.90(11A) of the Act.

8.3. This Determination is made on the basis that s.87B undertakings dealing with two issues have been executed by ABL, Rugby and CCL, and offered to and accepted by the Commission. The first issue dealt with by way of s.87B undertaking is the requirement that the ABL acquisition of CCL not be concluded without the ABL acquisition of ABCL and the RHL acquisition of ABL taking place contemporaneously. The second issue dealt with by way of s.87B undertaking is the adjustment of BGC's current contract for clinker supply to ensure that BGC will be able to compete effectively with the merged ABL/CCL.

8.4. The Determination comes into force:

- (a) subject to paragraphs (b) and (c) below, at the end of the period in which an application may be made to the Tribunal for a review of this Determination;
- (b) if an application for review is made to the Tribunal - on the day on which the Tribunal makes a Determination on the review; or
- (c) where the application for review is withdrawn - on the day on which the application is withdrawn.

8.5. Normally, an application to the Tribunal for review must be made within 21 days of the Commission's Determination. However, the Commission is aware that the Australian Competition Tribunal has agreed to shorten the appeal period. Justice von Doussa ordered on 30 April 1999 that the time allowed for an application to be made to the Tribunal to review the Commission's Determination/s be shortened to expire on 11 May 1999. Accordingly any application to review the Commission's Determination/s in this matter must be filed in the Tribunal Registry on or before 11 May 1999.

8.6. Attached to this Determination is a copy of Justice von Doussa's order made on 15 April 1999 in which His Honour first considered ABL's application to shorten the review period.

IN THE AUSTRALIAN  
COMPETITION TRIBUNAL  
File No. 8 of 1999



RE AN APPLICATION BY ADELAIDE  
BRIGHTON LIMITED TO SHORTEN THE TIME  
WITHIN WHICH ANY APPLICATION MAY BE  
MADE UNDER SUBSECTION 101(1) OF THE  
TRADE PRACTICES ACT 1974 (CTH) FOR  
REVIEW OF THE DETERMINATIONS BY THE  
AUSTRALIAN COMPETITION AND  
CONSUMER COMMISSION OF APPLICATIONS  
FOR AUTHORISATION BY ADELAIDE  
BRIGHTON LIMITED.

### ORDER

Tribunal: von Doussa J (Acting President)

Date of Order: 15 April 1999

Where Made: Sydney

Application having been made under s 101(1B) of the *Trade Practices Act 1974* (Cth) to the Acting President.

It is determined that:

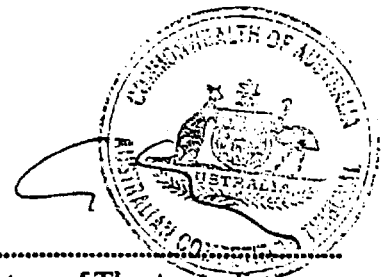
1. The application is validly made by the form of application lodged with the Registrar on 9 April 1999, and that the application has not been made prematurely.

It is further ordered that:

2. The application stand over to 11:00 am on Friday 30 April 1999 for consideration of whether in all the circumstances it would be unfair to make the order sought by the applicant.
3. The applicant arrange at its own expense for the publication in newspapers circulating in Australia including but not limited to the *Australian Financial Review*, the *Adelaide Advertiser* and the *West Australian* of advertisements in a form to be agreed with the ACCC notifying readers of the hearing on Friday 30 April 1999 and advising that interested parties who consider the making of the order sought would be unfair may either appear and make submissions to the Tribunal at that time (having first advised the Registrar of their intention to do so) or may make written submissions which should be directed to the Registrar to arrive before 9:30 am EST on 30 April 1999.

4. The ACCC use its best endeavours to notify by facsimile before close of business in the recipients time zone on Friday 23 April 1999 the persons identified by it as being interested parties and those persons who have made submissions to it in relation to it in relation to the applicant's applications for authorisation number A90682 and A90683 in terms of the advertisement referred to in Order 3 above.
5. Any person intending to appear on the hearing of the application must first file an address for service in the manner required by regulation 21 of the Trade Practices Regulations 1974.

Date entered: 16 April 1999



.....  
**Registrar of The Australian  
Competition Tribunal**

