



COMMERCE COMMISSION

Decision No. 662

Determination pursuant to the Commerce Act 1986 in the matter of an application for a merger transaction between

Coca-Cola Amatil (NZ) Limited

and

Old Fashioned Foods Limited

The Commission: Denese Bates QC
Peter JM Taylor
Gowan Pickering

Summary of Application: The acquisition of the Baker Halls and Baker Halls Original brands, a hot-fill production line, and other associated assets.

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: 28 January 2009

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THE PROPOSAL

1. On 5 December 2008, the Commission received a notice pursuant to s 66(1) of the Commerce Act 1986 (the Act). The notice sought clearance for the acquisition by Coca-Cola Amatil (NZ) Limited (CCA) of the Baker Halls and Baker Halls Original brands, a hot-fill production line, and other associated assets (the Baker Halls Business) from Old Fashioned Foods Limited (OFF).
2. In addition to the acquisition of the assets the transaction proposes a [

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DECISION

3. The Commission is satisfied that existing competition in the relevant market would be likely to constrain the combined entity post-acquisition. Consequently, the Commission is satisfied that the proposed acquisition would be unlikely to result in a substantial lessening of competition in the relevant market.

ANALYTICAL FRAMEWORK

4. The Commission uses an analytical framework¹ for assessing a substantial lessening of competition in the context of an acquisition. The first step is to determine the relevant market or markets. To do this, the Commission identifies the areas of overlap between the acquirer and the target, and then considers what, if any, products and geographic regions, constitute relevant close substitutes from both a customer's and a supplier's point of view.
5. The Commission uses a forward-looking type of analysis to assess whether a lessening of competition is likely, so, an important subsequent step is to establish the appropriate hypothetical future with and without scenarios, defined as the situations expected:
 - with the acquisition in question (the factual); and
 - in the absence of the acquisition (the counterfactual).
6. The impact of the acquisition on competition is then viewed as the prospective difference in the extent of competition in the market between those two scenarios.
7. The Commission analyses the extent of competition in each relevant market for both the factual and counterfactual scenarios, in terms of:
 - existing competition - the degree to which existing competitors compete and their ability and incentives to expand production in the event that the combined entity raises prices;
 - potential competition – the ability of businesses to enter the market and thereafter expand, given an inducement to do so;

¹ Commerce Commission, *Mergers and Acquisitions Guidelines*, January 2004.

- other competition factors, such as the countervailing market power of buyers - the combined entity may be constrained if purchasers were able to exert a substantial influence on the price, quality or terms of supply of a good or service;
 - coordinated behaviour – whether the acquisition would enhance the ability of market participants to collude either tacitly or explicitly.
8. A comparison of the extent of competition in the relevant markets in both the factual and counterfactual scenarios enables the Commission to assess the probable extent of the lessening of competition under the proposed acquisition, and whether that contemplated lessening is likely to be substantial.

PARTIES

The Acquirer - CCA

9. CCA is a company incorporated in New Zealand. CCA is ultimately 100% owned by Coca-Cola Amatil Limited (CCA Australia), which is a publicly listed Australian company. In New Zealand, CCA manufactures a wide range of non-alcoholic beverages (NABs) including carbonated soft drinks, sports drinks, bottled water, fruit drinks, new age drinks and cordials.
10. Of relevance to the Commission's current investigation is the manufacture and supply of cordials. In New Zealand, CCA's cordial brands are Schweppes and Roses.

The Target – OFF's Baker Halls Business

11. The Baker Halls business is a cordial manufacture and supply business, based in Auckland, that is 100% owned by OFF, a manufacturer and exporter of food and beverages.
12. In addition to the Baker Hall business, OFF manufactures the Thriftee line of cordials. [].
13. Currently, OFF utilises [] of the capacity of its hot-fill production line to contract manufacture certain NABs for CCA. CCA production constitutes approximately [] of OFF's hot-fill capacity. The remaining capacity is used to manufacture the Baker Hall brands [].

Other Relevant Parties

14. Barkers Fruit Processors Ltd (Barkers) – is a Geraldine based manufacturer of a number of food and beverage products including the Barkers range of cordials. []].
15. GlaxoSmithKline (NZ) Ltd (GSK) – imports the Ribena brand of blackcurrant cordial and ready-to-drink (RTD) products. GSK manufactures the Ribena cordial sold in New Zealand in Malaysia from New Zealand grown blackcurrants.
16. Foodstuffs Co-Operatives (Foodstuffs) – are three separate regionally based co-operatives which operate the New World and Pak’n’Save supermarket banners nationwide. Additionally Foodstuffs owns and retails the Pam’s and Budget house brands, which include (Pam’s) cordial.
17. Progressive Enterprises Ltd (Progressive) – is an Australian owned nationwide supermarket operator with its head office in Auckland. Progressive operates the Countdown, Woolworths and Foodtown supermarket banners. Additionally Progressive owns and retails the Signature Range, Home Brand and Select house brands, and currently retails cordial products under the Signature Range brand.

INDUSTRY BACKGROUND

18. Cordial products are manufactured using a mixture of concentrated fruit juice, flavourings, colourings, sugar and water – using a process that is similar to the process used for the manufacture of other reconstituted fruit juice beverages. Cordials come in a syrup form and require the consumer to dilute with water to taste. As a general rule, cordials are a more cost effective option per litre for consumers than RTD juices and drinks.
19. Cordial manufacture can occur either on a cold-fill line, which requires preservatives to be added to the product to make it shelf stable, or on a hot-fill line, where the product is heated at the time it is bottled and sealed to maintain its sterilisation. Presently, Barkers and Baker Halls hot-fill their products, while CCA cold-fills its Schweppes and Roses brands.
20. Several market participants import finished cordial to New Zealand, including GSK (Ribena) and Buderim Ginger Ltd (Buderim).
21. Supermarkets retail approximately [] of the cordial available in New Zealand, which includes the supermarkets’ house brands.
22. Industry participants consider the market to be mature, although recognise that there is a small degree of annual growth; on average []].
23. Industry participants informed the Commission that price and brand are the two main factors upon which consumers differentiate cordial products. Ribena, for example, is a strong brand perceived as a premium cordial, and as such, commands a price premium. Thriftee, on the other hand, is at the budget end of the spectrum.

MARKET DEFINITION

24. Industry participants informed the Commission that there is a high degree of supply-side substitutability between the production of cordials and other NABs, in particular, sports drinks and flavoured water. The Applicant estimates that [] of the equipment for manufacturing sports drinks and flavoured water is the same as that used to manufacture cordials. Additionally industry participants can choose whether to manufacture or import cordial products for supply.
25. Notwithstanding the high degree of supply-side substitutability, the Commission considers there to be limited demand-side substitutability between cordials and other NABs. Industry participants informed the Commission if a consumer were to switch away from a particular cordial brand due to a price increase, that consumer would be most likely to switch to another cordial product, rather than switch to a different type of NAB.
26. The Commission previously considered NAB markets in *Decision 481 The Coca-Cola Company / Rio Beverages Ltd.* The Commission concluded that there were separate product markets for the manufacture/importation and supply of carbonated soft drinks, bottled water, fruit juices and new age beverages. The Decision noted that separate markets could exist for (inter alia) cordials, however as cordial was not relevant to the acquisition in question, a conclusion was not drawn on the matter.
27. Industry participants informed the Commission that, as in Decision 481, cordial supply occurs on a nationwide basis.
28. For the purposes of this Application, the Commission considers the relevant market to be the national market for the manufacture/ importation and supply of cordial. The Commission notes that if there are no competition concerns in a conservatively defined cordial market, it is unlikely that issues would arise in a more broadly defined market.

COUNTERFACTUAL

29. OFF advised the Commission that [

]. The Commission is satisfied that in the counterfactual the Baker Halls business would be sold to an independent third party.

COMPETITION ANALYSIS

Existing Competitors

30. The market is characterised by four medium to large competitors and a number of smaller competitors. Based on volume, the proposed acquisition would see [

] as Table 1 demonstrates.

Table 1 - Market Shares by Value and Volume in the New Zealand Cordial Market (through supermarkets)*

	Brands	Sales by value (\$000s)	Market share by value	Sales by volume (thousands of reconstituted litres²)	Market share by volume
CCA - Roses	Roses	[]	[]	[]	[]
CCA - Schweppes	Schweppes	[]	[]	[]	[]
The Baker Hall Business	Baker Halls	[]	[]	[]	[]
Merged Entity		[]	[]	[]	[]
Barker Fruit Processors Ltd	Barkers	[]	[]	[]	[]
[]	[]	[]	[]	[]	[]
Barkers' total production		[]	[]	[]	[]
Old Fashioned Foods Ltd	Thriftee	[]	[]	[]	[]
[]	[]	[]	[]	[]	[]
OFF's total production		[]	[]	[]	[]
GlaxoSmithKline	Ribena	[]	[]	[]	[]
Buderim Ginger Ltd	Buderim	[]	[]	[]	[]
Kaban Industries Ltd	Kaban	[]	[]	[]	[]
Liquidmaid Products Ltd	Fresha	[]	[]	[]	[]
West's NZ Ltd	West's	[]	[]	[]	[]
Thorncroft Drinks Ltd	Thorncroft	[]	[]	[]	[]
Lloyd Products Pty Ltd	Bickfords	[]	[]	[]	[]
Sykes Cordials Ltd	Sykes	[]	[]	[]	[]
Nichols Plc	Vimto	[]	[]	[]	[]
Belvoir Fruit Farms Ltd	Belvoir	[]	[]	[]	[]
Other		[]	[]	[]	[]
TOTAL		[]	100.00%	[]	100.00%

*Source: ACNielsen data from September 2007 to September 2008

31. Table 1 includes the Thriftee range in OFF's total production. [

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² "Reconstituted Litres" describes how many finished beverage litres can be made up after dilution with water.

32. []].
33. Based on the figures in Table 1, in the factual the combined entity would have a market share of [] and the three-firm concentration ratio would exceed 70%. Based on these figures, the proposed acquisition would be outside the Commission's safe harbour guidelines.
34. However, safe harbour guidelines are one of a number of factors the Commission uses to analyse the state of competition in a market, and the guidelines are not considered determinative in isolation.
35. Cordials are regularly promoted through supermarket specials, and access to promotional slots is decided on through a negotiation process between supermarkets and suppliers. The supermarkets ultimately control how frequently products are promoted and the amount of shelf space suppliers receive.
36. Competition between industry participants for the allocation of promotional slots and shelf space in supermarkets is evidence of the strength of existing competition in the market.
37. In addition, industry participants advised the Commission that in the event the combined entity raised prices, consumers would be likely to look to other cordial brands before switching to other NABs. Industry participants further advised that they could easily expand their production to meet demand in the event that the combined entity increased prices to the extent that end consumers switched brands. They advised the Commission that they could do this either through expanding their own plant or by engaging a contract packer.
38. However, it has to be recognised that whilst industry participants have the physical ability to expand, economic thinking generally suggests that their incentive to do so may be limited to some degree. The reason lies in the larger profits that they would be likely to earn if they were not fully to make up the shortfall in supply by the combined entity. The reduction in overall market supply would cause prices to rise, allowing all parties to enjoy higher profits. The Commission's assessment, in this case, is that the overall supply changes are likely to be small and therefore that any price increase is also likely to be small.

Other Competition Factors

39. Industry participants advised that the market is mature, with limited growth and limited product innovation and as a result, consider the most effective way to compete is to engage in in-store discount promotions.
40. Industry participants provided the Commission with examples of instances where the supermarkets had withheld promotional slots in order to 'discipline' suppliers. To this extent, the Commission considers that, in this particular instance, the supermarkets have a considerable degree of countervailing power.

Competition Analysis: Conclusion

41. Based on these factors, the Commission is satisfied that the current level of existing competition in the relevant market is likely to constrain the combined entity post-acquisition. In addition, the Commission is of the view that supermarkets have a considerable degree of countervailing power over cordial suppliers. Consequently, 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/ importation and supply of cordial.

DETERMINATION ON NOTICE OF CLEARANCE

42. Pursuant to section 66(3)(a) of the Commerce Act 1986, the Commission determines to give clearance for the acquisition by Coca-Cola Amatil (NZ) Limited of the Baker Halls and Baker Halls Original brands, the hot-fill production line and other associated assets of Old Fashioned Foods Limited.

Dated this 28th day of January 2009

Peter JM Taylor
Division Chair