



COMMERCE COMMISSION

Decision No. 680

Determination pursuant to the Commerce Act 1986 in the matter of an application for an acquisition of shares or assets between

Frucor Beverages Ltd

and

Simply Squeezed Holdings Ltd and/or Brownlie Brothers Ltd

- The Commission:** Dr MN Berry
PJM Taylor
SJ Begg
- Summary of Application:** The Acquisition of up to 100% of the shares in, or assets of, Simply Squeezed Holdings Ltd and/or Brownlie Brothers Ltd.
- 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:** 25 August 2009

THE PROPOSAL

1. On 7 July 2009, the Commission received a notice pursuant to s 66(1) of the Commerce Act 1986. The notice sought clearance for the acquisition by Frucor Beverages Ltd (Frucor), or any interconnected body corporate of Frucor, of 100% of the shares in, or assets of, Simply Squeezed Holdings Ltd and/or Brownlie Brothers Ltd (Simply Squeezed).

DECISION

2. The Commission is satisfied that existing competition along with other competition factors in the relevant market would be likely to constrain the combined entity post-acquisition. 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 / import and supply of fruit beverages.

ANALYTICAL FRAMEWORK

3. 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.
4. The Commission uses a forward-looking analysis to assess whether a lessening of competition is likely, so, an important analytical step is to identify 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).
5. 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 scenarios².
6. 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.

² Where a transaction gives rise to two or more likely counterfactuals, the Commission assesses the possibilities, discards those that have only a remote prospect of occurring, and considers each of the real and substantial possibilities as counterfactuals against which the factual is to be assessed. (See *Decision 650 The Southern Cross Health Trust / Aorangi Hospital Ltd*; 4 September 2008, p 16).

- 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.
7. 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, if any, under the proposed acquisition, and whether that contemplated lessening is likely to be substantial.

PARTIES

The Acquirer - Frucor

8. Frucor is a wholly owned subsidiary of Suntory Holdings Ltd, a Japanese company. Frucor manufactures a number of non-alcoholic beverage (NAB) brands in New Zealand including the “V” brand of energy drink and the Pepsi range of carbonated soft drinks. Of particular relevance to the Commission’s investigation are Frucor’s fruit beverage brands which include Just Juice, Fresh Up, Arano, Citrus Tree, Joo-C, McCoy, and Twist.

The Target – Simply Squeezed

9. Simply Squeezed is a Hawke’s Bay based manufacturer of fruit beverages. The company is currently owned [] by Crescent Capital Partners Ltd (CCP), an Australian based private equity firm and [] by its founder Steve Brownlie.
10. Simply Squeezed operates a nationwide franchisee-based distribution model with the majority of its sales made in the hospitality, restaurant and café (HORECA) channel.
11. [].
12. Simply Squeezed’s proprietary brands are Simply Squeezed, Bay Harvest, Supreme Country Style, and Allganics.

Other Relevant Parties

13. Coca-Cola Amatil (NZ) Ltd (CCA) is ultimately owned by The Coca-Cola Corporation, a United States based beverage manufacturer. CCA has a significant number of beverage brands in New Zealand, including Coca-Cola, L&P, Sprite, Pump (bottled water), and the Keri and Thextons brands of fruit beverages.
14. Charlie's Trading Company Ltd (Charlie's) was founded in 1999 and supplies fruit beverages in New Zealand and Australia. Charlie's is a prominent brand in the supermarket and HORECA channels. Charlie's imports pre-packaged fruit beverages to New Zealand from its manufacturing facilities in Australia.
15. Pinto Ltd (Pinto) is a subsidiary of Mainland Poultry Ltd and produces chilled juice under the Sejuice brand. []. Pinto also operates the Pinto Express chilled distribution network nationwide.
16. Natural Dairy Products Ltd (NDP) is a Canterbury based dairy producer which currently manufactures chilled juice under the Al & Sons brand and sells it through Foodstuffs Co-Operatives in the South Island and Wellington. [].
17. GlaxoSmithKline (NZ) Ltd (GSK) imports the Ribena brand of blackcurrant cordial and ready-to-drink products from Malaysia where it is produced from New Zealand grown blackcurrants.
18. Heinz Wattie's Ltd (Golden Circle) purchased the Golden Circle fruit beverage business as part of an Australasia-wide acquisition. Golden Circle ambient juices and drinks are imported from Australia to New Zealand.
19. Foodstuffs Co-Operatives (Foodstuffs) are three separate regional co-operatives which operate the New World, Pak'n'Save supermarket banners and Four Square convenience stores nationwide. Additionally Foodstuffs owns and retails the Pam's and Budget private label brands and currently retails fruit beverages under both brands.
20. Progressive Enterprises Ltd (PEL) is an Australian owned nationwide supermarket operator with its head office in Auckland. PEL operates the Countdown, Woolworths and Foodtown supermarket banners. Additionally, PEL owns and retails the Signature Range, Home Brand and Select private labels, and currently retails fruit beverages under the Signature and Home Brand brands.

INDUSTRY BACKGROUND

21. The majority of fruit beverage manufacture occurs on either 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.

22. Fruit beverages are typically characterised by the percentage of fruit juice they contain and whether that fruit juice is sourced from fresh, pre-packaged (not from concentrate), or concentrated product.
23. Generally, fruit beverages fall into the following categories:
- fresh juice
 - pure fruit juice that must not contain food additives such as flavouring, colouring, preservatives or any juice that has undergone a concentration process; must not be subjected to high temperature treatment or be stored frozen or contain frozen juice; short shelf life (less than one week);
 - chilled juice
 - fresh or not from concentrate (NFC) juice blended with juice prepared from concentrates, with minimal addition of some preservatives and additives, typically flash pasteurised; shelf life extended to around one month; includes smoothies;
 - ambient juice
 - NFC or, more commonly, reconstituted fruit juice that is temperature treated for a period of time to improve shelf stability; shelf life of six months or longer;
 - nectars
 - contain between 50% and 75% juice content; and
 - fruit drinks
 - contain at least 5% fruit juice; fruit drinks typically contain preservatives and other additives.
24. Presently, Frucor and Simply Squeezed use a mix of NFC and on-site extraction of juice. Juice is then blended with other ingredients, which may include reconstituted juice from concentrate.
25. Pasteurisation and packaging play an important role in extending the shelf-life of fruit beverage products. For example, Charlie's markets its fruit beverages as *not from concentrate* and is able to extend the shelf-life of its product to 12 months without refrigeration through pasteurisation and certain packaging techniques.
26. Currently Charlie's, Golden Circle, GSK and [] import some or all of the product that they sell in New Zealand.
27. Non-pasteurised freshly squeezed juice is rare in New Zealand. Industry participants informed the Commission that a handful of boutique suppliers manufacture fresh juice, but that due to the short shelf life (one to two days) and high purchase price, fresh juice has limited appeal outside cafés.
28. Supermarkets retail approximately [] of all fruit beverages sold in New Zealand, with the remaining [] being sold through route (convenience stores, petrol stations and dairies) and HORECA channels.

29. Per capita consumption of juice in New Zealand is low when compared with other western countries. Industry participants consider the market to be growing, with growth led by the chilled category. Ambient fruit beverage sales appear to be principally driven by price, whereas chilled fruit beverage sales are more likely to be driven by brand.

MARKET DEFINITION

30. The Commission previously considered NAB markets in *Decision 481 The Coca-Cola Company / Rio Beverages Ltd (2002)*. The Commission concluded that four product markets relevant to that case were carbonated soft drinks, bottled water, fruit juices³ and new age beverages. In *Decision 662 Coca-Cola Amatil (NZ) Ltd / Old Fashioned Foods Ltd (2009)* concluded that the relevant product market was that for cordials.
31. Industry participants advised the Commission that they tend to refer to the market in terms of narrower fruit beverage categories, in particular chilled and ambient juices. However, the Commission considers that there is significant demand-side substitutability between categories and, although consumer choice is influenced by need, perceived quality, brand and price, the chilled / ambient distinction is mainly the result of storage location in supermarkets. Moreover, a proportion of the products sold in supermarket chillers are in fact shelf-stable and could be sold as non-chilled ambient juice.
32. The Commission considers that the substitution on both the supply and demand sides between the different types of fruit beverages strongly supports the view that the conclusion in Decision 481 remains relevant and that all fruit beverages can be considered within the one product market. In this instance, the Commission considers this to be a conservative position because Frucor and Simply Squeezed currently focus on different types of fruit beverages; Frucor principally on ambient and Simply Squeezed principally on chilled. Therefore using the wider fruit beverage market results in greater aggregation than using narrower fruit beverage categories.
33. The Commission has also given careful consideration as to whether discrete markets should be adopted for supply to large customers (supermarkets) and the supply to small customers (the route trade and HORECA channels). It notes that these separate customer classes have their own characteristics (volume, number of deliveries, contracting terms, and product mix, for example) and that generally the []. However, all the main fruit beverage suppliers compete for both categories of customers and can readily switch product from one customer type to another as demand and competition change. Accordingly, for the purposes of this analysis the Commission does not propose to delineate the market on the basis of a customer dimension.

³ The Rio Decision defined all fruit beverages as fruit “juices”. The Commission has adopted the term fruit “beverages” in this investigation to more accurately reflect the various product categories in the market.

Conclusion on Market Definition

34. For the purposes of this Application, the Commission considers the relevant market to be the national market for the manufacture / import and supply of fruit beverages.

COUNTERFACTUAL

35. Simply Squeezed advised the Commission that [].
36. []. The Commission considers that, in the counterfactual, Simply Squeezed is likely to be sold to an independent third party.

COMPETITION ANALYSIS

Existing Competition

37. The market is characterised by two large competitors, two medium-sized competitors and a number of smaller competitors. Based on volume, the proposed acquisition would see [].

Table 1: Estimated Market Shares by Volume and Value to July 2009

	Sales by value (\$000s)	Market share by value	Sales by volume (thousands of litres)	Market share by volume
Frucor	[]	[]	[]	[]
Simply Squeezed	[]	[]	[]	[]
Merged Entity	[]	[]	[]	[]
CCA	[]	[]	[]	[]
Charlie's	[]	[]	[]	[]
Pinto	[]	[]	[]	[]
Golden Circle	[]	[]	[]	[]
Ribena RTD	[]	[]	[]	[]
Al & Sons	[]	[]	[]	[]
Other	[]	[]	[]	[]
TOTAL	[]	100%	[]	100%

38. Based on the figures in Table 1, in the factual the combined entity would have a market share of []% by value and []% by volume. The three-firm concentration ratio would be []% by value and []% by volume. Based on these figures, the proposed acquisition would be outside the Commission's safe harbours in both instances.

39. While Frucor and Simply Squeezed compete to varying degrees across all sales channels, Frucor is particularly strong in the supermarket channel, while Simply Squeezed has a significant presence in the HORECA channel. [].
40. The combined entity's largest competitor would be CCA. Industry participants informed the Commission that CCA is a formidable competitor across all NAB categories. CCA has significant penetration in all customer channels and can offer customers its fruit beverage products in combination with a wide range of other NAB products.
41. Fruit beverages are regularly promoted through supermarket specials, and access to promotional slots is decided through a negotiation process between supermarkets and suppliers. There is strong competition between industry participants for the allocation of promotional slots and in the past, industry participants that have shown a reluctance to discount their products have lost promotional slots and, consequently, volume.
42. Imports are an important competitive constraint, with a number of existing fruit beverage suppliers importing their products. The level of imported finished product currently stands at []% of retail sales. Most importers of fruit beverages advised the Commission that they could easily expand if incentivised to do so.
43. Both Foodstuffs and PEL advised the Commission that [].
44. Existing competitors informed the Commission that access to inputs is not a barrier to expansion as the majority of fruit beverages in New Zealand are made from imported ingredients that are readily available on international markets. [].
45. [].

46. The Commission considers that it is unlikely that the combined entity would have the ability to exercise market power because of:
- the number of participants in the market;
 - evidence of recent entry and expansion (for both manufacture and import); and
 - the presence of supermarkets which have demonstrated they are willing to foster entry or expansion.

Conclusion

47. Therefore 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 / import and supply of fruit beverages.

DETERMINATION ON NOTICE OF CLEARANCE

48. Pursuant to section 66(3)(a) of the Commerce Act 1986, the Commission determines to give clearance for the acquisition by Frucor Beverages Ltd, or any interconnected body corporate of Frucor Beverages Ltd, of 100% of the shares in, or assets of, Simply Squeezed Holdings Ltd and/or Brownlie Brothers Ltd.

Dated this 25th day of August 2009

Dr Mark Berry
Division Chair