

## **Determination**

### **Visy and HPNZ [2012] NZCC 9**

**The Commission:** Dr Mark Berry  
Sue Begg  
Dr Jill Walker

**Summary of application:** The acquisition by VRPS Limited and Visy Industries Australia Pty Limited of certain businesses and assets of HP Industries Holding Limited and HP Industries (New Zealand) Limited relating to PET bottles, plastic containers, and plastic closures.

**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 March 2012

Confidential material in this report has been removed. Its location in the document is denoted by [ ].

## The Application

1. On 2 February 2012, the Commission registered a Notice from VRPS Limited and Visy Industries Australia Pty Limited (together Visy or the Applicant) seeking clearance to acquire certain businesses and assets of HP Industries Holding Limited (in receivership) and HP Industries (New Zealand) Limited (in receivership) (together HPNZ). The businesses and assets relate to PET<sup>1</sup> bottles, plastic containers, and plastic closures.

## The Decision

2. The Commission considers that if incentivised by the actions of the merged entity, customers would have the option of switching to alternative suppliers in each of the respective markets. These suppliers have spare capacity and could quickly increase their current levels of production and therefore provide a competitive constraint on the merged entity. In addition, large customers would have the option of self supplying their requirements.
3. Accordingly, 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 any of the relevant markets.

## Analytical Framework

4. The Commission applies a consistent analytical framework to all its clearance decisions. An important step the Commission takes is to determine the relevant market or markets. As acquisitions considered under s 66 of the Commerce Act 1986 (the Act) are prospective, the Commission uses a forward-looking analysis to assess whether a substantial lessening of competition is likely in the defined markets. Hence, an important subsequent step is to establish the appropriate likely future with and without scenarios, defined as the situations expected:
  - 4.1 with the acquisition in question (the factual); and
  - 4.2 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 scenarios. The Commission analyses the extent of competition in each relevant market for both the factual and the counterfactual scenarios, in terms of:
  - 5.1 existing competition;
  - 5.2 potential competition; and
  - 5.3 other competition factors, such as the countervailing market power of buyers or suppliers.

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<sup>1</sup> Polyethylene terephthalate (PET) is a common resin used in the manufacture of plastic products.

## Key Parties

### Visy

6. Visy is a privately owned packaging and recycling company with operations in Australia, New Zealand and Asia. In New Zealand, Visy supplies a number of packaging products including a range of PET beverage bottles.

### HPNZ

7. HP Group is a plastic packaging manufacturer with operations in New Zealand and Australia. Its New Zealand subsidiary, HPNZ, supplies a range of products including PET beverage bottles, plastic containers and plastic closures.
8. HPNZ is currently in receivership. The HP Group in Australia (but not HPNZ) was placed into liquidation on 26 March 2012.

## Other relevant parties

### Plastic product suppliers

#### *VIP Plastic Packaging (NZ) Limited (VIP)*

9. VIP is a manufacturer and supplier of a range of different plastic products including plastic bottles, containers and jars.
10. VIP is a subsidiary of The Pact Group Pty Limited (Pact). In previous investigations, the Commission has considered Visy and Pact to be associated entities for the purposes of s 47 of the Act. This means that the Commission treated Visy and Pact as one entity in the market. Under ss 47(3) and (4) of the Act, two or more corporate entities are associated if one, either directly or indirectly, is able to exert a substantial degree of influence over the activities of the other. Whether or not there is association in this case is discussed further below.

#### *T.S.L. Plastics Limited (TSL)*

11. TSL is a manufacturer and supplier of PET beverage bottles. [ ] of the bottles TSL produces are for its downstream filler company, Bevpac NZ Limited (Bevpac).
12. Bevpac is a soft drink manufacturer and contract filling company. Bevpac supplies house brand soft drinks to supermarkets and contract fills for companies such as Frucor.

#### *Linkplas Limited (Linkplas)*

13. Linkplas is a manufacturer and supplier of PET beverage bottles and containers. Linkplas specialises in high quality custom design and innovation in PET. For example, Linkplas developed the first PET 187 ml wine bottle known as a 'Pettle'.

#### *Waipak Limited (Waipak)*

14. Waipak is a manufacturer and supplier of PET preforms, beverage bottles, and containers along with polypropylene (PP) and high density polyethylene (HDPE) closures. Waipak started its operations in June 2009 in Hawke's Bay.

*Pharmapac Limited (Pharmapac)*

15. Pharmapac is a manufacturer and supplier of PET and non-PET containers. Pharmapac is most prominent in the areas of pharmaceutical, medical, nutritional and personal care packaging.

**Key customers***Coca-Cola Amatil (NZ) Limited (CCA)*

16. CCA is the licensed bottler in New Zealand of the Coca-Cola Company brands.
17. CCA is the largest user of PET beverage bottles in New Zealand. For the past 10 years, CCA has been supplied by Visy. However, in 2009 CCA decided it would move to self supply and it recently began producing its own PET beverage bottles.

*Frucor Beverages Group Limited (Frucor)*

18. Frucor is the second largest non-alcoholic beverage company in New Zealand. Frucor distributes brands such as Pepsi, Just Juice, Fresh-Up, H2Go, Mizone, and V. Frucor is currently supplied with PET beverage bottles by both Visy and HPNZ.

**Association**

19. The Commission must determine if the Applicant is associated with any other person in the relevant markets. Section 47(2) of the Act provides that, for the purposes of s 47(1), a reference to a person includes two or more persons that are interconnected or associated.
20. The Commission is unable to reach a definitive view as to whether Visy and Pact are associated for the purposes of s 47. However, the Commission has analysed the competitive effects of the proposed acquisition on the basis that Visy and Pact are associated, as it appears to the Commission that conditions exist that allow Pact and Visy to be viewed as associated persons. It is likely that this scenario would expose the most acute competition concerns in the relevant markets. The Commission has adopted this position on the basis that if there are no competition concerns when Visy and Pact are considered to be associated, then it is likely that there would be no competition concerns if the alternative proposition is considered.

**Commission's analysis of substantial degree of influence**

21. Sections 47(3) and (4) state that two or more corporate entities are associated if one, either directly or indirectly, is able to exert a substantial degree of influence over the activities of the other. The Commission is of the view that, in this context, a substantial degree of influence means being able to bring real pressure to bear on the decision making processes of the other.<sup>2</sup> The Commission assesses the ability to substantially influence in terms of the nature and extent of communications

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<sup>2</sup> *Air New Zealand Limited and Ansett Holdings Limited & Anor* (Commerce Commission Decision 278, 1996) at para 180.

between relevant persons, and the apparent influence of one person on the key strategic decisions of the other.<sup>3</sup>

22. In coming to a view on association, the Commission must consider each case on its particular facts. None of the features typically considered by the Commission to be indicative of association are present in the current fact situation. There are no:
- 22.1 direct ownership links between Visy and Pact;
  - 22.2 overlapping directorships between Visy and Pact;
  - 22.3 ability for either Visy or Pact to appoint directors to the other company; or
  - 22.4 joint shareholdings between Visy and Pact.
23. In this case there are strong family and financial links between Visy and Pact.
24. The relevant question for the Commission is whether Visy or Pact has the ability to substantially influence the activities of the other such that it is impractical to regard Visy and Pact as separate competitors in the market. Ability can also be thought of in terms of the capacity or potential to influence.

*Visy/Pact Relationship – The Commission’s Previous View*

25. The Commission has previously considered the relationship of Visy and Pact. In its assessment of Visy Industrial Plastics (NZ) Limited’s acquisition of ACI Operations NZ Limited in 2004<sup>4</sup> (the ACI Decision), the Commission took the view that Visy and Pact were associated for the purposes of s 47 of the Act. The Commission did not revisit this assessment in 2006 when Alto Holdings<sup>5</sup> (the Alto Decision) was also acquired by Visy, and therefore proceeded on the basis that Visy and Pact were associated.

*Visy/Pact Relationship – The Applicant’s View*

26. The Applicant submitted that the fact situation has changed<sup>6</sup> since the earlier transactions took place and that when considering the current transaction between Visy and HP, the Commission should take the view that Visy and Pact are not associated for the purposes of s 47 of the Act.<sup>7</sup> The Applicant’s submissions are considered below.

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<sup>3</sup> *New Zealand Seafood Investments Limited and Basuto Investments Limited* (Commerce Commission Decision 388, 2000) at paras 16-24.

<sup>4</sup> *Visy Industrial Plastics (NZ) Limited and ACI Operations NZ Limited* (Commerce Commission Decision 524, 2004).

<sup>5</sup> *Visy Industrial Plastics (NZ) Limited and Alto Holdings Limited* (Commerce Commission Decision 583, 2006).

<sup>6</sup> [

].

<sup>7</sup> See section 3 of the Application.

*Family Relationships*

27. Visy is privately owned by the Pratt family through the Pratt Family Holdings Trust (Pratt Trust).

27.1 [

]

27.2 [

]

27.3 [

]<sup>8</sup> [

]

27.4 [

]

28. Pact is privately owned by the Geminder family through the Geminder Family Trust (Geminder Trust) and controlled by Raphael Geminder. Fiona Geminder (nee Pratt) is Raphael Geminder’s wife and also daughter of Jeanne and the late Richard Pratt.

28.1 [

]

28.2 [

]

28.3 [

]

29. Therefore, [ ] have economic interests in Visy as beneficiaries of the Pratt Trust as a result of the distributions they are entitled to, and they also have an interest in their own trust, the Geminder Trust.

29.1 In addition, [

].

29.2 [

]

30. In the Applicant’s view, [

] In support of this view, the Applicant submitted

that:

30.1 [

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<sup>8</sup>

[

]

30.2 [ ]

30.3 [ ]<sup>9</sup>

30.4 [ ]

*Industry Perception*

31. The Commission asked industry participants about the effectiveness of competition between Visy and Pact and received mixed responses. One customer<sup>10</sup> submitted that the two companies operate a convenient arrangement to minimise direct competition by focusing on the manufacture of different types of plastic products. Other customers expressed the view that Visy and Pact are two separate companies and provided the Commission with examples of Visy and Pact competing for business.<sup>11</sup> The Commission considers that the views of industry participants are inconclusive on this issue.

*Service Arrangements*

32. [ ]. However, the Commission must consider the current situation and cannot rely on Visy’s future intentions as it would be unable to enforce the implementation of such arrangements.

33. In addition, [ ]

*Conclusion*

34. There are a number of factors that have the potential to alter the incentives for Visy and Pact to compete:

34.1 [ ]

34.2 [ ]

<sup>9</sup> For example, [ ]

<sup>10</sup> Commerce Commission interview with [ ].

<sup>11</sup> Commerce Commission interview with [ ] and [ ].



34.3 [ ]

34.4 [ ]

35. Based on the information provided by the Applicant, and collected by the Commission, it may be that [ ] do not in practice exert a substantial degree of influence over Visy, as Visy has set up a number of mechanisms to protect Visy's confidential and strategic PET/plastics business information, and safeguard against any potential conflicts of interest.
36. But the Commission cannot assume that such arrangements will always be maintained, and nothing compels the companies to adopt or maintain these measures. It is also difficult for the Commission to evaluate the effectiveness of these mechanisms in practice. We note that the existence of these mechanisms also represents recognition by Pact and Visy that there may at least be a perceived conflict of interest.
37. Therefore, the Commission is unable to reach a definitive view as to whether Visy and Pact are associated, and in this instance, it is not necessary to do so. The Commission intends to analyse the competitive effects of the acquisition on the basis that Visy and Pact are associated, as it appears to the Commission that conditions exist that allow Pact and Visy to be viewed as associated persons and this position would be likely to expose the most acute competition concerns in the relevant markets.
38. If there are no competition concerns when Visy and Pact are considered to be associated, then it is likely that there would be no competition concerns if the alternative proposition is considered (ie that Visy and Pact are *not* associated) as there would be one more independent constraint on Visy post acquisition.

### **Previous decisions on market definition**

39. In the Alto and ACI Decisions, the Commission considered the supply of PET beverage bottles and other plastic products:
- 39.1 In the ACI Decision, the Commission noted that there were discrete product markets based on the type of plastic used (in that case PET) and the end use of the bottles, which was to hold a beverage.
- 39.2 In the Alto Decision, the Commission found that transporting PET beverage bottles was quite expensive, especially when compared to the unit cost of the beverage bottle. As a result, not many PET beverage bottles were shipped between the North Island and the South Island. In that instance, the Commission considered it appropriate to define discrete North Island and South Island markets for PET beverage bottles.
40. On 21 March 2012, the Australian Competition & Consumer Commission (ACCC) announced it would not oppose the proposed acquisition by Visy Industries Australia Pty Limited of the HP Group in Australia. When considering PET containers (including

PET jars, bottles, and other containers) the ACCC did not consider it necessary to reach a definitive view on the exact boundaries of the markets and, in particular, whether there was a single market for the manufacture and supply of PET containers or separate markets for those PET containers manufactured on two-stage equipment (such as PET beverage bottles) and PET containers manufactured on single-stage equipment.

## Market definition

41. The Commission defines markets that highlight the main areas of overlap that would result from the proposed acquisition, namely:
  - 41.1 The North Island market for the manufacture and supply of PET beverage bottles, where the overlap is between Visy, Pact and HP.
  - 41.2 The North Island market for the manufacture and supply of PET non-beverage containers, where the overlap is between Pact and HP.
  - 41.3 The national market for the manufacture/importation and supply of plastic closures, where the overlap is between Pact and HP.

## Product dimension

### *PET beverage bottles*

42. Visy, Pact, and HPNZ all supply PET beverage bottles. From a demand side perspective, the relevant question for the Commission is whether a sufficient number of buyers of PET beverage bottles would be willing to switch to other products so as to prevent a SSNIP<sup>12</sup> in the price of PET beverage bottles.<sup>13</sup>
43. A potential substitute for PET beverage bottles are bottles made from other plastics, like HDPE. The Commission found that PET and HDPE beverage bottles are not functionally interchangeable for most PET beverage bottle purchasers. PET has certain technical properties that make it distinct from other types of plastic products. In particular, PET is the preferred plastic to hold carbonated soft drinks (CSDs) because HDPE is unable to hold carbonated products.
44. Glass bottles and aluminium cans are substitutes for some PET bottles. However, the higher cost of glass in relation to PET and the limited functionality of aluminium cans compared to bottles means that these products are not close substitutes for most PET beverage bottles.
45. From a demand side perspective, the Commission considers that PET beverage bottles are in a separate market.

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<sup>12</sup> Small but significant and non-transitory increase in price.

<sup>13</sup> The Commission notes that from a demand-side perspective, PET beverage bottles are in a separate product market from PET non-beverage containers since bottles and other containers are not functional substitutes. The question of supply-side substitution across PET beverage producers and PET non-beverage producers is separately considered.

46. The Commission notes that there is differentiation in PET beverage bottles. Some bottles are generic, while some are highly customised, and others fall somewhere in-between.
47. Further, PET beverage bottles can be made by two different processes. Each process uses different PET machinery.<sup>14</sup>
- 47.1 There is two-stage machinery that is best suited for the production of large volume generic/uniformly shaped type bottles but is not able to produce certain types of customised bottles.
- 47.2 Then there is single-stage machinery that can produce both the customised bottles and the generic bottles.
48. The Commission acknowledges the different options and competitive constraints that apply depending on a customer's volume and design requirements. However, in this instance the Commission does not consider it necessary to reach a definitive view on whether there should be discrete markets for PET beverage bottles made on single-stage machines and those made on two stage machines.

*PET non-beverage containers*

49. Visy and HP overlap in the production and sale of PET non-beverage containers by way of Visy's association with Pact.<sup>15</sup>
50. From a demand-side perspective, PET non-beverage containers come in a range of different sizes and shapes.<sup>16</sup> The different types of containers are not necessarily functional substitutes, in that a container designed to hold peanut butter is not suitable for holding mouth wash.
51. However, from a supply-side perspective, the machinery used to produce this range of PET non-beverage containers is the same and so the Commission considers that all PET non-beverage containers are likely to be in a single relevant market.

*Supply-side substitution between PET beverage bottles and PET non-beverage containers*

52. The Commission considered whether producers of PET non-beverage containers are in a position to switch easily to the production of PET beverage bottles so as to defeat a SSNIP in PET beverage bottles, and vice versa.
53. While single-stage machinery can be used to produce both PET beverage bottles and PET non-beverage containers, two-stage machinery can generally only be used to produce PET beverage bottles.
54. Some PET manufacturers use their single-stage machines to produce both PET containers and bottles, while others only produce one or the other.

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<sup>14</sup> See Attachment A for a diagram of the production process.

<sup>15</sup> As noted, Visy currently only produces PET beverage bottles.

<sup>16</sup> Refer to Attachment A

55. The Commission considers that those producers who only produce PET non-beverage containers could technically use their machinery to produce PET beverage bottles. The reverse also seems to apply.<sup>17</sup> However, it is not clear that those producers who do not currently use their machines this way would do so in response to a SSNIP.
56. As such, from a supply-side perspective, the distinction between PET non-beverage containers and PET beverage bottles is blurred and therefore it is difficult to draw a definitive boundary. This blurring is discussed further under the competition assessment.
57. However, treating these products separately highlights the areas of competitive overlap and current competition. This is because, at present:
- 57.1 Visy, Pact and HPNZ all supply PET beverage bottles.
  - 57.2 TSL only supplies PET beverage bottles.
  - 57.3 Pact and HPNZ supply PET non-beverage containers.
  - 57.4 Pharmapac supplies only PET non-beverage containers.
  - 57.5 Linkplas and Waipak supply both PET beverage bottles and PET non-beverage containers.
58. Consequently, for the purposes of market definition in this decision, the Commission treats PET beverage bottles and PET non-beverage containers as being in separate product markets.<sup>18</sup>

#### *Supply-side substitution between PET manufacturers and non-PET manufacturers*

59. The Commission finds that non-PET manufacturers are not likely to form part of the relevant markets. Industry participants advised that there is limited supply-side substitutability with products made from glass, aluminium, or other plastic materials. For example HDPE and PP machinery cannot be easily modified to make PET products.

#### *Other products*

60. In addition to PET containers and bottles, Pact and HPNZ make a range of plastic closures. Closures are the lids that attach to different PET beverage bottles and PET non-beverage containers.
61. Typically, closures are made to industry standard dimensions and are therefore able to be used on different manufacturers' bottles/containers. In New Zealand, there are

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<sup>17</sup> That is, the Commission found that single-stage machinery producers who only produce PET beverage bottles could technically use their machinery to produce PET-non-beverage containers.

<sup>18</sup> The Commission's conclusions do not rely on this distinction.

a number of different suppliers of closures. Closures are also imported into New Zealand.

62. The Commission considers that plastic closures are likely to be a relevant market.
63. Pact (and therefore by association, Visy) is a large supplier of non-PET plastic containers. At present, HPNZ only makes a small amount of non-PET containers. Given the level of competitive overlap for non-PET products is likely to be de minimus, the Commission does not consider non-PET products any further.

#### *Conclusion on product markets*

64. The Commission considers the relevant product markets to be:

- 64.1 PET beverage bottles;
- 64.2 PET non-beverage containers; and
- 64.3 plastic closures.

#### **Geographic dimension**

65. Visy has plants in Christchurch and Auckland. Pact has plants in Auckland, Hamilton and Christchurch. HPNZ only has a plant in Auckland.
66. Industry participants advised that transporting empty bottles or containers is effectively transporting air. As such, the distance that PET beverage bottles and PET non-beverage containers are transported tends to be limited. This is consistent with previous Commission investigations.<sup>19</sup>
67. In this investigation, the Commission found few examples of beverage bottles and non-beverage containers being transported between the North and the South Islands. HPNZ is based in Auckland and only supplies customers within the North Island. Both Visy and Pact typically supply their North Island customers from their respective North Island plants and their South Island customers from their respective Christchurch plants.
68. Accordingly, the Commission considers that, for PET beverage bottles and PET non-beverage containers, the relevant geographic market is likely to be the North Island.
69. In respect of plastic closures, the same space considerations do not apply. Plastic closures are relatively small and are transported around the country from a range of different manufacturers. Plastic closures are also imported into New Zealand. Accordingly, the Commission considers the relevant market to be national in scope.

#### **Functional dimension**

70. Both Visy and HPNZ manufacture and supply PET products to end customers. The Commission considers the relevant functional level to be manufacture and supply.

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<sup>19</sup> For example, see the Alto Decision.

71. A large number of plastic closures are imported. Accordingly the Commission considers the relevant functional level for plastic closures to be the manufacture/importation and supply level.

### **Conclusion on market definition**

72. For the purpose of this decision the Commission considers that the relevant markets are the :
- 72.1 North Island market for the manufacture and supply of PET beverage bottles (the PET beverage bottles market).
- 72.2 North Island market for the manufacture and supply of PET non-beverage containers (the PET non-beverage containers market).
- 72.3 The national market for the manufacture/importation and supply of plastic closures (the plastic closures market).

### **Factual / counterfactual**

73. If the proposed acquisition goes ahead, Visy would acquire the businesses and assets of HPNZ relating to PET bottles, plastic containers, and plastic closures.
74. The Commission considers that without the acquisition, HPNZ's assets would remain in the relevant markets.
75. Given that it is in receivership, it appears unlikely that HPNZ will continue under its current ownership. The Receiver advised that, absent the proposed acquisition, it would likely sell the HPNZ assets either by tender or auction. This is because:
- 75.1 [ ].
- 75.2 [ ].
76. Nevertheless, the Receiver advised the Commission that [ ].
77. It is widely known in the industry that HP Group is in receivership due to its debt issues in Australia rather than the performance of HPNZ. During the Commission's investigation, several parties expressed an interest in the HPNZ assets.
78. To this extent, the Commission considers that without the proposed acquisition, HPNZ's assets are likely to remain in the relevant markets in competition with both Visy and Pact.

## **Competition assessment**

79. The Commission considers that if incentivised by the actions of the merged entity, customers would have the option of switching to alternative suppliers in each of the relevant markets. These suppliers each have spare capacity and could quickly increase their current levels of production and therefore provide a competitive constraint on the merged entity.
80. In addition, in the PET beverage bottle market, the largest customer is likely to have a degree of countervailing power.

### **The PET beverage bottles market**

81. At present, Visy, Pact, and HPNZ are the three largest suppliers of PET beverage bottles. Other suppliers in the market include TSL, Linkplas and Waipak, as well as a number of fringe suppliers.
82. Each of these competitors differs in the volume and range of PET beverage bottles they supply. Therefore, in order to calculate market shares, the Commission obtained a range of information from industry participants, which included the amount of PET resin used, the number of beverage bottles produced, and sales revenue.
83. Table 1 shows the estimated market share for the major firms in the PET beverage bottles market.

**Table 1: Estimated market share for PET beverage bottles in 2011**

<b>Parties</b>	<b>Resin used (tonnes)</b>	<b>Market share (%)</b>	<b>Number of bottles (million units)</b>	<b>Market share (%)</b>	<b>Sales revenue (\$ million)</b>	<b>Market share (%)</b>
Visy Two-stage machines	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]
Pact* Single-stage machines	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]
HPNZ Single- and two-stage machines	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]
<i>Combined Visy/Pact/HPNZ entity</i>	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]
TSL Single-stage machines	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]
Linkplas Single-stage machines	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]
Waipak Two-stage machines	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]
<b>Total</b>	[ ]	<b>100</b>	[ ]	<b>100</b>	[ ]	<b>100</b>

Source Industry participants. \*Pact and Visy treated as one head in the market.

84. Table 1 indicates that the merged entity would have a market share of between [ ] and the three firm concentration ratio, post acquisition, would be between [ ]. This is outside the Commission's safe harbours.

*Ability of existing competitors to expand*

85. Although the merged entity would have a large presence in the market, all industry participants advised that the barriers to expansion in PET beverage bottles for existing suppliers are relatively low. All existing suppliers advised the Commission they had significant excess capacity and could easily take on additional volumes.
86. Table 2 shows the current production and the total existing capacity of the main suppliers in the PET beverage bottles market.



**Table 2: Current capacity of existing suppliers**

<b>Parties</b>	<b>Current production (million units)</b>	<b>Total capacity(million units)</b>	<b>Excess capacity(million units)</b>	<b>Existing utilisation (%)</b>
Visy	[ ] <sup>20</sup>	[ ]	[ ]	[ ]
Pact	[ ]	[ ]	[ ]	[ ]
HPNZ	[ ]	[ ]	[ ]	[ ]
TSL	[ ]	[ ]	[ ]	[ ]
Linkplas	[ ]	[ ]	[ ]	[ ]
Waipak	[ ]	[ ]	[ ]	[ ]
Pharmapac*	[ ]	[ ]	[ ]	[ ]

Source: Industry participants and Commission estimates. \*Pharmapac included as potential competitor.

87. Further, all existing suppliers advised that if incentivised to do so, they would be willing and able to obtain additional machinery to increase their capacity, particularly if they were approached by a large customer.
88. Expansion could involve acquiring single and two-stage machinery to produce stock bottles and customised bottles. All industry participants spoken to by the Commission advised that the necessary PET equipment is widely available, and could be commissioned relatively quickly.
89. TSL currently produces [ ] PET beverage bottles a year and stated it could easily produce up to [ ] beverage bottles per year with its existing machinery. TSL has advised the Commission that it [ ].
90. Linkplas currently produces [ ] PET products a year and stated that it could double this production. Linkplas stated that it has concentrated on supplying customised beverage bottles. For example, it does not currently produce PET beverage bottles for CSDs. [ ].
91. [ ].
92. [ ].

<sup>20</sup> Visy noted that this figure excludes supply to CCA which is in the process of switching to self supply.

93. Waipak is a recent entrant into the market. Waipak is based in Hawke's Bay. Since its entry in 2009, it has grown from supplying [ ]. Waipak provides both stock<sup>21</sup> and customised bottles.
94. Waipak advised [ ]
95. [ ]
96. The Commission considers that expansion by existing PET beverage bottle suppliers in the North Island could occur relatively easily through the use of existing excess capacity. In addition, existing suppliers do not appear to be constrained in their ability to acquire additional capacity, if need be.
97. The largest customer in the market is Frucor, which purchases in excess of [ ] units per year. Industry participants advised that Frucor's volume could not be easily accommodated within the existing capacity of any supplier, other than the merged entity. However, capacity would not be a problem for other customers.
98. The Commission obtained the volumes of the top ten customers of both Visy and HPNZ, excluding Frucor. These 20 customers accounted for approximately [ ] million units in 2011. As indicated in Table 2, this volume could be accommodated within the existing capacity of the other competitors in the market (although there could be scheduling issues if all the customers switched at the same time).
99. Customers spoken to by the Commission provided differing views as to what effect the proposed acquisition would have on them. For example:
- 99.1 [ ] expressed concerns over its supply options post merger as it thought the proposed merger would remove the only alternative to Visy from the market.
- 99.2 However, other customers such as [ ] believed there would still be competitive options in the market post merger.

#### *Conclusion on existing competition*

100. The Commission considers that, while the proposed acquisition would combine the two largest existing suppliers of PET beverage bottles, the merged entity would likely be constrained by the presence of several other suppliers in the market each of whom has excess capacity.

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<sup>21</sup> A stock bottle is a standard, generic bottle that can be purchased by any customer.

101. In addition, the existing competitors do not appear to be constrained in their ability to expand their present operations if incentivised to do so.

**Countervailing power**

102. Industry participants advised that historically, Visy (and to a certain extent HPNZ) have concentrated on supplying high volumes of standard PET beverage bottles to large customers such as CCA and Frucor.

103. Following CCA's decision to self supply, the largest customer for PET beverage bottles is Frucor.

104. The Commission notes that Frucor has traditionally split its supply between Visy and HPNZ. This has enabled Frucor to gain some commercial advantages from the resulting competitive tension between these two suppliers. The proposed acquisition would remove this competitive tension.

105. However, Frucor advised that for some of its products it only requires small volumes and so the smaller customised suppliers provide an alternative source of supply. For example, [ ]. Also, certain subsidiaries of Frucor have self supplied their bottle requirements in the past.

106. In addition, Frucor advised [ ].

107. [ ] At that time, Frucor would consider all its possible options. These options could include:

107.1 [ ]

107.2 [ ]

108. [ ]

*Conclusion on countervailing power*

109. Accordingly, the Commission considers that post acquisition large customers would likely have a degree of countervailing power.

**Conclusion on the PET beverage bottles market**

110. The Commission finds that the combined Visy/Pact/HPNZ entity is likely to be constrained by the presence of several other suppliers in the market who have excess capacity. Existing competitors are able to expand their present operations if incentivised to do so.
111. In addition, the largest purchaser in the market is likely to have a degree of countervailing power.
112. Accordingly, the Commission considers that the proposed acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in the PET beverage bottles market.

**The PET non-beverage containers market**

113. In the PET non-beverage containers market, the Commission finds that the merged entity would continue to face competition from existing smaller participants in the market.
114. At present, Pact and HPNZ are the two largest existing suppliers of PET non-beverage containers. Other suppliers in the market include Pharmapac, Linkplas and Waipak.
115. Table 3 shows the estimated market share for the major firms in the PET non-beverage containers market.

**Table 3: Estimated market share for PET non-beverage containers for 2011**

Parties	Resin used (tonnes)	Market share (%)	Number of bottles (million units)	Market share (%)	Sales revenue (\$ million)	Market share (%)
Pact*	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]
HPNZ	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]
<i>Combined Visy/Pact/HPNZ entity</i>	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]
Pharmapac	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]
Linkplas	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]
Waipak	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]
<b>Total</b>	[ ]	<b>100</b>	[ ]	<b>100</b>	[ ]	<b>100</b>

Source Industry participants. \*Pact and Visy treated as one competitor in the market. Visy does not operate in this market.

116. Table 3 indicates that the merged entity would have a market share between [ ] and the three firm concentration ratio, post acquisition, would be [ ]. This is outside the Commission's safe harbours.
117. While small, existing suppliers in the PET non-beverage containers market advised that they could use their existing capacity to increase the number of PET non-beverage containers they supply. As with the PET beverage bottles market, incremental expansion could be achieved relatively quickly as the machinery is widely available.
118. Pharmapac is a recent entrant in this market and produces containers primarily for the [ ]. Pharmapac previously only supplied non-PET plastic containers but acquired a PET machine in 2009 and has expanded into this market. In 2011, Pharmapac achieved sales of [ ].
119. Pharmapac's PET machinery is currently operating at [ ] capacity. Pharmapac advised [ ].
120. Waipak has been actively approaching a range of different PET non-beverage container customers, particularly in the Auckland region. [ ]

]

121. As with PET beverage bottles, customers of PET non-beverage containers provided the Commission with mixed responses when asked whether they thought the acquisition would affect them.
- 121.1 [ ] did not think the proposed merger would affect its supply options.
- 121.2 [ ] considered Pharmapac to be a viable alternate supplier.
- 121.3 [ ] was unhappy with the proposed merger but believed it had a range of alternate options, including using another domestic supplier as well as potentially importing containers, which it could use as leverage in future negotiations with the merged entity.

*Prospects for potential entry*

122. As noted above, it is difficult to draw a definitive market boundary between PET non-beverage containers and PET beverage bottles.
123. For example, [ ] considers itself to be a PET beverage bottle supplier. However, [ ] advised that it has the ability to make PET non-beverage containers with its existing machinery and would be able to make a range of different PET non-beverage containers for a customer, if required.
124. Accordingly, the Commission considers that existing PET beverage bottle suppliers would provide a degree of constraint on PET container suppliers.
125. The reverse also appears to be true. [ ], advised that it could use its spare capacity to produce PET beverage bottles, if incentivised by a customer.
126. The Commission also notes that several parties in the plastic industry raised the prospect of a non-PET manufacturer entering the market, if sufficiently incentivised.
127. [ ], a manufacturer of plastic (non-PET) beverage bottles and containers, advised that it has the necessary industry knowledge to supply PET non-beverage containers. It would only need to acquire the necessary machinery and would do this if incentivised by a customer.
128. [ ], a manufacturer and supplier of a range of plastic packaging products, advised that it is looking to expand its current production capability. This could include expanding into manufacturing PET non-beverage containers. It currently purchases some PET non-beverage containers [ ] to complement its range of plastic products that it sells to its customers.

**Conclusion on the PET non-beverage containers market**

129. The Commission finds that the merged entity would continue to face competition from existing smaller participants in the market. All of the existing participants have

significant excess capacity and consider that they would be able to quickly expand to capture market share.

130. Furthermore, even absent the current excess capacity of the smaller market participants, the Commission finds that expansion through the purchase of additional new capacity by a current PET supplier, or potentially a non-PET supplier, could be achieved within a short timeframe.
131. Accordingly, the Commission finds that the proposed acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in the PET non-beverage containers market.

### **The plastic closures market**

132. HPNZ and Pact both supply a range of plastic closures. Visy advised that it currently does not supply any closures but stated that it will arrange for such supply if requested to do so by an existing customer.
133. Industry participants advised that there are a number of suppliers of plastic closures, other than the merged entity, and these include domestic and overseas manufacturers. No industry parties expressed any concerns about the supply of plastic closures because closures are relatively small and can be transported in bulk at relatively little cost.
134. Accordingly, the Commission considers that the proposed acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in plastic closures market.

### **Overall conclusion**

135. The proposed acquisition would see Visy acquire the business and assets of HPNZ relating to PET beverage bottles, PET non-beverage containers and plastic closures.
136. The Commission has analysed the application on the basis that Visy and Pact associated parties because this approach would highlight the key competitive concerns arising from the proposed acquisition.
137. For the purpose of its competition analysis, the Commission defined markets that highlighted the main areas of overlap that would result from the proposed acquisition, namely:
- 137.1 The North Island market for the manufacture and supply of PET beverage bottles.
- 137.2 The North Island market for the manufacture and supply of PET non-beverage containers.
- 137.3 The national market for the supply of plastic closures.

138. If the proposed acquisition did not go ahead, the Commission considers that HPNZ's assets would likely remain in the relevant markets.
139. The Commission considers that if incentivised by the actions of the merged entity, customers would have the option of switching to an alternative supplier in all the relevant markets. These suppliers have spare capacity and could quickly increase their current level of production and therefore provide a competitive constraint on the merged entity.
140. In addition, large customers would have the option of self supplying their requirements if incentivised by the actions of the merged entity.
141. Accordingly, 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 any of the relevant markets.



### **Determination on the notice of clearance**

142. Pursuant to s 66(3)(a) of the Commerce Act 1986, the Commission determines to give clearance to VRPS Limited and Visy Industries Australia Pty Limited to acquire certain businesses and assets of HP Industries Holding Limited (in receivership) and HP Industries (New Zealand) Limited (in receivership) relating to PET bottles, plastic containers, and plastic closures.

Dated this 30<sup>th</sup> day of March 2012

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Dr Mark Berry  
Chair

# Attachment A

