

Determination

Henkel New Zealand Limited and Earthwise Group Limited [2023] NZCC 11

The Commission:	Sue Begg Joseph Liava'a Elisabeth Welson
Summary of application:	An application from Henkel New Zealand Limited seeking clearance to acquire the Earthwise brand and business from Earthwise Group Limited.
Determination:	Under section 66(3)(a) of the Commerce Act 1986, the Commerce Commission gives clearance to the proposed acquisition.
Date of determination:	1 June 2023

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The proposed acquisition

1. On 12 April 2023 the Commerce Commission registered an application (the Application) from Henkel New Zealand Limited (Henkel) seeking clearance to acquire the Earthwise brand and business from Earthwise Group Limited (Earthwise Group), comprising the intellectual property in the Earthwise name, logo, bottle and formulas, the Earthwise goodwill and relevant Earthwise business records (the Proposed Acquisition).¹ The Proposed Acquisition does not include any manufacturing facilities or other brands that the Earthwise Group owns, namely the Nourish and Glow Lab brands.

Our decision

2. The Commission gives clearance to the Proposed Acquisition as we are satisfied that it will not have, or would not be likely to have, the effect of substantially lessening competition in any market in New Zealand.
3. Henkel and Earthwise Group supply a range of household cleaning products. The Commission's investigation focused on the potential for the Proposed Acquisition to result in unilateral effects in markets for the wholesale supply of laundry detergents, laundry pre-wash aids and toilet cleaners as these are the products that both the merging parties supply.
4. The Commission found that Henkel and Earthwise Group are not close competitors in any of these markets. Henkel and Earthwise Group focus on different consumer preferences. Henkel and Earthwise Group's closest competitors are those suppliers of laundry detergents, laundry pre-wash aids and toilet cleaners whose products target the same consumer preference. Further, existing suppliers in the relevant markets face low barriers to expanding the volume of products they currently manufacture. We are satisfied that competition from these other suppliers is likely to constrain Henkel, post-acquisition.

Our framework

5. Our approach to analysing the competition effects of mergers is based on the principles set out in our Mergers and Acquisitions Guidelines (our guidelines).²
 - 5.1 We assess mergers using the substantial lessening of competition test. 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).³

¹ A public version of the Application is available on our website at: <http://www.comcom.govt.nz/business-competition/mergers-and-acquisitions/clearances/clearances-register/>.

² Commerce Commission, *Mergers and Acquisitions Guidelines* (May 2022).

³ *Commerce Commission v Woolworths Limited* (2008) 12 TCLR 194 (CA) at [63].

- 5.2 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.⁴ There is no bright line that separates a lessening of competition that is substantial from one which is not. What is substantial is a matter of judgement and depends on the facts of each case.⁵
- 5.3 We must clear a merger if we are satisfied that the merger would not be likely to substantially lessen competition in any market.⁶ If we are not satisfied – including if we are left in doubt – we must decline to clear the merger.

The key parties

6. Henkel is the New Zealand subsidiary of Henkel AG & Co KGaA, which is a multinational chemical and consumer goods company based in Germany.⁷ Relevant to the Proposed Acquisition, in New Zealand it imports and wholesales the following laundry and home care brands:⁸
- 6.1 Cold Power, Dynamo and Fab branded laundry detergents;
- 6.2 Sard branded laundry pre-wash; and
- 6.3 Bref branded toilet cleaner.
7. The Earthwise Group is a New Zealand company that manufactures a range of laundry, homecare and cosmetic products.⁹ It currently supplies products under the Nourish, Glow Lab and Earthwise brands, although the Nourish and Glow Lab brands are not being sold to Henkel.¹⁰
8. Earthwise-branded products are marketed as being environmentally friendly products because they are made from biodegradable, plant-based ingredients and supplied in sustainable packaging made from recycled materials.¹¹

Industry background

9. Henkel and Earthwise Group only overlap in New Zealand for the supply of laundry detergents, laundry pre-wash aids and toilet cleaners. We did not receive any evidence to suggest that there is, or would be, overlap between Henkel and the Earthwise brand and business in other product areas and so we have focused our investigation on the three areas of existing overlap between the two parties.

⁴ *Woolworths & Ors v Commerce Commission* (2008) 8 NZBLC 102,128 (HC) at [127].

⁵ *Mergers and Acquisitions Guidelines* above n2 at [2.23].

⁶ Section 66(3)(a) of the Commerce Act 1986.

⁷ The Application at [1].

⁸ The Application at [2].

⁹ The Application at [7].

¹⁰ The Application at [8].

¹¹ Earthwise “Our Story” <<https://earthwise.co.nz/our-story/>>.

10. In addition to Henkel and Earthwise Group, there are several other suppliers of household cleaning products in New Zealand. The suppliers and products relevant to this application include:
 - 10.1 Unilever New Zealand Limited (Unilever), with its Persil and Surf branded laundry detergent products;
 - 10.2 Reckitt Benckiser (New Zealand) Limited (Reckitt Benckiser), with its Vanish Napisan branded laundry pre-wash aids and Harpic branded toilet cleaner products;
 - 10.3 SC Johnson & Son (SC Johnson), with its Shout branded laundry pre-wash aids and Duck branded toilet cleaner products;
 - 10.4 Ecostore Company Limited (Ecostore), with its ecostore branded laundry detergents, laundry pre-wash aids and toilet cleaner products; and
 - 10.5 Quantum Pacific Limited (Quantum Pacific), with its Eco Planet branded laundry detergents, laundry pre-wash aids and toilet cleaner products.
11. Industry participants advised that consumers have a range of preferences when purchasing their preferred product, including price and quality considerations. In addition, some consumers prefer eco-friendly cleaning products that utilise natural ingredients. More specifically, there tend to be two main types of suppliers of household cleaning products.
 - 11.1 Suppliers, such as Unilever and Henkel, focus on supplying their products to price/quality-conscious consumers using 'classic' chemicals that are often oil-based and have been used in the industry for some time. These suppliers tend to be referred to as mainstream suppliers.
 - 11.2 Conversely, there are suppliers such as Earthwise Group and Ecostore, that focus on supplying products containing natural ingredients to more "eco-conscious" consumers. These suppliers tend to be referred to as eco-friendly suppliers and their products are typically manufactured using plant-based ingredients that are grey water and septic tank safe, as opposed to products that are manufactured using 'classic' chemicals which are often crude-oil based.
12. Almost all household cleaning products purchased by consumers in New Zealand are supplied via a supermarket operated by one of the major grocery retailers.¹² While all the household cleaning products are supplied via the major grocery retailers, the suppliers design and develop their products for end consumers. In addition to

¹² The Application at [51]. The major grocery retailers in New Zealand are Woolworths New Zealand Limited (Woolworths NZ), Foodstuffs North Island Limited, and Foodstuffs South Island Limited. The Woolworths NZ retail banners are Countdown, FreshChoice and SuperValue. The Foodstuffs North Island retail banners are PAK'nSAVE, New World and Four Square. The Foodstuffs South Island retail banners are PAK'nSAVE, New World, Four Square, Reward Fresh and On the Spot.

competing for shelf space with the major grocery retailers, the suppliers also compete with each other when supplying products to end consumers.

13. For completeness, household cleaning products excludes commercial cleaning products that may be used to clean homes, which are unlikely to be supplied via the major grocery retailers.

Market definition

14. Market definition is a tool that helps identify and assess the close competitive constraints the merged entity would face. Determining the relevant market requires 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.
15. 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.
16. In general, the more closely substitutable two products are, the closer the competition and the greater the competitive constraint between the products.

Product dimension

17. Henkel submitted that there are separate product markets for laundry detergents, laundry pre-wash aids and toilet cleaners because each product has a different end-use.¹³
 - 17.1 Laundry detergent products are used in washing machines or handwashing processes to clean clothes.¹⁴ Most laundry detergents comprise some (or all) of the following ingredients: surfactants; builders; bleaches; enzymes; polymers; optical brighteners; and perfumes.¹⁵
 - 17.2 Laundry pre-wash aids are products added before or with the washing machine or handwashing process to assist in removing stains, deodorise clothes, enhance colours and/or kill germs.¹⁶ Pre-wash aids include fabric softeners, stain removers, and fabric whiteners.
 - 17.3 Toilet cleaner products are used to wash toilets (including the toilet bowl and the cistern).
18. The evidence gathered from industry participants supports Henkel's view that there are separate product markets for the different cleaning products relevant to the

¹³ The Application at [22.3].

¹⁴ The Application at [34].

¹⁵ The Application at [35].

¹⁶ The Application at [99].

Proposed Acquisition, namely laundry detergents, laundry pre-wash aids and toilet cleaners.¹⁷

19. We considered whether it is appropriate to define narrow markets for the supply of mainstream and eco-friendly products because the evidence suggests these products are differentiated to meet the range of consumer preferences. That is, consumers who prefer eco-friendly products may not consider mainstream products to be close substitutes. However, we do not consider it necessary to define separate markets along these lines because the distinction is becoming "blurred" and there is no clear delineation.
20. Further, Henkel does not currently supply any eco-friendly products. To this extent, we do not consider it necessary to assess eco-friendly products separately from other mainstream products. In our view, including mainstream and eco-friendly suppliers in the same product markets helps isolate the key competition issues arising from this particular Proposed Acquisition.

Other market dimensions

21. As per the Application, there are likely to be national wholesale distribution markets for the relevant products, as a vast majority of products are supplied to consumers via the major grocery retailers and all suppliers supply on a national basis.¹⁸ Further, most suppliers import relevant products to New Zealand to wholesale to the major grocery retailers.¹⁹ Some suppliers manufacture the relevant products locally, using raw ingredients imported from overseas.²⁰

Conclusion on approach to market definition

22. We consider the most appropriate way to assess the effects of the Proposed Acquisition on competition is to define national wholesale markets for the supply of:
 - 22.1 laundry detergents (the laundry detergents market);
 - 22.2 laundry pre-wash aids (the laundry pre-wash aids market); and
 - 22.3 toilet cleaner products (the toilet cleaners market).

With and without scenarios

23. To assess whether competition is likely to be substantially lessened in any market, we compare the likely state of competition with the acquisition (often referred to as

¹⁷ In addition, the evidence gathered also supports Henkel's view that liquid laundry detergents are substitutable for powdered laundry detergents.

¹⁸ The Application at [80-81].

¹⁹ The Application at [46], [49], and [71].

²⁰ Commerce Commission interview with [] (2 May 2023); and Commerce Commission interview with [] (3 May 2023).

the factual) to the likely state of competition without the acquisition (often referred to as the counterfactual).²¹

24. With the Proposed Acquisition, Henkel would acquire the Earthwise brand and business from Earthwise Group. However, Earthwise Group will retain its other brands, namely Glow Lab and Nourish, which it will continue to operate independently.

24.1 The Proposed Acquisition

[]²²

24.2 Earthwise Group told us

[]²³

25. Without the Proposed Acquisition, the status quo is likely to continue, where Earthwise Group retains the Earthwise brand []²⁴
[]²⁵ Henkel submits that without the Proposed Acquisition,
[]²⁶

How the Proposed Acquisition could substantially lessen competition

26. Our investigation focused on whether the Proposed Acquisition would be likely to substantially lessen competition by assessing the potential for unilateral effects.
27. Unilateral effects can arise when a firm merges with, or acquires, a competitor that would otherwise provide a significant competitive constraint. The Proposed Acquisition could substantially lessen competition due to unilateral effects if, in any of the three relevant markets, the competition lost between the merging parties' products allowed the merged entity to profitably increase the wholesale price and/or reduce the quality of its products.
28. We also considered whether the Proposed Acquisition would increase the potential for the merged entity and all, or some, of its competitors to co-ordinate their behaviour to collectively exercise market power to reduce output or increase prices.

²¹ *Mergers and Acquisitions Guidelines* above n2 at [2.29]; *Commerce Commission v Woolworths Limited* (2008) 12 TCLR 194 (CA) at [63].

²² The Application at [29].

²³ Commerce Commission interview with Earthwise Group [].

²⁴ The Application at [30]; and Commerce Commission interview with Earthwise Group [].

²⁵ The Application at [32].

²⁶ The Application at [33].

Competition assessment

29. The Commission found that in each of the three relevant markets, Henkel and Earthwise Group are not close competitors, rather, Henkel's and Earthwise Group's closest competitors are those suppliers of laundry detergents, laundry pre-wash aids and toilet cleaners whose products target the same consumer preference. The competition from these other suppliers is likely to constrain Henkel post-acquisition in each market.
30. Further, the Proposed Acquisition is unlikely to substantially lessen competition by changing conditions in each of the three relevant markets to make it easier for the merged entity and all, or some competitors to co-ordinate their behaviour to collectively exercise market power to reduce output or increase prices. We found that market participants negotiate directly with the major grocery retailers, which would make it hard for firms to monitor each other's behaviour. In addition, in the markets where the Proposed Acquisition will increase the symmetry between the largest suppliers, the increase is very limited and we do not consider this would materially affect the likelihood of co-ordination.

Unilateral effects – the laundry detergents market

31. In the laundry detergents market, we consider the Proposed Acquisition will not have, or would not be likely to have, the effect of substantially lessening competition because the merger parties are not each other's closest competitor, and the merged entity will continue to be constrained by the presence of several well-established competitors. We set out our reasoning for this assessment below.
32. At present, in addition to Henkel and Earthwise Group, there are several other suppliers of laundry detergents including Unilever, Ecostore and PZ Cussons plc. Table 1 shows estimated market shares of the main suppliers in the laundry detergents market in 2022.

Table 1: Estimated shares in the laundry detergents market in 2022

Supplier	Brand	2022	
		Sales (\$)	Share
Henkel	Dynamo	[]	[]
	FAB	[]	[]
	Cold Power	[]	[]
	Henkel total	[]	[]
Earthwise	Earthwise	[]	[]
<i>Merged entity</i>		[]	[]
Unilever	Persil	[]	[]
	Surf	[]	[]
	Unilever total	[]	[]
Ecostore	Ecostore	[]	[]
Quantum Pacific	Eco Planet	[]	[]
PZ Cussons plc	Reflect	[]	[]
All others		[]	[]
Total	Total	[]	100%

Source: IRI data from the Applicant. Includes rounding errors.

33. Henkel submitted that the Proposed Acquisition does not give rise to, nor would it be likely to give rise to, a substantial lessening of competition within the laundry detergents market because the merged entity would be constrained by:²⁷
- 33.1 the presence of numerous other suppliers; and
 - 33.2 the countervailing power of the major grocery retailers.
34. Our assessment supports the Applicant’s submission that the Proposed Acquisition would not be likely to substantially lessen competition in the laundry detergents market.
- 34.1 All industry participants contacted by the Commission did not consider that Henkel and Earthwise Group are close competitors.²⁸
 - 34.2 Rather, they advised that Henkel is more of a mainstream supplier that is focused on supplying laundry detergents to price/quality-conscious consumers. In this respect, Henkel’s closest competitor is Unilever.²⁹

²⁷ The Application at [88-89].

²⁸ The Application at [89.1]; Commerce Commission interview with [] (2 May 2023); Commerce Commission interview with [] (3 May 2023); [] response to the Commission’s RFI (18 May 2023); and [] response to the Commission’s RFI (18 May 2023).

²⁹ [] response to the Commission’s RFI (18 May 2023); [] response to the Commission’s RFI (18 May 2023); and Commerce Commission interview with [] (11 May 2023).

34.2.1 In contrast, Earthwise Group is focused on “eco-conscious” consumers by manufacturing laundry detergent products containing natural ingredients. In this respect, Earthwise Group’s closest competitor is Ecostore, followed by Quantum Pacific.³⁰

34.3 Industry parties noted the significant presence of Unilever in the laundry detergents market with its two brands: Persil and Surf. In this respect, Unilever would provide a significant constraint on Henkel, post-acquisition.³¹ In addition to Unilever, there are several other competitors, including Ecostore, PZ Cussons plc and Quantum Pacific that also would provide constraint on Henkel, post-acquisition.³² There was no evidence to suggest that the Proposed Acquisition would impact on the ability of any of these suppliers to supply their product in the laundry detergents market, because there appear to be low barriers to them expanding the volume of products they currently supply.³³

35. Countervailing power exists when a customer possesses special characteristics which gives that customer the ability to substantially influence the price that the merged firm charges. We consider it is not necessary to assess the laundry detergents market against countervailing power, as the merged entity will be constrained in the first instance by several other suppliers.

Unilateral effects – the laundry pre-wash aids market

36. In the laundry pre-wash aids market, we consider the Proposed Acquisition will not have, or would not be likely to have, the effect of substantially lessening competition due to the presence of several well-established competitors. We set out our reasoning for this assessment below.

37. At present, in addition to Henkel and Earthwise Group, there are several other suppliers of pre-wash aids including Reckitt Benckiser, Bayer New Zealand Limited and Pental Limited. Table 2 shows the estimated market shares of the main suppliers in the laundry pre-wash aids market in 2022.

³⁰ Commerce Commission interview with [] (11 May 2023); Commerce Commission interview with [] (2 May 2023); and Commerce Commission interview with [] (3 May 2023).

³¹ The Application at [90]; and [] response to the Commission’s RFI (12 May 2023).

³² The Application at [90]; [] response to the Commission’s RFI (12 May 2023); [] response to the Commission’s RFI (18 May 2023); and [] response to the Commission’s RFI (18 May 2023).

³³ Commerce Commission interview with [] (3 May 2023); [] response to the Commission’s RFI (18 May 2023) and; [] response to the Commission’s RFI (18 May 2023).

Table 2: Estimated shares in the laundry pre-wash aids market in 2022

Supplier	Brand	2022	
		Sales (\$)	Share
Henkel	Sard	[]	[]
Earthwise	Earthwise	[]	[]
	<i>Merged entity</i>	[]	[]
Reckitt Benckiser	Vanish Napisan	[]	[]
Bayer New Zealand Limited	Canesten	[]	[]
SC Johnson	Shout	[]	[]
Pental Limited	Sunlight	[]	[]
Other	Includes products from Unilever, Ecostore, Quantum Pacific and multiple others	[]	[]
Total		[]	100%

Source: IRI data from the Applicant. Certain products are excluded because they are not used as pre-wash (or on clothes).

38. Henkel submitted that the Proposed Acquisition does not give rise to, nor would it be likely to give rise to, a substantial lessening of competition within the laundry pre-wash aids market because the merged entity:³⁴

38.1 will be constrained by the presence of numerous other suppliers;

38.2 will have low market share (with minimal aggregation from the Proposed Acquisition); and

38.3 will be constrained by the countervailing power of the major grocery retailers.

39. Similar to our assessment for laundry detergents, we found that the Proposed Acquisition would not be likely to substantially lessen competition in the laundry pre-wash aids market because:

39.1 Henkel and Earthwise Group are not close competitors and there are several prominent competitors. Henkel's closest competitors are Reckitt Benckiser, Bayer New Zealand Limited and SC Johnson, whereas Earthwise Group's closest competitor is Quantum Pacific;³⁵ and

39.2 the merged entity will obtain minimal aggregation from the Proposed Acquisition of []%.³⁶

³⁴ The Application at [102 - 104].

³⁵ The Application at [103]; [] response to the Commission's RFI (18 May 2023); and [] response to the Commission's RFI (18 May 2023).

³⁶ The Application at [103].

40. Further, we consider it is not necessary to assess the laundry pre-wash aids market against countervailing power, as the merged entity will be constrained in the first instance by several other suppliers.

Unilateral effects – the toilet cleaners market

41. In the toilet cleaners market, we consider the Proposed Acquisition will not have, or would not be likely to have, the effect of substantially lessening competition due to unilateral effects. We set out our reasoning for this assessment below.
42. At present, in addition to Henkel and Earthwise Group, there are several other suppliers of toilet cleaners including Reckitt Benckiser, SC Johnson and Pental Limited. Table 3 shows estimated market shares of the main suppliers in the toilet cleaners market in 2022.

Table 3: Estimated shares in the toilet cleaners market in 2022

Supplier	Brand	2022	
		Total (\$)	Share
Henkel	Bref	[]	[]
Earthwise	Earthwise	[]	[]
	<i>Merged entity</i>	[]	[]
SC Johnson	Duck	[]	[]
Reckitt Benckiser	Harpic	[]	[]
Pental Limited	Janola	[]	[]
Ecostore	Ecostore	[]	[]
Others	Includes products from Unilever, Quantum Pacific and multiple others	[]	[]
Total		[]	100%

Source: IRI data from the Applicant.

43. Henkel submitted that the Proposed Acquisition does not give rise to, nor would it be likely to give rise to, a substantial lessening of competition within the toilet cleaners market because the merged entity:³⁷
- 43.1 will be constrained by the presence of numerous other suppliers;
 - 43.2 will have low market share (with minimal aggregation from the Proposed Acquisition); and
 - 43.3 will be constrained by the countervailing power of the major grocery retailers.
44. Similar to our assessments for laundry detergents and laundry pre-wash aids, we found that the Proposed Acquisition would not be likely to substantially lessen competition in the toilet cleaners market because:

³⁷ The Application at [106-108].

- 44.1 Henkel and Earthwise Group are not close competitors and there are several prominent competitors. Henkel's closest competitors are SC Johnson, Reckitt Benckiser and Pental Limited, whereas Earthwise Group's closest competitors are Ecostore and Quantum Pacific;³⁸ and
- 44.2 the merged entity will obtain minimal aggregation from the Proposed Acquisition of []%.³⁹
45. Further, we consider it is not necessary to assess the toilet cleaners market against countervailing power, as the merged entity will be constrained in the first instance by several other suppliers.

Overall conclusion

46. For the reasons outlined above, we are satisfied that the Proposed Acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in any relevant market.

³⁸ The Application at [108].

³⁹ The Application at [108].

Determination on notice of clearance

47. Under section 66(3)(a) of the Commerce Act 1986, the Commerce Commission determines to give clearance to Henkel New Zealand Limited to acquire the Earthwise brand and business from Earthwise Group Limited.

Dated this 1 June 2023

Sue Begg
Division Chair