

## Determination

### **H. B. Fuller Company Australia Pty Limited and Advanced Adhesives (New Zealand) Limited [2016] NZCC 8**

<b>The Commission:</b>	Dr Mark Berry Elisabeth Welson Dr Jill Walker
<b>Summary of application:</b>	H. B. Fuller Company Australia Pty Limited seeks clearance to acquire the business and assets of Advanced Adhesives (New Zealand) Limited
<b>Determination:</b>	Under s 66(3)(a) of the Commerce Act 1986, the Commerce Commission gives clearance to the proposed acquisition.
<b>Date of determination:</b>	20 April 2016

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## The proposed acquisition

1. On 18 February 2016, the Commerce Commission (the Commission) received an application from H. B. Fuller Company Australia Pty Limited (H. B. Fuller) under s 66(1) of the Commerce Act 1986 (the Act) seeking clearance to acquire the business and assets of Advanced Adhesives (New Zealand) Limited (Advanced Adhesives).

## The decision

2. The Commission gives clearance to the proposed merger as it is satisfied that the proposed merger will not have, or would not be likely to have, the effect of substantially lessening competition in a market in New Zealand.

## Our framework

3. Our approach to analysing the competition effects of the proposed acquisition is based on the principles set out in our Mergers and Acquisitions Guidelines.<sup>1</sup>

## The substantial lessening of competition test

4. We determine whether a merger is likely to substantially lessen competition in a market by comparing the likely state of competition if the merger proceeds (the scenario with the merger, often referred to as the factual), with the likely state of competition if the merger does not proceed (the scenario without the merger, often referred to as the counterfactual).<sup>2</sup>
5. We make a pragmatic and commercial assessment of what is likely to occur in the future, with and without the acquisition based on the information we obtain through our investigation and taking into account factors including market growth and technological changes.
6. A lessening of competition is generally the same as an increase in market power. Market power is the ability to raise price above the price that would exist in a competitive market (the 'competitive price'),<sup>3</sup> or reduce non-price factors such as quality or service below competitive levels.
7. Determining the scope of the relevant market or markets can be an important tool in determining whether a substantial lessening of competition is likely.
8. We define markets in the way that we consider best isolates the key competition issues that arise from the merger. In many cases this may not require us to precisely define the boundaries of a market. A relevant market is ultimately determined, in the words of the Act, as a matter of fact and commercial common sense.<sup>4</sup>

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<sup>1</sup> Commerce Commission *Merger and Acquisition Guidelines* (July 2013) <http://www.comcom.govt.nz/business-competition/guidelines-2/mergers-and-acquisitions-guidelines/>

<sup>2</sup> *Commerce Commission v Woolworths Limited* (2008) 12 TCLR 194 (CA) at [63].

<sup>3</sup> Or below competitive levels in a merger between buyers.

<sup>4</sup> Section 3(1A). See also *Brambles v Commerce Commission* (2003) 10 TCLR 868 at [81].

### When a lessening of competition is substantial

9. Only a lessening of competition that is substantial is prohibited. A lessening of competition will be substantial if it is real, of substance, or more than nominal.<sup>5</sup> Some courts have used the word ‘material’ to describe a lessening of competition that is substantial.<sup>6</sup>
10. There is no bright line that separates a lessening of competition that is substantial from one that is not. What is substantial is a matter of judgement and depends on the facts of each case. Ultimately, we assess whether competition will be substantially lessened by asking whether consumers in the relevant market(s) are likely to be adversely affected in a material way.

### When a substantial lessening of competition is likely

11. A substantial lessening of competition is ‘likely’ if there is a real and substantial risk, or a real chance, that it will occur. This requires that a substantial lessening of competition is more than a possibility, but does not mean that the effect needs to be more likely than not to occur.<sup>7</sup>

### The clearance test

12. We must clear a merger if we are satisfied that the merger would not be likely to substantially lessen competition in any market.<sup>8</sup> If we are not satisfied – including if we are left in doubt – we must decline to clear the merger.<sup>9</sup>
13. The burden of proof lies with H. B. Fuller as the applicant to satisfy us on the balance of probabilities that the acquisition is not likely to have the effect of substantially lessening competition.<sup>10</sup> The decision to grant or refuse a clearance is necessarily to be made on the basis of all the evidence.<sup>11</sup> We will sometimes have before us conflicting evidence from different market participants and must determine what weight to give to the evidence of each party.<sup>12</sup>

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<sup>5</sup> *Woolworths & Ors v Commerce Commission* (2008) 8 NZBLC 102,128 (HC) at [127].

<sup>6</sup> *Ibid* at [129].

<sup>7</sup> *Woolworths & Ors v Commerce Commission* (HC) above n 5 at [111].

<sup>8</sup> Section 66(3)(a).

<sup>9</sup> In *Commerce Commission v Woolworths Limited* (CA), above n 2 at [98], the Court held that “the existence of a ‘doubt’ corresponds to a failure to exclude a real chance of a substantial lessening of competition”.

<sup>10</sup> *Commerce Commission v Southern Cross Medical Care Society* (2001) 10 TCLR 269 (CA) at [7]. *Commerce Commission v Woolworths Ltd* (CA) above n 2 at [97].

<sup>11</sup> *Commerce Commission v Woolworths Ltd* (CA) above n 2 at [101].

<sup>12</sup> *Brambles New Zealand Ltd v Commerce Commission* above n 4 at [64].

## Industry background

### Overview

14. This merger concerns the supply of industrial adhesives with the major focus on two main adhesive technologies in which the merging parties are active: hot-melt and water-based adhesives.<sup>13</sup> Each of these technologies has different applications.

#### *Hot-melt adhesives*

15. Hot-melt adhesives (hot-melts) are supplied in solid form before being heated into liquid form – often using electric glue guns – and then solidifying on cooling. Hot-melts are designed to provide a strong bond and are used where high-speed bonding is required. They can also be used to bond non-porous surfaces.
16. Hot-melts are used by various industries in a range of applications. Applications relevant to this merger are:
- 16.1 case, carton and package-sealing;
  - 16.2 packaging manufacture and carton making (collectively, paper-converting); and
  - 16.3 bookbinding, where hot-melts are used for fastening sheets of paper together, including spine gluing of hard cover books and other printed matter.
17. There is only one manufacturer of hot-melts in New Zealand (Advanced Adhesives) with the remaining suppliers importing the product including from Australia, Asia, the United Kingdom and USA.

#### *Water-based adhesives*

18. Water-based adhesives involve the mixing of raw materials (polymers and other additives) with water. These adhesives are activated when the water evaporates or is absorbed. Unlike hot-melts, these products are generally used on porous surfaces where high-speed bonding is not required.
19. Water-based adhesives are used for different purposes than hot-melts. For example, within the broader application of paper-converting, water-based adhesives are used to make products such as paper towels, toilet tissues and to laminate cardboard to make corrugated cardboard packaging, whereas hot-melts are used for cardboard box manufacture, bag and sack making, and self-adhesive labels. In woodworking and joinery, water-based adhesives are used for edge panel gluing and general furniture joinery whereas hot-melts are used for edge banding and profile wrapping.<sup>14</sup>
20. Almost all water-based adhesives sold in New Zealand are manufactured locally.

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<sup>13</sup> The other main technology is solvent-based adhesives.

<sup>14</sup> Profile wrapping is a process by which a decorative surface is laminated on to a substrate.

## Key parties

### H. B. Fuller

21. H. B. Fuller forms part of a global group of companies that are involved in the manufacture and supply of adhesives, sealants and other speciality chemical products. In New Zealand, H. B. Fuller mainly supplies hot-melts for a range of applications, including food and other packaging, other paper products (eg adhesive labels), woodworking, bookbinding and hygiene products. These include a range of specialty hot-melts, such as those used in the production of pressure-sensitive labels. It also supplies a small volume of water-based adhesives to customers for use in bookbinding, woodworking and paper-converting.

### Advanced Adhesives

22. Advanced Adhesives is a private, family-owned company. In New Zealand it manufactures and supplies a range of water-based adhesives as well as mainly 'standard' grades of hot-melts, both of which are used in a range of applications, including food and other packaging, other paper products, bookbinding and woodworking. While Advanced Adhesives manufactures some more specialised adhesive products at its New Zealand plant, such as rubber-based adhesives, it does not have the same capability as H. B. Fuller to produce the higher performance products, such as the pressure-sensitive labels that use hot-melt adhesives.

## Other relevant parties

### Competitors

#### *Henkel New Zealand Limited*

23. Henkel New Zealand Limited (Henkel), which is a subsidiary of the German-based Henkel Ag Co KGa, manufactures water-based adhesives in New Zealand. It also imports hot-melts from other members of the Henkel group for supply to a wide range of customers.

#### *Other competitors*

24. Other suppliers of hot-melts and water-based adhesives include G&A Adhesives Limited (G&A) and Bostik New Zealand Limited (Bostik). Both of these firms manufacture water-based adhesives in New Zealand and import and supply hot-melts. However, Bostik has a limited presence in the supply of hot-melts and its sales are mainly confined to customers operating in the construction sector.
25. In addition, there are various importers of hot-melts, including Adhesion Services Limited (Adhesion Services), a locally based company, and the Australian-based Johns Adhesives (Johns) and Jowat Adhesives (Jowat), both of which supply into New Zealand.

#### *Customers*

26. There is a diverse range of customers for hot-melts and water-based adhesives. The major users of relevance to this merger include:

- 26.1 companies that use these products in the sealing of cartons and the making of packaging, such as Fonterra Co-operative Group Limited, Heinz Wattie's Limited, Coca-Cola Amatil (NZ) Limited and DB Breweries Limited;
- 26.2 paper converters such as Orora Group, a manufacturer of cartons and cardboard packaging;
- 26.3 printing and bookbinding companies such as Webstar New Zealand;
- 26.4 wood processing companies such as Carter Holt Harvey Limited, Juken New Zealand Limited and Nelson Pine Industries Limited; and
- 26.5 distributors of industrial adhesives such as Glue Guru Industrial Products Limited, which is the New Zealand agent for Henkel, and resells these products to smaller end-users.

### **With and without scenarios**

- 27. To assess whether competition is likely to be substantially lessened in any market, we compare the likely state of competition with the acquisition to the likely state of competition without the acquisition.<sup>15</sup>

#### **With the acquisition**

- 28. H. B. Fuller would acquire the business and assets of Advanced Adhesives.

#### **Without the acquisition**

- 29. Without the acquisition, we consider that the status quo is likely to prevail.

#### **How the acquisition could substantially lessen competition**

- 30. We consider there are two potential ways in which the acquisition could substantially lessen competition:
  - 30.1 removing Advanced Adhesives as a significant competitive constraint for the supply of hot-melts and water-based adhesives such that H. B. Fuller can profitably increase price above the competitive level; and
  - 30.2 creating two large, evenly sized firms with small fringe competitors, potentially enhancing the ability of the merged entity and its rivals to coordinate post-merger.

### **Market definition**

#### **Our approach to market definition**

- 31. Market definition is a tool that helps identify and assess the close competitive constraints the merged entity would face. Determining the relevant market requires

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<sup>15</sup> *Mergers and Acquisitions Guidelines* above n 1 at [2.29]; *Commerce Commission v Woolworths Limited* (2008) 12 TCLR 194 (CA) at [63].



us to judge whether, for example, two products are sufficiently close substitutes as a matter of fact and commercial common sense to fall within the same market.

32. We define markets in the way that best isolates the key competition issues that arise from the merger. In many cases this may not require us to precisely define the boundaries of a market. What matters is that we consider all relevant competitive constraints, and the extent of those constraints. For that reason, we also consider products which fall outside the market but which still impose some degree of competitive constraint on the merged entity.

#### **The applicant's view of the relevant markets**

33. H. B. Fuller submitted that the relevant markets are the national supply of:<sup>16</sup>
- 33.1 hot-melts for case/carton sealing;
  - 33.2 hot-melts for paper-converting;
  - 33.3 hot-melts for bookbinding;
  - 33.4 water-based adhesives for bookbinding; and
  - 33.5 water-based adhesives for woodworking.

#### **Our view of the relevant markets**

34. For the reasons outlined below, we consider that the relevant markets for the purpose of considering this merger are the national supply of:
- 34.1 hot-melts; and
  - 34.2 water-based adhesives.

#### **Product dimension**

35. The merger would result in overlap in respect of the supply of water-based adhesives and hot-melts.
36. H. B. Fuller submitted that hot-melts and water-based technologies are used by end users for different purposes. As noted previously, we consider that each of these products have different characteristics and end uses.
37. For example:
- 37.1 hot-melts and water-based adhesives are used for different purposes as discussed at paragraph 19; and
  - 37.2 there is a considerable price difference with hot-melts being approximately 2.5 to 4 times more expensive per kilogram than water-based adhesives.

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<sup>16</sup> Application at [14.1].

38. Therefore, from the demand-side perspective, we consider that hot-melts and water-based adhesives are not close substitutes.
39. We agree with H. B. Fuller that water-based adhesives and hot-melts might each be further differentiated into separate markets by application, for example water-based adhesives used separately in paper-converting, bookbinding and woodworking and hot-melts used separately in case/carton sealing, paper-converting and woodworking. Additionally, they may be further customised to meet individual customers' requirements.
40. We consider that there is no supply-side substitutability between hot-melts and water-based adhesives – both products require different manufacturing processes and plants. However, there can be some supply-side substitutability within each product market. For instance, a number of manufacturers supply a range of water-based adhesives to customers for different end uses. Similarly, there are a number of suppliers of hot-melts that are used for different applications.
41. In summary, if we were to further analyse demand- and supply- side substitution we may define narrower product markets. However, we do not consider that such an analysis is necessary when assessing this merger as it would make no difference to the competition analysis. Therefore, we propose to define the relevant product markets as those for each of hot-melts and water-based adhesives.

### Geographic dimension

42. H. B. Fuller submitted that the relevant markets are national.<sup>17</sup> Further, it considers that most providers supply or could supply the relevant products throughout New Zealand either directly or through third-party distributors.
43. [ <sup>18</sup> [ ]<sup>19</sup> ].
44. With the exception of Advanced Adhesives, which manufactures the product locally, hot-melts are imported into New Zealand and are used throughout the country. Water-based adhesives for the most part are domestically manufactured in plants, all of which are located in the North Island and are used nationwide. Industry participants agreed that the geographic scope of each of the hot-melts and water-based adhesives markets is likely to be national. Therefore, we consider that national geographic markets are appropriate for the purpose of assessing this merger.

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<sup>17</sup> Application at [14.7.1].

<sup>18</sup> Application at [5.4].

<sup>19</sup> Interview with Advanced Adhesives (8 March 2016).

## Competition analysis

### Overview

45. We consider that for the reasons discussed below, the unilateral effects arising from this merger are unlikely to result in a substantial lessening of competition in the national markets for the supply of:

45.1 hot-melts; and

45.2 water-based adhesives.

### Water-based adhesives

46. Water-based adhesives are currently manufactured for supply in New Zealand by Advanced Adhesives, Henkel, Bostik and G&A.

47. H. B. Fuller submitted that it only sells a limited volume of water-based adhesives for use in bookbinding, woodworking and paper-converting.<sup>20</sup> Currently, its annual sales turnover for water-based adhesives is approximately \$[ ]. Unlike most other suppliers, H B. Fuller does not have a manufacturing plant in New Zealand so must import these products. However, due to the high water content, H. B. Fuller submitted that it is not usually economic to import this product fully made, compared to the cost of sourcing the raw materials offshore and then producing it locally.

48. [ ]<sup>21</sup>

49. Given that H. B. Fuller's sales of water-based adhesives are minimal, we consider that the merger would result in limited aggregation of market share and there would be only minor changes to the competitive situation.

50. We also consider that, based on the information provided by industry participants, competition would continue to be provided post-merger by existing competitors, including Henkel, the largest supplier, but also to some extent from other existing market participants, for example Bostik and G&A. All of these companies have manufacturing plants in New Zealand and have told us they have the capacity to readily expand their production.

### *Conclusion on the water-based adhesives market*

51. For these reasons, we consider that this merger is unlikely to result in a substantial lessening of competition in the water-based adhesives market.

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<sup>20</sup> Application at [10.3.8].

<sup>21</sup> Application at [10.3.9].

## Hot-melts

### *Existing competition*

52. Currently, there are three major suppliers of a wide range of hot-melts in New Zealand – H. B. Fuller, Advanced Adhesives and Henkel. In addition, there are a number of smaller suppliers, including Johns, G&A, and Adhesion Services. H. B. Fuller also identified Bostik as a competitor in the supply of hot-melts but its presence is very small in this market and is largely confined to servicing customers in the construction sector.<sup>22</sup>
53. While we have found it difficult to obtain precise market share figures, we have set out in Table 1 estimated sales for the three overlapping product categories (ie carton sealing, paper converting and bookbinding).

**Table 1: Estimated market shares for hot-melts**

	\$m	% approx
H. B. Fuller	[ ]	[ ]
Advanced Adhesives	[ ]	[ ]
<b>Combined entity</b>	[ ]	[ ]
Henkel	[ ]	[ ]
Others	[ ]	[ ]
<b>Total</b>	[ ]	100

Source: Application and industry participants

54. The acquisition would result in the amalgamation of two of the three largest suppliers of hot-melts. However, we consider that the merged entity would continue to face strong competition from Henkel, the largest single market participant, and from smaller fringe competitors. All of these rival companies rely on imports, but have the capability to supply a broad range of the standard grades of hot-melts to large and small customers.
55. We have found that prices are broadly within a similar range for equivalent grades of hot-melts and suppliers will adjust their pricing in an attempt to secure business. [ ]<sup>23</sup>

<sup>22</sup> Interview with Bostik (8 March 2016).

<sup>23</sup> [ ]

56. [ ]<sup>24</sup>
57. This is also consistent with information from end users we spoke to, who commented that Henkel is an aggressive competitor. For instance, [ ], told us that Henkel along with [ ], competes very strongly for its business.<sup>25</sup>
58. We consider that Henkel, which is the largest global supplier of industrial adhesives, is likely to continue to have a strong presence in the hot-melts market and provide a major constraint to the merged entity. Henkel has identified its main rivals as [ ].<sup>26</sup>
59. The fringe suppliers also appear to be competing strongly for business in the hot-melts market. One example is G&A. Although still a small supplier, G&A has been growing its hot-melts business in recent years and [ ](see paragraphs 71 and 72 for further details).<sup>27</sup> Other suppliers, such as Johns, [ ], and Adhesion Services, [ ], have also developed a presence in the hot-melts market.
60. We also consider that no party is likely to face any significant cost or other efficiency disadvantage to the merged entity and that is unlikely to change regardless of whether Advanced Adhesive's hot-melt manufacturing plant remains open or is shut post-acquisition. The competition to supply end users appears to be intense and there is evidence of customer switching.

#### *Conclusion on existing competition*

61. In summary, we consider that Henkel is likely to provide a strong competitive constraint on the merged entity with additional competition provided by fringe suppliers. In addition, for the reasons discussed below, we consider that the ability and willingness of existing competitors to expand is likely to provide an additional constraint post-merger.

#### **Potential competition in hot-melt adhesives**

##### *Likelihood of entry and/or expansion*

62. In this section we consider whether existing suppliers of hot-melts could expand or new suppliers would enter and effectively compete with the merged entity if prices increased. The threat of entry or expansion must be sufficient to prevent a

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<sup>24</sup> [ ]

<sup>25</sup> Interview with [ ].

<sup>26</sup> Interview with Henkel (3 March 2016).

<sup>27</sup> Interview with G&A ((4 March 2016),

substantial lessening of competition. This requires entry/expansion to be likely, sufficient in extent, and timely (referred to as the 'LET test').<sup>28</sup>

63. As part of our assessment of the likelihood of entry or expansion we have considered the conditions for entry and expansion via imports.
64. We consider that the entry/expansion conditions of relevance to our analysis of this market include:
- 64.1 access to a reputable producer of hot-melts;
  - 64.2 sufficient sales and marketing staff; and
  - 64.3 technical and customer support.

*Entry or expansion*

Adhesion Services

65. Adhesion Services is the most recent example of entry into the affected market. It has been importing hot-melts from Wisdom Adhesives of the USA, which is one of the largest global producers of industrial adhesives, for about a year [ ].<sup>29</sup> It commented that many adhesive manufacturers had been looking to enter or expand in New Zealand.

66. [ ]<sup>30</sup> [ ]  
 ].<sup>31</sup>

67. [ ]<sup>32</sup>

68. [ ]<sup>33</sup>

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<sup>28</sup> Commerce Commission, *Mergers and Acquisitions Guidelines*, July 2013 at [3.96].

<sup>29</sup> Interview with Adhesion Services (22 March 2016).

<sup>30</sup> Ibid.

<sup>31</sup> Interview with [ ].

<sup>32</sup> Interview with Adhesion Services (22 March 2016).

<sup>33</sup> Ibid.

Henkel

69. [ ]<sup>34</sup> [ ]<sup>35</sup> Other end- users of hot-melts have also told us that the merger may facilitate increased competition between an enlarged H. B. Fuller and Henkel.<sup>36</sup>

70. [ ]<sup>37</sup> [ ]

G&A

71. G&A, a small importer of hot-melts (annual sales of \$[ ]) has been expanding in recent years, [ ]<sup>38</sup> [ ]<sup>39</sup> [ ]

72. Industry participants have told us that G&A is a very aggressive competitor on price<sup>40</sup> and that its hot-melts meet quality standards.<sup>41</sup> [ ]

Johns

73. Johns is an Australian-based company that sources hot-melts from Beardow Adams, a UK-based company which is one of the largest global suppliers.<sup>42</sup> It has been competing in New Zealand for over 10 years and the annual turnover for its hot-melts’ business has been growing to be currently around \$[ ].<sup>43</sup>

74. Johns sees itself as competing [ ]

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<sup>34</sup> Interview with Henkel (22 March 2016).

<sup>35</sup> Ibid.

<sup>36</sup> For example, interviews with [ ]

<sup>37</sup> Interview with Henkel (3 March 2016).

<sup>38</sup> Interviews with G&A (4 and 22 March 2016).

<sup>39</sup> Interview with G&A (24 March 2016)

<sup>40</sup> Interview with [ ]

<sup>41</sup> Interview with [ ]

<sup>42</sup> The other large global producers of industrial adhesives include Henkel, H. B. Fuller, Bostik and Wisdom Adhesives.

<sup>43</sup> Interview with Johns (21 March 2016).

].<sup>44</sup> [

].<sup>45</sup>

75. [

].

Other suppliers

76. Apart from the suppliers outlined above, we are aware of other importers of hot-melts supplying customers in New Zealand. These include Jowat, an Australian-based importer.

*Conclusion on unilateral effects*

77. We consider that the existing competition in the hot-melts market, including from Henkel, the largest market participant, is likely to constrain the merged entity. We also consider that existing suppliers, including the fringe competitors, are likely to constrain the merged entity by their ability and willingness to expand such that the LET test is satisfied.

**Coordinated effects**

78. As we have found that there is likely to be sufficient competition from rival suppliers expanding their operations, any attempted coordination is likely to be defeated. Therefore, we consider that the acquisition would not make coordination more likely so as to result in a substantial lessening of competition.

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<sup>44</sup>

[ ]

<sup>45</sup>

Interview with [ ]



## **Determination**

79. We are satisfied that the proposed acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in a market in New Zealand.
80. Pursuant to s 66(3)(a) of the Act, the Commerce Commission determines to give clearance for H. B. Fuller to acquire the business and assets of Advanced Adhesives.

Dated this 20<sup>th</sup> day of April 2016

Dr Mark Berry  
Chairman