



COMMERCE COMMISSION

Decision No. 527

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

VISYPET (NZ) LIMITED

and

VISY INDUSTRIAL PLASTICS (NZ) LIMITED

The Commission: Paula Rebstock
Donal Curtin
David Caygill

Summary of Application: The acquisition by VisyPET (NZ) Limited of some or all of the two-stage PET manufacturing assets and related business contracts of Visy Industrial Plastics (NZ) Limited.

Determination: Pursuant to section 66(3) (a) of the Commerce Act 1986, the Commission determines to give clearance to the proposed acquisition.

Date of Determination: 30 June 2004

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THE PROPOSAL

1. A notice pursuant to s 66(1) of the Commerce Act 1986 (the Act) was registered on 14 June 2004. The notice sought clearance for the acquisition by VisyPET (NZ) Limited (Visy or the Applicant) of some or all of the two-stage PET manufacturing assets and related business contracts of Visy Industrial Plastics (NZ) Limited (VIP).

PROCEDURE

2. Section 66(3) of the Act requires the Commission either to clear or to decline to clear a notice given under s 66(1) within 10 working days, unless the Commission and the person who gave notice agree to a longer period. An extension of time of four working days was agreed between the Commission and the Applicant. Accordingly, a decision on the Application was required by 2 July 2004.
3. The Applicant did not seek confidentiality for any of the information contained in the Application.
4. The Commission's approach to analysing this proposed acquisition is based on principles set out in the *Commission's Merger and Acquisition Guidelines*.

STATUTORY FRAMEWORK

5. Under s 66 of the Act, the Commission may grant clearances for acquisitions where it is satisfied that the proposed acquisition would not have, or would not be likely to have, the effect of substantially lessening competition in a market. The standard of proof that the Commission must apply in making its determination is the civil standard of the balance of probabilities.¹
6. The Commission considers that it is necessary to identify a real lessening of competition that is not minimal.² Competition must be lessened in a considerable and sustainable way. For the purposes of its analysis, the Commission is of the view that a lessening of competition and creation, enhancement or facilitation of the exercise of market power may be taken as being equivalent.
7. When the impact of market power is expected to be predominantly upon price, for the lessening, or likely lessening, of competition to be regarded as substantial, the anticipated price increase relative to what would otherwise have occurred in the market has to be both material, and able to be sustained for a period of at least two years.
8. Similarly, when the impact of market power is felt in terms of the non-price dimensions of competition such as reduced service, quality or innovation, for there to

¹ Foodstuffs (Wellington) Cooperative Society Limited v Commerce Commission (1992) 4 TCLR 713-722.

² See Fisher & Paykel Limited v Commerce Commission (1996) 2 NZLR 731, 758 and also Port Nelson Limited v Commerce Commission (1996) 3 NZLR 554.

be a substantial lessening, or likely substantial lessening, of competition, these also have to be both material and sustainable for at least two years.

ANALYTICAL FRAMEWORK

9. The Commission applies a consistent analytical framework to all its clearance decisions. The first step the Commission takes is to determine the relevant market or 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 in question (the factual); and
 - in the absence of the acquisition (the counterfactual).
10. 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. The Commission analyses the extent of competition in each relevant market for both the factual and counterfactual scenarios, in terms of:
 - existing competition;
 - potential competition; and
 - other competition factors, such as the countervailing market power of buyers or suppliers.

THE PARTIES

VisyPET (NZ) Limited (Visy)

11. VisyPET (NZ) Limited is a New Zealand registered company, wholly owned by Visy Rigid Holdings (NZ) Limited.
12. Visy Rigid Holdings (NZ) Limited is also the sole owner of Visy Rigid Packaging (NZ) Limited.
13. Visy and Visy Rigid Packaging (NZ) Limited both trade as "VisyPak".
14. Visy Rigid Holdings (NZ) Limited is a member of a group of companies which are ultimately owned by Pratt Holdings Pty Limited.

Visy Industrial Plastics (NZ) Limited (VIP)

15. VIP is a New Zealand registered company, wholly owned by Visy Industrial Holdings (NZ) Limited.
16. Visy Industrial Holdings (NZ) Limited is a New Zealand registered company, wholly owned by an Australian registered company, Visy Industrial Packaging Holdings Pty Limited.

17. Visy Industrial Packaging Holdings Pty Ltd is owned by Salvage Pty Limited.

PREVIOUS DECISION

18. On 26 May 2004, the Commission gave clearance to the acquisition by VIP of the plastics packaging business and assets of ACI Operations NZ Limited (ACI). (The assets that were the subject of that proposal included the two-stage PET manufacturing assets and related business contracts, which are the subject of the present application). The written reasons for the Commission's decision are contained in Decision 524³.
19. The Commission proceeded with the competition analysis of that acquisition on the basis that VIP and Visy were associated entities and would act as "one head" in the market due to the community of interest between VIP and Visy.
20. In addition, in its application for clearance, VIP stated at para.10.2:
- Following the acquisition, VIP currently intends to on-sell the two stage PET manufacturing assets, subject to receiving a commercially acceptable offer for those assets. VisyPET (NZ) Limited is a potential buyer for the two stage PET equipment and VIP has entered into discussions with Visy. VIP stated that it does not currently have the expertise to manufacture two stage PET beverage containers.
21. During its investigation of the VIP application, the Commission ensured that all interested parties were aware of the possibility that VIP would on-sell the two-stage PET manufacturing business to Visy and gave all interested parties the opportunity to comment on that eventuality.
22. In Decision 524, the Commission considered, that the factual scenario was that VIP would operate the rigid packaging and single-stage PET operations of ACI as a single entity, and that it would on-sell ACI's two-stage PET assets to Visy, which would combine those assets with its own to be one of four competitors in the PET market.
23. In Decision 524, the Commission considered the relevant market to be :
- the New Zealand market for the manufacture and supply of PET bottles for non-alcoholic beverages.
24. Having analysed the extent of competition in the both the factual and counterfactual scenarios, the Commission concluded that, in the face of any attempt by the combined entity to raise prices, the existing level of competition, together with the ability of existing participants to expand, and the significant countervailing power of a major

³ Commerce Commission, Decision 524: *Visy Industrial Plastics (NZ) Limited and ACI Operations NZ Limited*, 27 May 2004.

purchaser of PET bottles, Frucor, would be sufficient to constrain the combined entity.

25. Accordingly, the Commission was satisfied that the proposed acquisition would not have, nor would be likely to have, the effect of substantially lessening competition in the New Zealand market for the manufacture and supply of PET bottles for non-alcoholic beverages.
26. Pursuant to section 66(3) (a) of the Commerce Act 1986, the Commission determined to give clearance for the proposed acquisition by VIP of the plastics packaging business and assets of ACI.

PRESENT PROPOSAL

27. Although, in Decision 524 the Commission considered VIP and Visy to be associated entities that would likely act as “one head” in the market, the Act does not operate so that a clearance granted to a named applicant will apply to any other entities with which it may be associated.
28. In the present application, the proposed acquisition is the subsequent transaction of the two-stage PET manufacturing assets, which was considered as part of the factual scenario by the Commission in Decision 524, namely the acquisition by Visy from VIP of the two-stage PET manufacturing assets and related business contracts that were previously owned by ACI.

OVERALL CONCLUSION

29. The Commission has made enquiries of the market and is advised that in the time elapsed since Decision 524 there have been no substantive changes in the New Zealand market for the manufacture and supply of PET bottles for non-alcoholic beverages.
30. Therefore, for the reasons set out in that Decision, and the fact that the Commission consulted fully with interested parties on this acquisition during its investigation of the VIP application, the Commission is satisfied that the acquisition proposed in the present application would not have, nor would be likely to have, the effect of substantially lessening competition in the New Zealand market for the manufacture and supply of PET bottles for non-alcoholic beverages.
31. Accordingly, pursuant to section 66(3) (a) of the Commerce Act 1986, the Commission determines to give clearance for the proposed acquisition by VisyPET (NZ) Limited of some or all of the two-stage PET manufacturing assets and related business contracts of Visy Industrial Plastics (NZ) Limited.

DETERMINATION ON NOTICE OF CLEARANCE

32. Pursuant to section 66(3) (a) of the Commerce Act 1986, the Commission determines to give clearance for the proposed acquisition by VisyPET (NZ) Limited of some or all of the two-stage PET manufacturing assets and related business contracts of Visy Industrial Plastics (NZ) Limited.

Dated this 30th day of June 2004

Paula Rebstock
Chair
Commerce Commission