Application for Authorisation

Lodged by

Australian Pharmaceutical Industries Limited

In respect of

Proposed merger with Sigma Company Limited

Date: 11 September 2002

Authorisation No:
A30215

Commissioners:
Fels
Bhojani
Jones
Martin
McNeill

File No: C2002/1088

PUBLIC VERSION

Executive Summary

The Applicants

On 26 July 2002 Australian Pharmaceutical Industries Limited (API) and Sigma Company Limited (Sigma) lodged an application for authorisation of their proposed merger (A30215). The principal activities of API and Sigma are the wholesale distribution of pharmaceuticals, healthcare and personal care products to retail pharmacies and hospitals.

API owns and operates the retail pharmacy banner groups Chemworld Chemist, Soul Pattinson Chemist, API Health Care and Pharmacist Advice. API provides financial assistance to retail pharmacies through loans and guarantees and provides retail support services to banner group members. API engages, to a limited extent, in manufacturing activities.

Sigma also owns and operates retail pharmacy banner groups, namely Amcal and Guardian. Like API, Sigma provides financial assistance and retail support services to banner group members. Sigma has significant pharmaceutical manufacturing operations and is the largest Australian contract manufacturer for Australian and international pharmaceutical companies.

The Relevant Market

The Applicants claim that the relevant market is the national market for the distribution of pharmaceuticals, including both ethical products and OTC products to pharmacies. This market includes supply by full-line wholesalers, short-line wholesalers and manufacturers distributing direct to pharmacies.

Whilst the Commission accepts the Applicants' product market definition it considers that the relevant geographic market is regional to state based. While wholesalers obtain supply from manufacturers in a national market, the demand side of the market is characterised by approximately 4,900 pharmacies requiring frequent delivery and short turnaround times for orders. Moreover, no full-line wholesaler prices on a national basis.

The Application

The *Trade Practices Act 1974* requires that 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. In making this evaluation, the Commission adopts the approach set out by the Tribunal of comparing the position that would apply in the future were the proposed acquisition not given effect with the position in the future which would arise if the proposed acquisition were given effect. This in turn requires an assessment of the likely competition effects of the proposed merger and any other public detriment that may arise.

The Commission received over 120 submissions from pharmacists, wholesalers, manufacturers and industry and professional associations. The principal supporters of the Application were pharmacists and the various branches of the Pharmacy Guild. These parties stated that it was essential that the current level of service provided by the

Applicants to pharmacy should not decrease and that the merger would ensure their continuation. In terms of anti-competitive effect they considered that the merger would create a stronger competitor to the remaining full-line wholesaler, Fauldings/Mayne.

As a whole, other wholesale distribution stakeholders including manufacturers and wholesalers were opposed to the merger proceeding on public benefit grounds. The Commission notes also that there were a significant number of pharmacists who also opposed the merger. There was significant concern that the merger would be highly anti-competitive and was likely to result in increased prices and a reduction in services provided. Further there was limited support for the public benefits raised by the Applicants. A number of interested parties commented that these benefits were occurring now as a result of competition and would continue to occur in the absence of the merger.

In considering the anti-competitive detriment and public benefit likely to arise from the proposed acquisition, the Commission has considered the Applicants' claims, submissions received from interested parties, the Commission's own market enquiries and other research material.

The Applicants claim that the competitive detriment of the merger will be small because the merged entity will face countervailing power from both manufacturers upstream and the Commonwealth downstream. The merged entity will also be constrained by the threat of bypass from manufacturers, short-line wholesalers and buying groups.

The Commission considers that the merger is likely to result in an anti-competitive detriment in the various regional to state based markets for the distribution of pharmaceuticals to pharmacies. The Commission considers that the merger will significantly increase barriers to entry in the market and will result in the removal of a vigorous and effective competitor. In some isolated instances, the Commission notes that pharmacy customers will no longer have a choice of wholesalers and will be required to use the merged entity. The Commission believes it is likely following the merger that service levels to pharmacy will decline in the long term, and that pharmacists will face higher prices which may be passed on to consumers in some instances.

In considering a future in which the proposed acquisition did not proceed, in the current environment, the Commission formed the view that there were three possible outcomes:

1. the status quo will be largely maintained, with three full-line wholesalers remaining in the market in approximately their present form;
2. one full-line wholesaler will scale down its operations and adopt a model more akin to that of a short-line wholesaler; or
3. two full-line wholesalers will scale down their operations and adopt a model more akin to that of a short-line wholesaler.

The Commission concluded that a merger between API and Sigma is likely to have greater anti-competitive effect than the other probable outcomes should the merger not proceed.

The Applicants claim that the merger will significantly enhance the following public benefits:

(i) Community Access to Pharmaceuticals;
(ii) Community Health Services;
(iii) Regional and Rural Support;
(iv) Innovation in Access to Pharmaceuticals and Health Services;
(v) Reductions in Commonwealth Government Expenditure;
(vi) Small Business Support;
(vii) Export Enhancement and Import Replacement; and
(viii) Industry Efficiencies.

The Commission acknowledges that the merger would result in some public benefits. The Commission accepts that the merger will achieve efficiency gains through rationalisation of the magnitude claimed by the Applicants. However, given the Commission's view on the anti-competitive effect of structural changes to the market, these benefits are likely to be dissipated over time. The loss of competitive tension in the market is likely to result in a lessening of the dynamic elements driven by competition and that greatly influence market development. These include innovation, more effective management and a more responsive attitude to the demands of users of products or services. Furthermore, any efficiency gains are likely to be retained by the merged entity for its benefit, and the benefit of its shareholders. Similarly, while the merger is likely to result in some capital market efficiencies as a result of the merged entity attracting increased institutional investor attention and a marginal decrease in the merged entity's cost of capital these benefits will be retained by the company.

The Commission accepts that the merger would enable the merged company to consolidate vertical integration of manufacturing and distribution which will assist in the promotion of generic pharmaceuticals with the associated benefits for PBS expenditure and export enhancement and import replacement. In this respect, the Commission notes that vertical integration is likely to have an anti-competitive effect on other similar sized manufacturers. The Commission notes the Applicants' argument that the merged entity will have increased manufacturing scale which will assist in export enhancement and import replacement. However, the Commission considers the link between the merger and export enhancement and import replacement is tenuous given the relatively small size of API's manufacturing operations and Sigma's ability in the past to increase its manufacturing operations independent of the merger.

The Commission also accepts that community access to pharmaceuticals, community health services, regional and rural support, innovation with respect to access to pharmaceuticals and health services and small business support represent benefits to the public. However, the Commission is not satisfied that these benefits arise from the merger or their continued provision is dependent on the merger. In addition, as a result of the significant anti-competitive detriment likely to result from the merger, the merged entity would have an enhanced ability to selectively withdraw these services.

Determination

For the reasons outlined in this report, the Commission is not satisfied, in all the circumstances, that the proposed merger of API and Sigma would result, or be likely to result, in such a benefit to the public that it should be allowed to take place.

The Commission has considered the undertakings offered by the Applicants and on balance formed the view that they do not significantly alter the balance between the public benefits and public detriments which are likely to arise from the merger in the long term. Further, the Commission considers that the Applicants are not in a position to give undertakings that would shift the public benefit/public detriment balance in favour of granting the Application for Authorisation.

Accordingly, the Commission has decided not to grant authorisation to the proposed merger.

Contents

Glossary

API	Australian Pharmaceutical Industries Limited
Applicants	Australian Pharmaceutical Industries Limited and Sigma Company Limited
Application	Application for Authorisation of proposed merger between Australian Pharmaceutical Industries Limited and Sigma Company Limited (A30215)
ARTG	Australian Register of Therapeutic Goods
Banner groups	Groups of retail pharmacies, similar to franchise groups, that allow for joint advertising and promotion
DHA	Department of Health and Ageing
EBIT	Earnings before Interest and Tax
EBITDA	Earnings before Interest, Tax, Depreciation and Amortisation
Ethical products	Pharmaceutical products listed in Schedule 4 and Schedule 8 of the Therapeutic Goods Administration's (TGA) SUSDP which can only be obtained with a prescription from a medical practitioner
Full-line wholesalers	Distribute the majority of pharmaceutical, healthcare and other products required by pharmacies and hospitals, typically stocking over 15,000 product lines and operate on a national basis
IMS Health	A provider of information solutions to the pharmaceutical and healthcare industries
NECG	Network Economics Consulting Group Pty Ltd
NPSA	National Pharmaceutical Suppliers Association
OTC	Over-the-counter products are non-ethical products, some having to be sold in pharmacies and some may be sold in other retail outlets such as supermarkets
PBAC	Pharmaceutical Benefits Advisory Committee
PBPA	Pharmaceutical Benefits Pricing Authority
PBS	Pharmaceutical Benefits Scheme

QCMA	*Re Queensland Co-operative Milling Association Ltd and Defiance Holdings Ltd* (1976), ATPR 40-012
ROCE	Return On Capital Employed
RPBS	Repatriation Pharmaceutical Benefits Scheme
S2	Non-prescription medicines the safe use of which may require advice from a pharmacist
S3	Non-prescription medicines for supply by pharmacists only
S4	Prescription only medicines
S8	Controlled drugs (eg strong analgesics such as morphine)
Sigma	Sigma Company Limited
Short-line wholesalers	Distribute a narrower product range than full-line wholesalers, typically stocking between 1,500 and 5,500 product lines and operate regionally
SSNIP	Small but Significant Non-transitory Increase in Price
SUSDP	Standard for the Uniform Scheduling of Drugs and Poisons
TG Act	Therapeutic Goods Act 1989
TG Regulations	Therapeutic Goods Regulations 1990
TGA	Therapeutic Goods Administration
The Act	Trade Practices Act 1974
The Code	Therapeutic Goods Advertising Code
The Commission	Australian Competition and Consumer Commission
Tribunal	Australian Competition Tribunal
WACC	Weighted Average Cost of Capital

1. Introduction

1.1 Under the *Trade Practices Act 1974* (Cth) (the Act) parties may apply to the Australian Competition and Consumer Commission (the Commission) for authorisation of mergers or acquisitions. Authorisation is the process of granting immunity, on public benefit grounds, for mergers and acquisitions which would or might otherwise contravene section 50 of the Act. Section 50 of the Act prohibits acquisitions that would have the effect, or likely effect, of substantially lessening competition in a substantial market.

1.2 Subsection 90(9) provides that the Commission shall not grant authorisation unless it is satisfied in all the circumstances that the proposed acquisition would result, or be likely to result, in such a benefit to the public that the acquisition should be allowed to take place. Once authorisation is granted in relation to an acquisition neither the Commission, the Minister, nor third parties can take action under the Act to overturn the acquisition.

1.3 On 26 July 2002, Australian Pharmaceutical Industries Limited (API) and Sigma Company Limited (Sigma) lodged an application with the Commission seeking Authorisation under section 88(9) of the Act to merge through a scheme arrangement. (Authorisation number A30215) (the Application).

1.4 The Commission had a period of 30 days in which to make a Determination in respect of the Application. During this period the Commission sought submissions from pharmacists, hospitals, pharmaceutical manufacturers, pharmaceutical wholesalers, government departments, industry and professional associations to assist in its assessment of the Application. Submissions made during the course of the Commission's inquiries are open for inspection on a public register. Attachment A to this Determination lists the parties who made submissions to the Commission in relation to the Application.

1.5 On 9 August 2002 the Commission requested additional information in relation to the Application from API and Sigma under section 90(11)(b) of the Act. This request for information had the effect of suspending the 30 day period which the Commission had to consider the Application. On 22 August 2002, the Commission received the information it had requested from the parties pursuant to the notice, and the Commission's time for considering the Application recommenced on that date.

1.6 On 28 August 2002, API and Sigma agreed to extend the deadline for the Commission's consideration of the Application to 12 September 2002.

In the course of its inquiries, the Commission was provided with confidential information from a range of parties. There is provision in the Act for maintaining confidentiality of commercially sensitive information or otherwise where it appears desirable to the Commission to grant confidentiality. In several places in this Determination, the Commission has drawn on that information in order to assist it in its consideration of the Application. This version of the Determination is a public document, so where confidential material is cited, the relevant paragraphs and tables

are marked with the words '(*Confidential material see endnote i*)' and the relevant information is contained in a separate document which is not publicly available.

Background

Australian Pharmaceutical Industry Regulation

1.7 Medicinal drugs are not ordinary items of commerce, where consumers are able to make informed choices about the right product to use and a fair price to pay. Rather, they are products that are capable of doing a great deal of harm if not used properly and, in many cases, are so expensive that some consumers would not be able to afford them if there were no public subsidy of their cost.

1.8 The Australian market for prescription products used under medical supervision is different from most markets in that the choice of the product to be purchased is made by an intermediary rather than the consumer. Both parties contributing to the payment for the goods (the Commonwealth through the Pharmaceutical Benefits Scheme and consumer) have little input into product selection, with the medical practitioner making the buying decision by prescribing specific medication. Further, the quality of the product, its promotion and price are all dictated, or at least heavily influenced, by parties independent of normal market pressures.

1.9 It is against this background that Australia has developed a comprehensive system of regulating the use of medicines and other therapeutic products in the community. The main methods of regulation of the Australian pharmaceutical industry are as follows:

Regulation of Therapeutic Goods

1.10 The bulk of therapeutic goods are regulated under the *Therapeutic Goods Act 1989* (TG Act).

1.11 The TG Act is a Commonwealth Act that sets out the legal requirements for the import, export, manufacture and supply of medicines in Australia. It details the requirements for listing or registering all therapeutic goods in the Australian Register of Therapeutic Goods (ARTG), as well as many other aspects of the law including advertising, labelling, and product appearance. The TG Act is supported by the *Therapeutic Goods Regulations 1990* (TG Regulations), and various Orders and Determinations which provide further details of matters covered in the TG Act. The TG Act provides a substantially uniform national system of controls over therapeutic goods, facilitating trade between the States/Territories and benefiting both consumers and industry.

Quality

1.12 The TG Act regulates the quality of pharmaceutical products in Australia. All prescription products must be approved for registration on the ARTG, pursuant to the TG Act, prior to supply and/or promotion. Section 14 of the TG Act requires that the

importation and supply of therapeutic goods in Australia must conform with the applicable standards determined by the Minister for Health and Ageing under section 10 of the TG Act. Section 109 of the TG Act gives the Minister the ability to establish a standard for therapeutic goods which goes to, inter alia, the quality of the goods or the procedures to be used in the manufacture of the goods.

1.13 Therefore, pursuant to the TG Act, the quality of the products supplied within this market is regulated. This has a natural impact on competition within this market, removing competition on product quality.

Promotion

1.14 The TG Act also regulates the promotion of pharmaceutical products in Australia. Under the TG Act it is an offence for a person to publish or insert in mainstream media an advertisement that is not an approved advertisement. An approved advertisement will be one that complies with the Therapeutic Goods Advertising Code (the Code), does not contain a prohibited representation, contains any required representations, complies with regulation 6A and 7C of the Therapeutic Goods Regulations and is approved by the Minister. The Code places further restrictions on promotion of therapeutic products, particularly to health professionals.

1.15 Therefore, pursuant to the TG Act, TG Regulations and the Code the promotion of products within this market is highly regulated. Advertising to the general public is subject to strict regulatory controls whilst the Code restricts what promotions may be made to health professionals. These controls impact on competition in this market, restricting product promotion to consumers, with the Code affecting the promotion of products to health professionals.

Standard for the Uniform Scheduling of Drugs and Poisons

1.16 Some medicines contain substances that have restricted availability. Access to these substances, listed in schedules contained in the Standard for the Uniform Scheduling of Drugs and Poisons ('SUSDP'), is usually restricted for a number of reasons, including toxicity, safety, and the risks and benefits associated with the use of the product. The schedules in the SUSDP list drugs and poisons according to the recommended restrictions on their availability to the public.

1.17 The schedules of the SUSDP which are most relevant to medicines are:

- Schedule 8 (S8) - controlled drugs (eg strong analgesics such as morphine)
- Schedule 4 (S4) - prescription only medicines;
- Schedule 3 (S3) - non-prescription medicines for supply by pharmacists only;
- Schedule 2 (S2) - non-prescription medicines the safe use of which may require advice from a pharmacist.

Pharmaceutical Benefits Scheme

1.18 The most important factor affecting the price of prescription drugs in the market is the Pharmaceutical Benefits Scheme (PBS). The PBS is a Commonwealth Government scheme for subsidising the cost of certain prescription only products, classified in the Poison's Schedule as S4 to S8 pharmaceuticals.

1.19 The PBS has been in operation since 1948, with the aim of providing reliable and affordable access to a wide range of necessary medicines. The subsidies are available to all Australian residents and eligible foreign visitors.

1.20 Pursuant to the PBS scheme the Pharmaceutical Benefits Advisory Committee ('PBAC') makes recommendations and gives advice to the Minister about which pharmaceutical products should qualify for subsidies under the PBS. No new drug may be made available as a PBS pharmaceutical benefit item unless the Committee has so recommended.

1.21 The PBAC is required by the *National Health Act 1953* to consider the effectiveness and cost of a proposed benefit compared to alternative therapies. In making its recommendations the PBAC, on the basis of community usage, recommends the maximum quantities and repeats and may also recommend restrictions as to indications where PBS subsidy is available. When recommending listings, the Committee provides advice to the Pharmaceutical Benefits Pricing Authority ('PBPA') regarding comparison with alternatives or their cost effectiveness.

1.22 The PBPA reviews the prices for products supplied under the scheme and recommends prices for new items that are recommended for listing on the PBS by the PBAC. Its objective is to secure reliable supply of pharmaceutical products at the most reasonable cost to Australian taxpayers and consumers consistent with maintaining a sustainable pharmaceutical industry in Australia. Pursuant to its terms of reference the PBPA recommends to the Minister the prices of items listed on the PBS or recommended by the PBAC. It also conducts negotiations with suppliers on proposed prices.

1.23 The Government establishes an "agreed price to pharmacist" for each item. Theoretically, the wholesaler receives 10% of the Government agreed price to pharmacist and the manufacturer 90%. The pharmacist may apply a mark-up of 10% on the price to the pharmacist up to $180, or $18.00 on the price to the pharmacist above $180 up to $450, or 4% on the price to the pharmacist above $450. The pharmacist may also apply a dispensing fee of $4.58 for ready prepared items or $6.49 for extemporaneously prepared items, plus a range of miscellaneous fees and allowances where applicable.[1]

1.24 The theoretical 10% fee received by the wholesaler is a fee that is unrelated to the actual costs of delivery of individual drugs. The cost of delivering drugs, such as cold chain drugs that have special handling requirements, may exceed the 10% fee.

[1] Department of Health and Ageing, http://www.health.gov.au/pbs/pbs/whopays.htm as at 25 June 2002.

1.25 The PBS scheme, therefore, sets a price at which the government is prepared to subsidise a particular pharmaceutical product. This is usually the price for the lowest priced drug in a group of pharmaceuticals which are therapeutically interchangeable and is arrived at by negotiation with the manufacturer. Where the product is not therapeutically interchangeable with another the PBS price will be that negotiated for that product. The amount actually payable by the consumer is dependent on the co-payment amount, any safety net options under the PBS, and a therapeutic group premium or brand premium.

1.26 Pursuant to the system the consumer will pay the co-payment amount applicable to that pharmaceutical product. The co-payment amount varies on the circumstances of the consumer, and requires that the consumer pay the first certain amount (as dictated under the PBS) for the product. As at 1 January 2002 the co-payment amount for general patients was $22.40 and $3.60 for concessional patients, applying per prescription item.[2]

1.27 In order to reduce price control for multi-branded and therapeutically interchangeable pharmaceutical products a brand pricing policy was introduced in December 1990. Pharmaceutical companies may wish to charge extra for their particular branded product in the drug group for a number of reasons, including recovering research and development costs or increasing margins. A brand premium will only occur where there are therapeutically interchangeable products and the consumer is given the option to purchase the lower priced interchangeable product in that group. Where a brand premium applies to a product, and the consumer chooses to purchase that product, the consumer will pay the higher price, being the co-payment plus the premium, and the supplier will receive the higher margin on the product. Thus a limited form of price competition will occur above the price set by the PBS, where the consumer has the ability to purchase a substitute product without a brand premium or products with varying brand premiums, with subsequent varying prices to the consumer.

1.28 The PBS allows for therapeutic group premiums to be applied. These premiums apply to four particular groups of drugs, also therapeutically interchangeable, where the Government will subsidise up to the lowest priced drug in the group. Substitution of these drugs is not permitted at the pharmacy level, with selection chosen on therapeutic grounds by the prescribing medical practitioner.

1.29 Having noted the above, the price payable by the consumer may also be dependent on the effect of the safety net. Safety nets are designed to protect individuals and families from large overall expenses of PBS listed products. The safety net limit means that, once a certain dollar amount in prescriptions is exceeded in a year, a reduced amount will be paid for any additional prescriptions during that calendar year.[3]

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[2] The 2002-03 Federal Budget has announced changes to the PBS. The changes announced include an increase of the co-payment amount for general patients to $28.60 per prescription and $4.60 for concessional patients. However, these changes are yet to receive parliamentary approval.

[3] The 2002-03 Federal Budget has announced changes to the safety net limit proposing an increase in the limit.

1.30 Over the last 10 years, there has been a marked growth in PBS expenditure from $1.2 billion in 1991 to $4.2 billion in 2001. This increase can be attributed to several long term trends: doctors prescribing newer, more expensive drugs on a more frequent basis and an ageing population that requires more frequent medication. The PBS is the fastest growing area of the health budget. The Federal Government is actively undertaking initiatives, such as the increase in patient co-payments, to curb the growth of the PBS.

1.31 In 2000-01, the PBS dealt with 148.1 million benefit prescriptions. This was an increase of 7.2% over 1999-2000. The cost to government of these prescriptions plus other miscellaneous services was $4,158.1 million - an increase of 19.2% over 1999-2000. The total cost of the PBS, including patient co-payments, was $4,902.3 million. Approximately 87% of all prescriptions issued in Australia are subsidised on the PBS.[4]

1.32 Department of Health and Ageing (DHA) estimates that of the $4,902 million spent on the PBS in 2000-01 approximately 70% went to manufacturers, 22% to pharmacists and 8% to wholesalers ($392 million).[5]

Joint Industry Government Review of Pharmaceutical Wholesaling Arrangements

1.33 The Commonwealth Government has stated its intention to reduce expenditure on wholesaling of PBS pharmaceuticals.

1.34 There is currently a joint industry/Government review of pharmaceutical wholesaler remuneration arrangements. The stakeholders involved in the review are:

- The National Pharmaceutical Suppliers Association (NPSA), comprising Mayne, API and Sigma;
- The Generic Manufacturers Industry Association;
- The Pharmacy Guild of Australia; and
- The Commonwealth Government.

1.35 The review will examine:

(a) the costs of providing the services currently provided by distributors to pharmacies and the extent to which they should be funded by governments;
(b) the current arrangements for funding distributors; and
(c) the options for improving existing arrangements for funding distributors to achieve greater efficiency and effectiveness.[6]

1.36 The Commission has been informed by the DHA that it expects the review will be concluded in September 2002. At that time the review group's report will be submitted to the Minister for Health and Ageing for consideration.

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[4] API/Sigma Submission, 26 July 2002, Page 18.
[5] Department of Health and Ageing, http://www.health.gov.au/pbs/pbs/whopays.htm and http://www.health.gov.au/pbs/pbs/phbeninf.htm as at 25 June 2002.
[6] Mayne Group Limited Submission, 13 August 2002, Page 5.

Repatriation Pharmaceutical Benefits Scheme

1.37 The Repatriation Pharmaceutical Benefits Scheme ('RPBS') supplies subsidised items from the PBS schedule and Repatriation Schedule to eligible veterans and eligible dependants for injury or death sustained by veterans as a result of war service. The RPBS applies in a similar way to the PBS system, with all eligible persons entitled to access pharmaceutical products at concessional rates. Whilst applying similarly to the PBS, the RPBS covers a wider range of items to include a number of medications and other items identified as meeting the specific health needs of veterans.

Non-PBS Products

1.38 Prescription products that are not listed on the PBS include those sold in the private prescription market and through private and public hospital prescriptions. These drugs are subject to the same controls under the TG Act, but are not subsidised under the PBS or RPBS. This also includes those products which cost less than the patient co-payment amount and are therefore not subsidised by the PBS.

1.39 In the case of hospital prescriptions the drug is purchased by the Commonwealth, State or private hospital and on-sold to the patient as part of the treatment supplied by the hospital. Whilst there is no PBS limit for price, PBS prices are often used as a point of reference in tender contracts.

1.40 The private prescription market comprises prescription only products which are not subsidised under the PBS. Products in this category include items such as Viagra, and are items that fulfil the requirements of the TGA, whilst not being recommended for listing on the PBS by the PBAC for various reasons.

The Australian Pharmaceutical Industry - Participants

1.41 The Australian pharmaceutical industry has a turnover of approximately $6.99 billion,[7] accounting for around 1% of world production with exports totalling around 22% of this amount.[8] Australia imports around 47% of its total demand.

1.42 The following groups are involved within the pharmaceutical industry:

Pharmaceutical Manufacturers

1.43 Pharmaceutical manufacturers produce pharmaceutical products such as ethical pharmaceuticals (both PBS and non-PBS ethicals), non-ethical pharmaceuticals available in pharmacies and other healthcare products available in outlets other than retail pharmacies. Some of these manufacturers supply their products directly to hospitals and retail pharmacies.

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[7] Figures from the Australian Pharmaceutical Manufacturers Association Inc. This figure includes prescription and self-medication pharmacy sales, hospital sales and exports for the year ended 30 June 2000. This value is an approximate value given the complexity of the data.

[8] The data for exports and imports are an estimated record based on *ABS International Trade unpublished data* for commodity codes encompassing human use pharmaceuticals for the financial year ended 30 June 2000.

1.44 The Australian pharmaceutical industry comprises more than 120 companies (both prescription and non-prescription), with a total turnover of about $6.04 billion in 1998-99 for human-use pharmaceuticals. Listed below are the top 20 PBS suppliers[9]:

TABLE 1: TOP 20 PBS SUPPLIERS

Rank	Supplier(s)	$mil.	%	Rank	Supplier(s)	$mil.	%
1	AstraZeneca	376.6	9.81	11	Wyeth	116.3	3.03
2	Merck Sharp & Dohme	270.8	7.05	12	SmithKline Beecham	115.6	3.01
3	GlaxoWellcome	268.7	7.00	13	Amrad	115.3	3.00
4	Parke Davis	250.0	6.51	14	Pharmacia & Upjohn	109.5	2.85
5	Alphapharm	236.5	6.16	15	Sanofi-Synthelabo	84.5	2.20
6	Bristol-Myers Squibb	183.4	4.78	16	Novartis	84.4	2.20
7	Aventis	175.9	4.58	17	Servier	68.9	1.79
8	Pfizer	146.8	3.82	18	Novo Nordisk	67.8	1.77
9	Roche	126.7	3.30	19	Schering	64.2	1.67
10	Eli Lilly	117.8	3.07	20	Sigma	62.9	1.64

Source: Australian Pharmaceutical Manufacturers Association

Full-line Wholesalers

1.45 Full-line wholesalers distribute the majority of pharmaceutical, healthcare and other products that pharmacies and other bodies such as hospitals require. They typically stock over 15,000 product lines. Full-line wholesalers provide a high level of individual service, providing frequent deliveries of small quantities of products on a national basis. They deliver at least daily to most urban pharmacy locations and daily to most regional locations. In order to provide these services, full-line wholesalers have warehouses spread around the country to minimise delivery times.

1.46 Pharmaceutical wholesaling differs systematically from general wholesaling. Pharmaceutical wholesaling involves:

- high frequency of delivery;
- four to five hour turnaround from order to delivery;
- information technology requirements;
- security measures for particular types of drugs; and
- the need to establish systems for single item picking.

Whereas a general wholesaler may deliver by the box or pallet load, pharmaceutical wholesalers often deliver items on an individual basis.

1.47 There are three full-line wholesalers in Australia: API, Sigma and Faulding (now owned by the Mayne Group). IMS Health data indicates that full-line wholesalers supply in excess of 80% of retail pharmacies' requirements.

Short-line Wholesalers

1.48 Short-line wholesalers provide a more limited service than full-line wholesalers. Generally, they deal in a narrower product range than full-line

[9] By total cost, 1999-2000 – derived from processed PBS prescriptions

wholesalers. Short-line wholesalers typically stock between 1,500 and 5,500 product lines, and deliver less frequently than full-line wholesalers. Furthermore, short-line wholesalers operate on a regional basis rather than a national basis.

1.49 The principal customers of short-line wholesalers are retail pharmacies and hospitals. Whilst some short-line wholesalers generally specialise in wholesale either to pharmacies or to hospitals, some organisations, such as Southern Hospital Supplies, distribute to both. Another example of a short-line wholesaler is Northern Pharmaceuticals.

Community Pharmacies

1.50 There are approximately 4,900 approved pharmacies in Australia, representing a pharmacy to population ratio of one pharmacy to 3,762 people. The table below shows the distribution of Australian pharmacies by urban and rural areas, 1997-98:[10]

TABLE 2: DISTRIBUTION OF PHARMACIES

State	No. of Pharmacies	People per pharmacy: urban	People per pharmacy: rural
NSW	1,727	3,598	3,746
VIC	1,182	3,802	4,218
QLD	959	3,394	3,790
WA	472	3,664	4,278
SA	385	3,854	3,815
TAS	143	3,054	3,519
ACT	58	5,336	-
NT	28	4,681	10,287
Australia	4,954	3,667	3,937

Source: Commonwealth Department of Health and Family Services.

1.51 Recent research[11] indicates that over 80 per cent of Australians aged 30 or over usually go to the same pharmacy to purchase prescription medicines. Older persons are more likely to use the same pharmacy with almost 90 per cent of persons aged 60 years or older going to the same pharmacy to purchase prescription medicines.

1.52 The same research indicates that over 70 per cent of consumers use a pharmacy in their neighbourhood shopping centre, whilst 25 per cent use a pharmacy in a major shopping centre.

1.53 Full-line wholesalers distribute all or the majority of products that retail pharmacies require. Typically retail pharmacists use one full-line wholesaler as their principal source of supply and another full-line wholesaler as their secondary source of supply.

[10] Commonwealth Department of Health and Family Services, 1997-98, Canberra, 1998. Page 82.
[11] *Pharmacy Choice by Australian Consumers,* Campbell Research and Consulting, July 1999, Pages 2-3.

Banner Groups

1.54 Banner groups are groups of retail pharmacies similar to franchise groups. They are principally marketing groups that allow for joint advertising and promotion. They are formed for the purpose of providing support to retail pharmacies. This support generally includes the provision of marketing services including assistance with store layout, promotions and business advice (including financial advice). Banner group members are in some cases also able to obtain products branded with the name of the banner group.

1.55 Banner groups operated by API are: Chemworld; Soul Pattinson; Pharmacist Advice; and, API Health Care. Banner Groups operated by Sigma are Amcal and Guardian. Mayne operates the Chemmart, Terry White Healthsense and Synergy banner groups. Whilst independent banner groups also exist such as Fullife and My Chemist, the majority of banner groups are owned and operated by API, Sigma and Mayne.

1.56 Approximately 36% of pharmacies are in banner groups operated by the three full-line wholesalers with the remainder operating in independent banner groups or without banners.

TABLE 3: NUMBER OF PHARMACIES IN BANNER GROUPS CONTROLLED BY FULL-LINE WHOLESALERS

Group	Number of Pharmacies
API	623
Sigma	662
Mayne/Faulding/Other	683
Non-banner pharmacies	2940

Source: API/Sigma Submission, pages 66 and 68 and Commission estimates

Buying Groups

1.57 Buying groups are formed by individual pharmacists whose aim is to act collectively in purchasing and, in doing so, obtain cheaper prices than would be possible if they were acting individually. Buying groups obtain products from both wholesalers and direct from manufacturers. Examples of buying groups include: Barretts (in Victoria) and Chemplus (in South Australia).

Hospitals

1.58 Public hospitals and private hospitals acquire products direct from manufacturers as well as from full-line and short-line wholesalers. Public hospitals may also acquire products direct from manufacturers by way of competitive tender. The tender process differs in various states.

The Australian Pharmaceutical Industry - Products

1.59 The Australian pharmaceutical industry supplies a number of pharmaceutical products. These include both prescription and non-prescription products. These can be classified as:

Ethical Pharmaceutical Products (S8 and S4 products)

1.60 Ethical pharmaceutical products can only be obtained by a consumer who has a prescription from a medical practitioner. The term ethical pharmaceuticals refers to products listed in S4 and S8 of the Therapeutic Goods Administration's (TGA) SUSDP.

1.61 There are two types of ethical products:

- ethical pharmaceutical products covered by the PBS; and
- ethical pharmaceutical products not covered by the PBS.

Pharmacist-only and Pharmacy-only Products (S3 and S2 products)

1.62 Pharmacist-only and pharmacy-only products are classes of non-ethical products (ie. no prescription is required). Pharmacist-only products are S3 0non-prescription medicines that must be sold in a pharmacy under the supervision of a pharmacist. These products must be stored and displayed behind the counter in a pharmacy. An example of an S3 product is a pack of 50 Panadol tablets which in large quantities are considered to require additional restriction on availability.

1.63 Pharmacy-only products are S2 and are non-prescription medicines that must be sold in a pharmacy, but are not required to be stored behind the counter in a pharmacy. These are medicines which may require advice from a pharmacist to ensure that they are used safely. Examples of S2 products include:

- claratyne;
- sudafed;
- nurofen;
- most cold remedies; and
- nasal sprays.

Other Products

1.64 These products are not scheduled in the SUSDP and can be sold through any distribution outlet. Examples of other products include:

- non-prescription analgesics such as aspirin or paracetamol;
- the heartburn remedy Mylanta;
- saline solutions; and
- non-pharmaceutical products such as cosmetics, perfumery products and toiletries.

This group of products is subject to strong price competition at the retail level as they are sold in a wide variety of outlets, including supermarkets.

Over the Counter (OTC) products

1.65 A term often used in the industry is OTC. OTC products are non-ethical products. Some OTC products must be sold in pharmacies and some may be sold in other retail outlets such as supermarkets. Examples of OTC products includes:

- non-prescription analgesics such as aspirin or paracetamol;
- most topical antifungals (e.g. clotrimazole cream);
- most cough and cold remedies (e.g. cough mixtures, nasal sprays, throat lozenges);
- hayfever treatments containing antihistamines;
- antiseptics; and
- sunscreens.

2. The Application

The Applicant

2.1 Australian Pharmaceutical Industries Limited (API) was founded as a co-operative of pharmacists in 1910. In 1997 API listed on the Australian Stock Exchange.

2.2 API is a national full-line wholesaler of pharmaceutical and other healthcare and personal care products to retail pharmacies, hospitals and healthcare professionals. API operates its wholesale business from 15 warehouses located in New South Wales at Northmead, Newcastle, Wollongong, Kempsey, Tamworth, Orange, Wagga Wagga and Queanbeyan: in Queensland at Richlands, Cairns and Toowoomba; in Victoria at Rowville; in South Australia at Regency Park; in Western Australia at Perth and in Tasmania at Hobart.

2.3 API also operates its own fleet of delivery vehicles in major capital cities and regional centres where its major warehouses are located and sub-contracts transport to third party suppliers in these areas as well as in other regional and rural locations.

2.4 API also owns and operates the retail pharmacy banner groups Chemworld Chemist, Soul Pattinson Chemist, API Health Care and Pharmacist Advice. The number of pharmacist members in these marketing groups is:

TABLE 4: PHARMACIES IN API BANNER GROUPS

Banner	Pharmacists
API Health Care	166
Chemworld	135
Pharmacist Advice	92
Soul Pattinson Chemist	230

Source: Application for Authorisation (A.30215), 2002, p.68.

2.5 API provides financial assistance to retail pharmacies through loans and guarantees and provides retail support services to banner group members. Loans are provided through its wholly-owned subsidiary, API Finance Limited.

2.6 API engages in some manufacturing activities. It manufactures a range of over-the-counter products, general merchandise and toiletries. These products are manufactured under the Souls and Soul Pattinson brands.

The Target

2.7 Sigma Company Limited (Sigma) is also a publicly listed company. Sigma was formed in 1912 as a co-operative of pharmacists that sold packaged pharmaceutical products to its members. Sigma was incorporated in 1927 and commenced manufacturing operations in 1942.

2.8 Today, Sigma is a manufacturer and a full-line wholesaler of pharmaceuticals and associated healthcare and personal products to retail pharmacies and, to a limited extent, hospitals. Sigma manufactures ethical and over-the-counter products under the Sigma and F&M brands. It is also the largest Australian contract manufacturer for Australian and international pharmaceutical companies.

2.9 Sigma's wholesaling division operates in all States and Territories in Australia. Sigma operates 16 warehouses located in Victoria at Laverton, Clayton, Mentone and Shepparton; in New South Wales at Wetherill Park, Newcastle and Kingsgrove; in Queensland at Mount Gravatt, Toowoomba, Rockhampton and Townsville; in Tasmania at Hobart and Launceston; in South Australia at Adelaide; in the Northern Territory at Darwin; and in Western Australia at Perth.

2.10 Sigma also owns and operates the Amcal and Guardian retail pharmacy banner groups. The number of pharmacist members are:

TABLE 5: PHARMACIES IN SIGMA BANNER GROUPS

Banner	Pharmacists
Amcal	395
Guardian	267

Source: Application for Authorisation (A.30215), 2002, p.66.

2.11 Like API, Sigma provides financial assistance to retail pharmacies and provides retail support services to banner group members. As at 31 January 2002, Sigma had provided guarantees to 544 pharmacists valued at $276 million. This was up from 489 guarantees valued at $243 million in the previous year.[12] In its annual report, Sigma states that the provision of guarantees is considered a necessary aspect of the wholesaling business.[13]

The Proposed Acquisition

2.12 API and Sigma intend to merge by way of a scheme of arrangement. API will acquire all the shares in Sigma in exchange for API shares.

The Submission

2.13 The Applicants submit that they are currently facing escalating competitive and commercial pressures in an environment where the Commonwealth Government is seeking to maintain low-cost, high-quality access to pharmaceuticals while reducing expenditure on health. These pressures, it is submitted, are threatening the continuation by API and Sigma of the full range of services they currently provide to pharmacists.

2.14 API and Sigma claim that the merger will reduce infrastructure duplication, increase efficiency and provide significant cost savings which will allow them to

[12] *Sigma Annual Report*, 2001-02, Page 50.
[13] *Sigma Annual Report*, 2001-02, Page 50.

maintain current service and support levels as well as enhance the public benefits they currently provide.

Public Benefits

2.15 API and Sigma submit that the merger would significantly enhance the provision of the following public benefits:

(i) Community access to pharmaceuticals

2.16 API and Sigma submit that, as full-line pharmaceutical wholesalers, they ensure the Commonwealth Government's commitment to provide timely and affordable medication to all Australians regardless of location or medication requirements can be maintained. Full-line wholesalers are the only current providers of a range of services and service levels in relation to the PBS that are of value to pharmacists, their customers and the community, including:

- the delivery of a full range of pharmaceutical products (around 13,000 lines), including all products listed on the PBS (around 2,400 products);
- the delivery of products with special handling requirements, such as cold-chain delivery and secure delivery of product (around 20% of PBS pharmaceuticals); and
- multiple daily deliveries in metropolitan areas, including urgent-response delivery of life-critical products.

2.17 The efficiencies resulting from the merger would substantially increase the range of pharmacies that API and Sigma can sustainably serve and the range of pharmaceuticals and support services they can sustainably supply.

(ii) Community health services

2.18 API and Sigma claim as full-line wholesalers they are instrumental in the provision of community health care both directly and through support of the community pharmacy network, including by:

- promoting quality health care and education through pharmacies;
- providing independent consumer health information and programs;
- participating in the nationwide return of unwanted medicines program and recall management programs to ensure public safety and responsible use of pharmaceuticals; and
- sponsoring professional and business training and continuing education for pharmacists directly or through professional bodies.

2.19 As noted above the parties claim that the merger would allow them to increase the range of pharmacies they can serve on a sustainable basis and the range of pharmaceuticals and support services they provide resulting in a substantial increase in the provision of community support services.

(iii) Regional and rural support

2.20 Only full-line wholesalers provide frequent deliveries of the full range of pharmaceuticals and the extensive support services described above to all pharmacists across Australia, including rural and regional areas. API and Sigma provide these services without any price differentiation between metropolitan and rural and regional areas[14].

2.21 As a result of the efficiencies from the merger, the merged entity would be able to substantially increase the range of pharmacies that it could sustainably serve in regional and rural areas.

(iv) Innovation in access to pharmaceuticals and health services

2.22 API and Sigma claim they are critical to the Commonwealth Government's initiatives to introduce innovation in access to pharmaceuticals and the provision of health service, such as PBS Online, the Better Medication Management Scheme and Health*Connect*. API and Sigma provide a range of IT support systems and interfaces that promote innovation in these areas and will be critical in the development and implementation of new systems by the Government and the Pharmacy Guild by familiarising and accustoming pharmacists to the on-line environment and preparing them for these new initiatives.

2.23 The efficiencies resulting from the merger would substantially increase API and Sigma's ability to invest in the systems necessary to support further innovation.

(v) Reductions in Commonwealth Government expenditure

2.24 The Commonwealth Government wishes to maintain the public benefits described above while reducing (or at least minimising the increase in) expenditure on the health system. In order to do so, it will need to maximise the efficiency of the entire distribution system. Community pharmacies and API and Sigma as full-line wholesalers have emerged as co-dependent parts of an efficient distribution system that delivers the public benefits identified as important to the community and the Commonwealth Government, and their coordination will be critical in controlling Commonwealth Government expenditure on healthcare.

(vi) Small business support

2.25 API and Sigma claim that the merger will substantially enhance the parties' ability to provide a range of services in support of pharmacies as part of the small business sector. These services include:

- the management of pharmacy brands and banner groups, which:
  (i) promotes consistent and high quality of care for pharmacy customers;
  (ii) provides valuable marketing and branding for pharmacies as small businesses (particularly in rural and regional areas where the local

[14] Mayne also provides these services on the same basis as API and Sigma.

community is often fearful that independent pharmacies do not provide the same purchasing benefits afforded by "branded" stores); and

(iii) provides substantial retail expertise not otherwise available to individual pharmacists;

- other pharmacy support services to all pharmacies that promote the effective operation of pharmacies in the community, such as:
  (i) merchandising services including brand coordinated consumer promotions, catalogues and loyalty programs;
  (ii) IT supply and support programs;
  (iii) pharmacy design and fit-out;
  (iv) stock control services;
  (v) sale of business coordination and advice regarding relocation and other opportunities;
  (vi) management advice including category management and retail management services; and
- the provision of finance support for pharmacy purchase, fixtures and fitting, refits, hardware and software technology, supporting pharmacists as small business purchasers and operators, in particular younger pharmacists in an industry where many pharmacists are nearing retirement.

(vii) Export enhancement and import replacement

2.26 API and Sigma claim that the increased scale of manufacturing operations resulting from the merger will potentially allow the merged entity to increase the real value of exports and promote import substitution in pharmaceutical manufacture.

2.27 API and Sigma claim that they currently face higher costs of capital than their returns on capital employed in wholesaling and are unable to attract the additional capital necessary to enhance their manufacturing operations. Sigma claims that its returns on capital in relation to its manufacturing business are significantly higher and would provide a positive return apart from the impact of the wholesaling business. The efficiency gains from merging the two businesses would allow the parties to attract the capital necessary to develop a world-class Australian manufacturing business thereby increasing the value of exports and import substitution.

2.28 The parties further claim that there are significant economies of scope between the manufacture and distribution of certain products, particularly generic pharmaceuticals and OTC products, since manufacturers can obtain information and marketing cost savings by integrating into distribution. API and Sigma provide pharmacy-brand OTC products as part of the banner management and retail support package of services. The parties argue that by maximising these economies of scope, full-line wholesaling can contribute to the public benefit arising from increasing the value of exports and import substitution.

(viii) Industry efficiencies

2.29 API and Sigma claim that the full-line wholesaling model itself provides significant efficiencies to the community. The centralisation of storage and warehousing combined with frequent deliveries provides the following efficiencies:

- frees pharmacists from separately and inefficiently maintaining large stores of pharmaceutical products;
- reduces the risk for individual pharmacists of spoilage and theft; and
- greatly reduces the number of transactions that would be necessary if pharmacists had to order direct from each manufacturer.

2.30 The parties claim that these efficiencies provide an important public benefit, particularly in relation to smaller pharmacies and pharmacies in rural and remote areas, and can have a substantial impact on the long-term viability of these pharmacies since the PBS does not make specific allowance for the higher costs of distributing to them.

(ix) Capital market efficiencies

2.31 API and Sigma claim that there are currently significant constraints on the liquidity of their respective stocks. A merger between the two companies would allow shares in the merged entity to be traded freely and create a top-100 Australian company with a far greater ability to attract institutional investment. The parties claim that the resulting benefits available through rating and more accurate pricing through indexing would significantly lower the merged entity's cost of capital, allowing it to maintain the public benefits set out above on a more sustainable basis. Increased trading and institutional investment would also increase market and institutional discipline on the merged entity, and would allow it to achieve greater economic efficiency by responding to clearer market signals.

Competitive Detriment

2.32 API and Sigma claim that the merger would not result in any anti-competitive detriment for the following reasons:

1. Price, rebate and service levels in the industry would continue to be determined through the interplay of the actions of the Commonwealth Government, as the principal purchaser of pharmaceuticals; manufacturers, as the monopoly providers of most of the products on the PBS; and pharmacists, who seek to source products at the lowest cost. Further, regardless of the number of full-line wholesalers operating in a particular area historically the level of price and service have remained consistent within the state or region. Further, transaction costs associated with different pricing for different geographic areas would outweigh any benefits that might be available from pricing according to wholesaler's share of sales in a region.

2. The alternative distribution channels that currently exist provide an effective safeguard against rising prices or declining service levels. These include short-line wholesalers and a range of direct distribution models, such as vertically integrated distribution by the manufacturer, or negotiating the terms of supply with pharmacists and outsourcing deliveries to a logistics provider or a pharmaceutical wholesaler. Further, there are no significant barriers to the expansion or diversification of existing operators in the event of a rise in prices or a decline in service levels nor will the merger raise any barriers to entry.

3. Mayne/Faulding will continue to be a vigorous and effective competitor due to a range of factors that give it significant advantages over API and Sigma, including:

   - its vertical integration, which gives it significant economies of scope between its wholesaling, substantial manufacturing and demand-generating hospital operations;
   - its cheaper access to capital as part of the Mayne Group; and
   - the economies of scope arising from its general wholesaling business, which may remain even if it demerges its non-healthcare logistics business as is being considered.

4. The Commonwealth Government as effectively a monopsony buyer of PBS products would ensure that price and service levels were maintained at the level most beneficial to the community. The NECG report commissioned by the parties states:

   "If there were any attempt by the merged entity to increase prices or reduce quality of service, the Commonwealth would be likely to reduce the wholesale margin further to eliminate any rents."

3. Relevant Provisions of the Act

Prohibition against anti-competitive acquisitions

3.1 API lodged this Application for authorisation (A30215) pursuant to subsection 88(9) of the Act. An authorisation granted pursuant to s.88(9) provides a statutory exemption from the operation of s.50 of the Act, which may otherwise prevent the proposed acquisition.

3.2 Subsection 50(1) of the Act provides:

> A corporation must not directly or indirectly:
> (a) acquire shares in the capital of a body corporate; or
> (b) acquire any assets of a person;
> if the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in a market.

3.3 Subsection 50(3) provides that the following non-exhaustive list of factors must be taken into account by the Court when evaluating whether an acquisition would have the effect, or be likely to have the effect, of substantially lessening competition:

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

3.4 Subsections 50(4) and (5) provide a mechanism for authorisation of existing contracts for the acquisition of shares or assets provided the contract is conditional on authorisation being granted.

3.5 Subsection 50(6) provides that a 'market' means a market for goods or services in:

> (a) Australia; or
> (b) a State; or
> (c) a Territory; or
> (d) a region of Australia.

3.6 Where an acquisition is found to breach s.50, the Federal Court can order divestiture of shares or assets acquired in contravention of s.50 (s.81(1)) or set aside the transaction (s.81(1A)) and, in addition, impose pecuniary penalties on the acquirer, or any other party who is knowingly concerned in the contravention, of up to $10 million.

If an acquisition has not proceeded and the Federal Court is satisfied that it will breach the Act, it can restrain the parties from proceeding with that acquisition (s.80(1)).

Authorisation of potentially anti-competitive acquisitions

3.7 The Act contains a process whereby certain conduct, including acquisitions, which may breach the restrictive trade practices provisions in Part IV of the Act, can be authorised if there is sufficient public benefit in allowing the conduct.

3.8 The current Application is made under subsection 88(9) of the Act, which provides that:

> (T)he Commission may, upon application by ... a person:
> (a) grant an authorisation to the person to acquire shares in the capital of a body corporate or to acquire assets of a person ...
> and, while such an authorisation remains in force:
> (b) ... section 50 does not prevent the person from acquiring shares or assets in accordance with the authorisation ...

3.9 The Commission shall only grant authorisation if the applicant satisfies the relevant test in subsection 90(9) of the Act. Subsection 90(9) provides that:

> The Commission shall not make a determination granting an authorisation under subsection 88(9) ... unless it is satisfied in all the circumstances that the proposed acquisition would result, or be likely to result, in such a benefit to the public that the acquisition should be allowed to take place.

3.10 In making its determination the Commission gives consideration to both the public benefits and public detriments that are likely to result from the proposed acquisition. In particular, subsection 90(9A) provides that:

> In determining what amounts to a benefit to the public for the purposes of subsection (9):
> (a) the Commission must regard the following as benefits to the public (in addition to any other benefits to the public that may exist apart from this paragraph):
> (i) a significant increase in the real value of exports;
> (ii) a significant substitution of domestic products for imported goods; and
> (b) without limiting the matters that may be taken into account, the Commission must take into account all other relevant matters that relate to the international competitiveness of any Australian industry.

3.11 Should the Commission be satisfied that the acquisition will give rise to the requisite degree of public benefit the Commission may grant authorisation or grant authorisation subject to conditions. If this is not the case, the Commission may refuse authorisation or alternatively, in refusing authorisation, indicate to the applicant how the application could be constructed to change the balance of detriment and public benefit so that authorisation may be granted.

3.12 The Commission has a period of 30 days to consider an application. This may be extended to 45 days for complex matter. It may also be extended by Commission requests for information from the Applicant or with agreement of the Applicant. If the Commission has not made a determination in the relevant period the authorisation is deemed to have been granted.