



## COMMERCE COMMISSION

### **Decision No. 702**

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

**TEC Projects Limited**

and

**Tecpak Industries Limited**

- The Commission:** Mark Berry  
Anita Mazzoleni  
Stephen Gale
- Summary of Application:** The acquisition of the entire plastic packaging business and assets of Tecpak Industries Limited and all its subsidiaries and associated companies.
- Determination:** Pursuant to section 66(3)(a) of the Commerce Act 1986, the Commission determines to give clearance for the proposed acquisition.
- Date of Determination:** 18 November 2010

## THE PROPOSAL

1. A Notice pursuant to s 66(1) of the Commerce Act 1986 (the Act) was registered on 19 October 2010. The notice sought clearance for TEC Projects Limited (TEC Projects or the Applicant) to acquire the entire plastic packaging business and assets of Tecpak Industries Limited and all its subsidiaries and associated companies.

## DECISION

2. The Commission considers that the merged entity is likely to be constrained by a combination of:
  - existing competition from Huhtamaki, Bonson/Cryovac, Packit and IML;
  - the ability of existing competitors to easily expand by quickly increasing output by using existing capacity, and/or by adding more injection moulding machines and robotics; and
  - the countervailing power of large customers that could threaten to switch, support expansion by a smaller manufacturer, or sponsor new entry.
3. Accordingly, the Commission is satisfied that the proposed acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in the relevant market, namely the national market for the manufacture and supply of injection moulded rigid thin-walled plastic food containers under 5L.

## ANALYTICAL FRAMEWORK

4. The Commission applies a consistent analytical framework to all its clearance decisions.<sup>1</sup> The first step is to determine the relevant markets. As acquisitions considered under s 66 are prospective, the Commission uses a forward-looking type of analysis to assess whether a lessening of competition is likely in the defined market(s). Hence, an important subsequent step is to establish the appropriate hypothetical future with and without scenarios, defined as the situations expected:
  - with the acquisition (the factual); and
  - in the absence of the acquisition (the counterfactual).
5. The impact of the acquisition on competition is then viewed as the prospective difference in the extent of competition in the relevant markets between those two scenarios. To analyse the extent of competition in the factual and counterfactual, the Commission considers:
  - existing competition;
  - potential competition;
  - other competition factors, such as the countervailing market power of buyers and suppliers; and
  - co-ordinated behaviour – whether the acquisition would enhance the ability of market participants to collude either tacitly or explicitly.

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<sup>1</sup> Commerce Commission, *Mergers and Acquisitions Guidelines*, January 2004.

## THE PARTIES

### *The Acquirer – TEC Projects Limited*

6. TEC Projects is a wholly-owned subsidiary of Pact Group (NZ) Limited. In New Zealand, Pact Group manufactures and supplies a range of plastic packaging products, including large and small food storage containers, food trays, PET<sup>2</sup> bottles and closures.

### *The Target - Tecpak*

7. Tecpak Industries is a New Zealand packaging company that manufactures and supplies small plastic packaging products from its plant in Dunedin.

## OTHER PARTIES

### *Thin-Walled Plastic Container Manufacturers*

8. There are a number of firms that manufacture and wholesale supply small rigid thin-walled plastic food containers in New Zealand. Of relevance to this application are:
- Bonson Industrial Company Limited (Bonson);
  - Huhtamaki New Zealand Limited (Huhtamaki);
  - IML Plastics Limited (IML);
  - NCI Packaging Limited (NCI); and
  - Packit Packaging Limited (Packit).

### *Other Plastic Packaging Manufacturers*

9. During this investigation, the Commission interviewed two firms that manufacture types of plastic packaging other than those that are the subject of this acquisition:
- Sealed Air (New Zealand) trading as Cryovac Sealed Air (Cryovac); and
  - Viscount Plastics (NZ) Limited (Viscount).

### *Customers*

10. The Commission interviewed a number of firms that purchase small rigid thin-walled plastic food containers:
- Arataki Honey Limited (Arataki Honey);
  - Emerald Foods Limited (Emerald Foods);
  - Fonterra Co-operative Group Limited (Fonterra);
  - Hansells Food Group Limited (Hansells); and
  - Talleys Group Limited (Talleys).

## INDUSTRY BACKGROUND

11. Small rigid thin-walled plastic food containers have a wide variety of uses and industry applications. They are made of a range of different resins and are formed using either injection moulding (IM) or extrusion and thermoforming (E&T). All of these containers have the basic function of preserving shelf life and product integrity.

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<sup>2</sup> Polyethylene terephthalate, a resin commonly used to manufacture soft drink and water bottles.

Many manufacturers of fast moving consumer goods (FMCG) also use packaging as a marketing tool. This is achieved by using shape and labelling to make their products more interesting and attractive to purchasers.

12. The key differences between IM and E&T containers relate to the precision offered by the IM manufacturing process. IM containers can be manufactured with special features such as custom-designed shapes, mechanical tamper evident seals, and in-mould labels. E&T containers are mostly standardised and produced for high volume commodity products.
13. Some examples of typical thin-walled plastic containers, manufacturers, and customers are presented in Table 1 below.

**Table 1. Examples of Manufacturers and Customers of Small Rigid Thin-Walled Plastic Containers**

| Product                                      | Packaging Type           | Manufacturers  | Customers   |
|--|--------------------------|--|---|
| Dairy desserts, cream cheese, sour cream     | E&T<br>Injection Moulded | Huhtamaki<br>Packit<br>Pact Group<br>Tecpak  | Fonterra  |
| Ice cream, dips, other small food containers | E&T<br>Injection Moulded | Bonson/Cryovac<br>Huhtamaki<br>IML Plastics<br>NCI<br>Packit<br>Pact Group<br>Tecpak | Arataki Honey<br>Emerald Foods<br>Fonterra<br>Hansells<br>Kiwi Ice Cream<br>Talleys |
| Spreads/yellow fats                          | E&T<br>Injection Moulded | Huhtamaki<br>Pact Group<br>Tecpak  | Fonterra<br>Goodman Fielder<br>Hansells   |
| Yoghurt                                      | E&T<br>Injection Moulded | Bonson/Cryovac<br>Huhtamaki<br>Packit<br>Pact Group                                  | Fonterra  |

Source: Industry Participants

## MARKET DEFINITION

14. The Commission has previously considered thin-walled plastic food containers in Decision 390<sup>3</sup> and 583.<sup>4</sup> In Decision 390 the Commission concluded that thin-walled plastic food containers formed a separate market from food trays. The Commission noted that IM was the process typically used to make food containers, and involved different technologies from the E&T process used to manufacture food trays.
15. In Decision 583 the Commission concluded that the relevant market was the market for the manufacture and wholesale supply of small rigid plastic containers up to 20L in New Zealand. However, Decision 583 differs from the current application because;
  - the main area of overlap was PET bottles;
  - the Commission's analysis focused on manufacturing methods other than injection moulding; and
  - the 'small' rigid plastic containers were larger (i.e., 5-20L vs. under 5L) and were generally used for holding commercial liquids, as opposed to food products.

<sup>3</sup> Decision 390, *PolarCup (NZ) Limited / Carter Holt Harvey Plastic Products Division*, 20 April 2000.

<sup>4</sup> Decision 583, *Visy Industrial Plastics (NZ) Limited / Alto Holdings Limited*, 28 June 2006.

16. In 2009, the Australian Competition & Consumer Commission (ACCC) considered the proposed acquisition by Pact Group of certain assets from Huhtamaki Australia Pty Ltd (Pact Group/Huhtamaki).<sup>5</sup> Both parties manufactured and supplied small thin walled rigid plastic containers. The ACCC did not form a definitive view as to market definition relevant for that transaction. Nonetheless, it considered that small rigid plastic containers manufactured using IM were in a separate market to those manufactured using E&T.
17. The Applicant submitted that the relevant market is likely to be *the national market for the manufacture and supply of small rigid plastic containers*. However, for the purposes of its competition analysis, the Applicant used a more narrowly defined market in order to capture the area of overlap, i.e., thin-walled plastic containers manufactured using the injection moulding process. The Applicant submitted that as there would be no competition issues in this narrow market, there would be no issues in a wider market (encompassing both IM and E&T plastic containers).
18. The Commission found that it might be possible to have a separate product market for IM containers and a separate product market for E&T containers. For example, many customers that use IM containers do not consider E&T to be a substitute due to IM containers being of a higher quality.
19. It might also be possible to define a product market that encompasses both IM and E&T containers as the two types of containers serve the same functional purpose. The Commission also discovered that some larger E&T customers are switching to IM, particularly as the price of IM containers decrease as economies of scale are achieved.
20. However, for the purposes of the analysis, the Commission considers it is unnecessary to reach a definitive conclusion on whether IM containers and E&T containers should be in the same product market. This is because:
  - there is broad industry consensus in respect of the Applicant's proposed narrow market definition;
  - the proposed acquisition results in aggregation solely in respect of IM containers (Tepak does not produce E&T containers);
  - the aggregation and competition concerns are effectively caught within the applicant's market definition; and
  - if there are no competition concerns in the narrower IM market, then it is unlikely that there would be concerns in a market which incorporates both E&T and IM containers.
21. In respect of container size, for most manufacturers the popular size is under 1L, with some making 2L ice cream tubs. The Applicant could make containers up to 5L using existing machinery and infrastructure. Manufacturing containers above 5L would require additional investment in new injection moulding machinery and robotics that are capable of processing larger-sized containers. The Commission therefore considers that the relevant market is for plastic food containers of up to 5L in capacity.
22. The Applicant submitted that the geographic dimension of the market is likely to be national. Manufacturers canvassed by the Commission agreed, as they typically

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<sup>5</sup> ACCC, *Proposed Acquisition by Pact Group of certain assets from Huhtamaki Australia Pty Ltd*, 15 September 2009. <http://www.accc.gov.au/content/index.phpml/itemId/892945/fromItemId/751043>.

distribute their products nationwide and a number of them also export to Australia.<sup>6</sup> Accordingly the Commission is of the view that the geographic extent of the market is national in scope.

23. The Commission concludes that the market relevant to this acquisition is the national market for the manufacture and supply of injection moulded rigid thin-walled plastic food containers under 5L (the IM market).

## FACTUAL/COUNTERFACTUAL

### *Factual*

24. In the factual, TEC Projects would own and operate Tecpak's injection plastic packaging facilities in Dunedin.

### *Counterfactual*

25. Absent the acquisition, TEC Projects and Tecpak would maintain their existing operations. The Commission considers the relevant counterfactual is the status quo.<sup>7</sup>

## COMPETITION ANALYSIS

26. The Applicant submitted that it would continue to face constraint from existing competitors which could readily increase output to meet additional demand from new customers. In particular, Huhtamaki would "retain practically the same market share as the merged entity, allowing it to continue operating as a very vigorous and effective competitor."
27. Table 2 provides estimated market shares for the major firms that manufacture/import and supply injection moulded thin-walled plastic food containers under 5L in New Zealand.

**Table 2. Estimated Market Shares for the IM Market in the 2009/10 Financial Year**

| Manufacturer           | Revenue<br>(2009/10 FY) | Market Share %<br>(Revenue) |
|------------------------|-------------------------|-----------------------------|
| Pact Group             | \$[ ]                   | [ ]%                        |
| Tecpak                 | \$[ ]                   | [ ]%                        |
| <b>Combined Entity</b> | <b>\$[ ]</b>            | <b>[ ]%</b>                 |
| Bonson/Cryovac         | \$[ ]                   | [ ]%                        |
| Huhtamaki              | \$[ ]                   | [ ]%                        |
| IML Plastics           | \$[ ]                   | [ ]%                        |
| Packit                 | \$[ ]                   | [ ]%                        |
| NCI                    | \$[ ]                   | [ ]%                        |
| <b>Total</b>           | <b>\$[ ]</b>            | <b>100%</b>                 |

Source: Industry Participants.

28. Table 2 shows that post acquisition, the combined entity would have a market share of [ ]% and the three-firm concentration ratio would increase from [ ]% to [ ]%. This would fall outside of the Commission's safe harbours.
29. In the factual scenario, Huhtamaki would be the largest competitor, with a market share of [ ]%. [ ] challenged the Applicant's assertions regarding Huhtamaki's

<sup>6</sup> For example, [ ] production is exported to Australia.

<sup>7</sup> [ ]

incentive or ability to constrain the combined entity, noting that Huhtamaki had recently sold its Australian assets to the Pact Group.

[

]. The Commission considers that Huhtamaki would provide competitive constraint for the merged entity in the factual.

30. Bonson and Cryovac have formed a partnership whereby Bonson manufactures injection moulded thin-walled plastic containers at its plant in Auckland under contract for Cryovac's customers. Cryovac already manufactures other types of plastic packaging. The partnership enables the two firms to leverage off Cryovac's existing relationships and provide new product ranges to Cryovac's customers [ ]. The Commission considers that Bonson and Cryovac would provide additional competitive constraint in the factual.
31. Industry participants canvassed by the Commission considered that there were limited barriers to switching, even for large contracted customers that have customized moulds. [ ] submitted that the proposed acquisition may enhance Pact Group's economies of scale and scope and thus provide it with a competitive advantage over smaller firms. However, customers such as [ ] were not concerned as they retain a suite of suppliers in order to ensure tender prices remain competitive. Competitors and customers alike provided the Commission with a variety of examples of switching between manufacturers. Competitors considered this would likely continue and would constrain the merged entity in the factual.
32. The Commission found that the merged entity would further be constrained by existing competitors who could easily expand by:
- increasing output volumes immediately by utilizing existing capacity and increasing staff and shifts;
  - adding additional capacity within six months by either increasing the number of moulding cavities and/or by purchasing more injection moulding machines
33. Existing competitors such as [ ] stated that expansion could be easily justified by securing new business with a large customer.  
[ ]
34. [ ] submitted that, post acquisition, it would be difficult for a large customer to switch to a small supplier. However, [ ] said that they would support expansion by smaller manufacturers in the event of an exercise of market power by the combined entity post-acquisition.
35. The Applicant submitted that imports form a significant proportion of the relevant market, and would continue to act as a constraint post-acquisition. Most industry participants canvassed by the Commission disagreed. They were of the view that containers imported from Asia were only viable alternatives for low-cost disposable packaging (e.g., takeaway containers). [ ] cited lower manufacturing costs in New Zealand, additional transport costs, and exposure to currency fluctuations as reasons why imports from Australia would not be cost effective.  
[ ]

36. All large customers canvassed by the Commission advised that they would continue to exercise countervailing power post-acquisition by:
- the threat of switching, e.g., [ ] retain a suite of suppliers and use prices submitted by other credible bidders to exert downward pricing pressure during the tender process;
  - supporting expansion by a smaller manufacturer, e.g., [ ] have supported expansion by Bonson/Cryovac; or
  - sponsorship of new entry, e.g., [ ] said that it would seek to support entry by [ ].
37. The Commission considers that the merged entity is likely to be constrained by a combination of:
- existing competition from Huhtamaki, Bonson/Cryovac, Packit and IML;
  - the ability of existing competitors to easily expand by quickly increasing output by using existing capacity, and/or by adding more injection moulding machines and robotics; and
  - the countervailing power of large customers that could threaten to switch, support expansion by a smaller manufacturer, or sponsor new entry.
38. The Commission is of the view that the proposed acquisition would be unlikely to enhance the scope for coordinated effects, due to existing excess capacity, the ease of expansion, and the countervailing power of large customers.
39. Accordingly, the Commission is satisfied that the proposed acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in the national market for the manufacture and supply of injection moulded rigid thin-walled plastic food containers under 5L.

## **OVERALL CONCLUSION**

40. Having considered the competition effects of the proposed acquisition, the Commission is satisfied that the proposed acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in the national market for the manufacture and supply of injection moulded rigid thin-walled plastic food containers under 5L.



**DETERMINATION ON NOTICE OF CLEARANCE**

41. Pursuant to section 66(3)(a) of the Commerce Act 1986, the Commission determines to grant clearance for TEC Projects Limited to acquire the entire plastic packaging business and assets of Tecpak Industries Limited and all its subsidiaries and associated companies.

Dated this 18<sup>th</sup> day of November 2010



Dr Mark Berry  
Chair