

Determination

Mayborn Group Limited and Jackel Pty Limited [2015] NZCC 2

- The Commission:** Dr Mark Berry
Anna Rawlings
Dr Jill Walker
- Summary of application:** An application from Mayborn Group Limited seeking clearance to acquire from Jackel Pty Limited and related entities, insofar as they relate to New Zealand, the Tommee Tippee brand and related assets.
- Determination:** Under s 66(3)(a) of the Commerce Act 1986 the Commerce Commission determines to give clearance to the proposed acquisition.
- Date of determination:** 29 January 2015

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

CONTENTS

THE PROPOSED ACQUISITION	4
THE DECISION – CLEARANCE GRANTED	4
OUR FRAMEWORK	4
THE SUBSTANTIAL LESSENING OF COMPETITION TEST	4
WHEN A LESSENING OF COMPETITION IS SUBSTANTIAL	5
WHEN A SUBSTANTIAL LESSENING OF COMPETITION IS LIKELY	6
THE CLEARANCE TEST	6
KEY PARTIES	6
MAYBORN	6
JACKEL	6
OTHER INDUSTRY PARTICIPANTS	7
WITH AND WITHOUT SCENARIOS	7
WITH THE ACQUISITION	7
WITHOUT THE ACQUISITION	7
MARKET DEFINITION	8
OUR APPROACH TO MARKET DEFINITION	8
THE APPLICANT’S VIEW OF THE RELEVANT MARKETS	8
OUR VIEW OF THE RELEVANT MARKETS	9
HOW THE ACQUISITION COULD LESSEN COMPETITION	10
THEORY OF HARM	10
COMPETITION ASSESSMENT	10
<i>Level of constraint from existing competition</i>	10
<i>Level of constraint from potential entry and expansion</i>	12
<i>Closeness of competition between Mayborn and Jackel in premium baby bottles</i>	12
OVERALL CONCLUSION	14
DETERMINATION ON NOTICE OF CLEARANCE	15
ATTACHMENT A: INDIVIDUAL PRODUCTS OR PRODUCT GROUPS	16

The proposed acquisition

1. On 20 November 2014, Mayborn Group Limited (Mayborn) applied for clearance to acquire from Jackel Pty Limited (Jackel) and related entities certain assets relating to its business in New Zealand. The assets being acquired as part of the proposed acquisition include (but are not limited to):^{1 2}
 - 1.1 intellectual property rights to the Tommee Tippee brands and trademarks;
 - 1.2 Jackel's current inventory of Tommee Tippee products;
 - 1.3 certain tooling; and
 - 1.4 data relating to Jackel's customer master file and supplier base.
2. The proposed acquisition is subject to Mayborn receiving clearances from the Commission and the Australian Competition and Consumer Commission.
3. The acquisition relates to the supply of baby and toddler feeding accessories and would result in the aggregation of Mayborn's Closer to Nature brand and Jackel's Tommee Tippee brand under Mayborn's ownership.

The decision – clearance granted

4. The Commission gives clearance to the proposed acquisition. 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 a market in New Zealand.

Our framework

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

The substantial lessening of competition test

6. As required by the Commerce Act 1986, we assess acquisitions using the substantial lessening of competition test.

¹ The proposed acquisition is fully detailed in the Asset Sale Deed included as Appendix B to clearance application from Mayborn Group Limited (20 November 2014). While Mayborn's application for clearance mainly discusses the Tommee Tippee brand, the Asset Sale Deed reveals that Mayborn would also acquire the Happy Baby brand as part of the proposed acquisition.

²

[

]

³ Commerce Commission, *Mergers and Acquisitions Guidelines*, July 2013.

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

When a lessening of competition is substantial

12. 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.⁷ Some courts have used the word 'material' to describe a lessening of competition that is substantial.⁸ A substantial lessening of competition in a significant section of a market, may, according to circumstances, be a substantial lessening of competition in a market.⁹
13. Consequently, there is no bright line that separates a lessening of competition that is substantial from one that is not. What is substantial is a matter of judgement and depends on the facts of each case. Ultimately, we assess whether competition will be

⁴ *Commerce Commission v Woolworths Limited* (2008) 12 TCLR 194 (CA) at [63].

⁵ Or below competitive levels in a merger between buyers.

⁶ Section 3(1A). See also *Brambles v Commerce Commission* (2003) 10 TCLR 868 at [81].

⁷ *Woolworths & Ors v Commerce Commission* (2008) 8 NZBLC 102,128 (HC) at [127].

⁸ *Ibid* at [129].

⁹ As the Federal Court of Australia noted in *Dandy Power Equipment Pty Ltd & Anor v Mercury Marine Pty Ltd* (1982) 64 FLR 238, 260; 44 ALR 173, 192; ATPR 40-315, 43,888, cited with approval by McGechan J in *Commerce Commission v Port Nelson Ltd* (1995) 6 TCLR 406 at 435: "Although the words "substantially lessened in a market" refer generally to a market, it is the degree to which competition has been lessened which is critical, not the proportion of that lessening to the whole of the competition which exists in the total market. Thus a lessening in a significant section of the market, if a substantial lessening of otherwise active competition may, according to circumstances, be a substantial lessening of competition in a market".

Other industry participants

19. A significant number of other brands of baby and toddler feeding accessories are currently supplied in New Zealand. The largest of these is AVENT, which is owned by Koninklijke Philips N.V. Nuby is also a significant brand in New Zealand that is stocked in numerous retailers (including supermarkets and The Warehouse).
20. Some of the other brands of baby and toddler feeding accessories specialise in supplying feeding accessories for only a particular development stage (eg, baby bottles or toddler feeding accessories), but a number supply a full range of baby and toddler feeding accessories. In addition, there is some differentiation between brands around market positioning, with some brands (or sub-brands) positioned and priced as more premium (higher quality) products.

With and without scenarios

21. We compare the likely state of competition with the acquisition to the likely state of competition without the acquisition.¹⁵

With the acquisition

22. Mayborn already owns the intellectual property rights to the Tommee Tippee brand in all other countries where it distributes its products, but not in New Zealand or Australia. With the transaction, Mayborn would have global ownership of the Tommee Tippee brand. The acquisition would aggregate the Tommee Tippee and Closer to Nature brands under the ownership of Mayborn.

Without the acquisition

23. Mayborn submitted that there are two possible without scenarios: the status quo or sale to a third party.¹⁶ The competition analysis is the same under either scenario.

24. Jackel submitted that

[
].^{17 18}
].¹⁹

25. [
]²⁰
]

¹⁵ Commerce Commission, *Mergers and Acquisitions Guidelines*, above n3 at [2.33].

¹⁶ Clearance application from Mayborn above n1 at [34].

¹⁷ Letter from Jackel to the Commerce Commission (19 December 2014).

¹⁸

[
]

¹⁹ Letter from Jackel to the Commerce Commission (19 December 2014).

²⁰ [
]

26. For the purposes of this determination, we have adopted a without the acquisition scenario where the Tommee Tippee brand is likely to remain independently owned in New Zealand (whether by Jackel or a third party).
27. We have compared the acquisition against this scenario on the basis that it is the most conservative. Doing so means our analysis is based on a worst case scenario, in the sense that it is the scenario that would give rise to the greatest competition concerns. If the proposed acquisition is unlikely to substantially lessen competition compared to this worst case scenario, then it is unlikely to substantially lessen competition when compared to any other likely scenario.

Market definition

Our approach to market definition

28. Market definition is a tool that provides a framework to help identify and assess the close competitive constraints the merged entity would likely face. In the end, however, what matters is that we consider all relevant competitive constraints and the extent of those constraints.²¹
29. 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.

The applicant's view of the relevant markets

30. Mayborn submitted that the relevant market is the national market for the wholesale supply of baby and toddler feeding accessories.²² It submitted that while the different product groups or specific individual products (eg, a cup and a spoon) are not substitutable on the demand-side, from a supply-side perspective distributors offering a particular product could extend into offering other products.²³
31. The baby and toddler feeding accessories supplied by Mayborn and Jackel (and the product groups in which the parties overlap) include:
- 31.1 baby bottles and associated products (eg, bottle sterilisers and teats);
 - 31.2 breastfeeding products (eg, breast pumps and nursing pads);
 - 31.3 formula feeding products (eg, milk formula dispensers);
 - 31.4 toddler feeding products (eg, cups, bowls and cutlery); and
 - 31.5 other baby and toddler products (eg, soothers and bibs).

²¹ Commerce Commission, *Mergers and Acquisitions Guidelines*, above n3 at [3.12].

²² Clearance application from Mayborn above n1 at [30].

²³ *Ibid* at [31-32].

Our view of the relevant markets

32. As submitted by Mayborn, the different product groups or individual products within the baby and toddler feeding accessories category are not substitutable from a demand-side perspective. Given this (as well as the fact that some competitors to Mayborn and Jackel²⁴ currently supply a more limited range of individual products that focus on only one or some product groups and/or supply individual products positioned at a more premium end), we took a conservative approach and assessed competition on both an individual product and product group basis. We note that if no concerns arise on these bases, then concerns would equally not arise on the basis of broader markets given that both parties supply products in all categories.
33. Mayborn and Jackel operate at the wholesale level of the supply-chain, supplying baby and toddler feeding accessories to retailers (eg, supermarkets, pharmacies, specialty baby stores and general merchandise retailers). We considered whether markets should be further divided by distribution channel because suppliers could price discriminate between different types of retailers (or distribution channels) and/or because the number and identity of competitors to Mayborn and Jackel varies between channels. This required us to consider:
- 33.1 on the demand-side, whether consumers would switch to retailers in other distribution channels in response to an increase in the relative price of baby and toddler feeding accessories supplied in one channel compared to other channels;
- 33.2 on the demand-side, whether a retailer (eg, a supermarket) would switch to alternative suppliers of baby and toddler feeding accessories that supply other distribution channels in response to an increase in the prices charged by an existing supplier; and
- 33.3 on the supply-side, whether suppliers that are not currently supplying to a particular retailer or distribution channel could “easily, profitably and quickly”, switch or expand distribution so that they were supplying that channel.
34. Pharmacies and specialty baby stores provide advice to consumers at the time of purchase which could suggest that consumers that value advice may not switch to buying baby and toddler feeding accessories at supermarkets or other retailers (eg, The Warehouse). However, while this may be a reason to define separate markets by channel, there is also evidence that indicates that different types of retailers see themselves as competing with one another in the supply of baby and toddler feeding accessories and consider other retailers in deciding pricing or the brands that they will stock.^{25 26} In addition, there is evidence that the same suppliers

²⁴ The competitors to Mayborn and Jackel being other parties that wholesale supply baby and toddler feeding accessories to retailers (eg, AVENT).

²⁵ [] E-mail from [].

of baby and toddler feeding accessories compete for the business of different types of retailers (or distribution channels).²⁷ For the purposes of this determination, we did not need to reach a final view on this issue. Our analysis would not be materially different if we defined separate markets by distribution channel as opposed to wider markets encompassing all channels given that both parties could supply products in all channels.

How the acquisition could lessen competition

Theory of harm

35. The proposed acquisition would bring Mayborn's Closer to Nature and Jackel's Tommee Tippee brands under the ownership of Mayborn.²⁸ It could potentially substantially lessen competition by reducing the level of competition in the wholesale supply of baby and toddler feeding accessories by removing competition between Mayborn and Jackel. For there to be a substantial lessening of competition, Mayborn's market power²⁹ with the acquisition would have to increase relative to its market power without the acquisition. A substantial lessening of competition is more likely to occur if Mayborn and Jackel are close competitors.³⁰

Competition assessment

Level of constraint from existing competition

36. As noted above, we considered whether competition issues would arise in relation to any individual products or product groups supplied by the parties that are demand-side substitutes.
37. For each individual product or product group that we examined, our market enquiries found the presence of numerous other competitors (as indicated in Attachment A).³¹
- 37.1 AVENT was cited by many parties, [], as a market leader along with Tommee Tippee. Mayborn's Closer to Nature brand was not identified by any parties as a market leader.^{32 33}

²⁶ [] Commerce Commission interview with [].

²⁷ For example (as discussed further below), AVENT is the market leader in most distribution channels and [].

²⁸ As noted earlier, Mayborn would also acquire the Happy Baby brand as part of the proposed acquisition. This Determination focusses on assessing the impact of Mayborn acquiring the Tommee Tippee brand given that sales of Happy Baby products are very small and accounted for []% of Jackel's New Zealand sales for the year to November 2014.

²⁹ Market power is the ability to raise price profitably and sustainably above competitive levels.

³⁰ In differentiated product markets, such as baby and toddler feeding, competition concerns are more likely to arise where the merger parties compete relatively closely. See Commerce Commission, *Mergers and Acquisitions Guidelines*, above n3 at [3.71-3.75].

³¹ In Attachment A, we set out information on the individual products that Mayborn and Jackel both supply, including information on sales and estimated market shares for each product (based on wider markets encompassing all channels).

37.2 Retailers did not identify any individual overlapping products or product groups where there are no other alternative brands.³⁴

37.3 Retailers considered that for all products they had sufficient alternatives to counter any attempted price increase by the merged entity and did not raise competition concerns with the proposed acquisition, even in the supply of premium baby bottles (the area of closest overlap between the parties, discussed in more detail below).^{35 36 37 38 39}

38. Were we to define separate markets for different distribution channels, we would still have found that the merged entity would face significant competition post-acquisition in each channel.

38.1 In supermarkets and The Warehouse, Tommee Tippee is the leading brand stocked, with AVENT and Nuby currently being stocked as the major alternative brands.

38.2 In specialty baby stores, pharmacies and Farmers, AVENT is the leading brand stocked, but one or more other brands are also stocked.⁴⁰

38.3 Even where retailers choose to stock products from only two suppliers, the availability of multiple alternative suppliers means that the loss of one supplier with the acquisition would not significantly affect competition. Brands that are currently only stocked in a particular channel for a limited range of products could expand their range of products in response to a price increase. For example, [] stated that Nuby is currently stocked as the third brand with limited range on shelf, but it could increase the range of Nuby products that it stocked (in particular, around premium baby bottles).⁴¹

32

[].

33

[].

34

[].

35

[].

36

[].

37

[].

38

[].

39

[].

40

In addition to AVENT, Farmers stocks Closer to Nature as its main second brand. Specialty baby stores stock a large number of brands in addition to AVENT, including (but not limited to) Tommee Tippee, Closer to Nature, Medela, Dr Browns, Nuby and NUK. Pharmacies also stock multiple brands, but Tommee Tippee and Medela are the main stocked alternatives to AVENT.

41

Commerce Commission interview with [] and Commerce Commission interview with [].

Level of constraint from potential entry and expansion

39. We also found no evidence to indicate that other competitors already supplying within New Zealand would not be able to easily expand post-acquisition or that new brands would not be able to enter the New Zealand market. All brands of baby and toddler feeding accessories supplied in New Zealand are manufactured overseas and imported into New Zealand. Mayborn submitted that, to be successful, the primary challenge competitors faced was around securing access to relevant distribution channels. Our market enquiries found evidence of retailers introducing new brands of baby and toddler feeding accessories.^{42 43}

Closeness of competition between Mayborn and Jackel in premium baby bottles

40. Industry participants considered the main area of competitive overlap between Mayborn and Jackel to be in the supply of premium (higher-priced) baby bottles and associated products.⁴⁴ At the premium end of the baby bottles product group, Mayborn's Closer to Nature brand exists as a competitive alternative to Tommee Tippee Miomee. Other Tommee Tippee products are considered to be more basic and to not compete as closely with Closer to Nature.
41. We therefore considered whether Closer to Nature and Tommee Tippee Miomee are close competitors and whether the proposed acquisition would result in the removal of a significant competitive constraint from the baby bottles product group.⁴⁵
42. We found evidence indicating that Closer to Nature and Tommee Tippee Miomee competed closely with one another.

42.1 With the acquisition,
[]⁴⁶

42.2 []⁴⁷ For example, Jackel advised that
[]

⁴² []

⁴³

[]
].

⁴⁴ Of the product groups listed at paragraph 31 above, the baby bottles and associated products group (which includes basic and premium products) is the largest product group that, based on estimates of total market size, accounts for []% of overall feeding category sales.

⁴⁵ Both the constraint imposed by Closer to Nature on Tommee Tippee Miomee and vice versa.

⁴⁶ [], attached to e-mail from Chapman Tripp (on behalf of Mayborn) to the Commerce Commission (12 December 2014)

⁴⁷ Jackel internal reports provided under the cover of a letter from Jackel to Commerce Commission (23 December 2014).

[]⁴⁸
] ^{49 50 51}

42.3 [

] ^{52 53}

43. However, we also found significant evidence suggesting that, notwithstanding the closeness of competition between Mayborn and Jackel in the supply of premium end baby bottles, the proposed acquisition was not likely to substantially lessen competition. This evidence includes the following:

43.1 AVENT being cited by many parties as a market leader (as noted earlier).⁵⁴

43.2 Nuby has a similar product range to Closer to Nature and Tommee Tippee Miomee and could easily expand post-acquisition.⁵⁵ [] stated

⁴⁸ Letter from Jackel to the Commerce Commission (23 January 2015).

⁴⁹ Ibid.

⁵⁰ []
Commission interview with [].

⁵¹

[] Letter from Jackel to the Commerce Commission (27 January 2015).

⁵²

[] Commerce Commission interview with

⁵³

[]
] Commission interview with [].

⁵⁴

As noted in Attachment A, AVENT supplies a similar range of baby and toddler feeding accessories to Closer to Nature and Mayborn. The only overlapping product that AVENT does not supply is bibs. In terms of baby bottles, AVENT does have a classic and a natural range, but both appear to be positioned and priced at the premium end of the market.

⁵⁵

The range of Nuby products stocked in New Zealand stores is currently only a portion of the range of products offered by Nuby overseas (which includes baby and toddler feeding products, as well as a basic and premium baby bottle range). If Nuby secured more shelf space in New Zealand retailers, it could expand the range of products it sells in New Zealand by importing products already supplied in overseas.

that Nuby is currently stocked as the third brand with limited range on shelf, but it could increase the range of Nuby products that it stocked (in particular, around premium baby bottles) if it was unhappy with Mayborn post-acquisition. Nuby is the first supplier that [] would turn to if it needed to review the category.⁵⁶

43.3 The presence of other brands of premium end baby bottles.⁵⁷

43.4 Mayborn submitted that
[

].^{58 59}

43.5 Jackel stated that
[

].⁶⁰

43.6 While Jackel
[

].⁶¹

Overall conclusion

44. We are therefore satisfied that the proposed acquisition is unlikely to substantially lessen competition in any relevant market, however defined. The merged entity would continue to face competition from AVENT and other suppliers of baby and toddler feeding accessories who could easily expand.

⁵⁶ Commerce Commission interview with [] and Commerce Commission interview with [].

⁵⁷ Other brands of premium end baby bottles include Medela and Dr Browns.

⁵⁸ E-mail from Chapman Tripp (on behalf of Mayborn) to the Commerce Commission (22 January 2015).

⁵⁹ Mayborn advised that []. E-mail from Chapman Tripp (on behalf of Mayborn) to the Commerce Commission (26 January 2015).

⁶⁰ Letter from Jackel to the Commerce Commission (23 January 2015).

⁶¹ Letter from Jackel to the Commerce Commission (27 January 2015).

Determination on notice of clearance

45. 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 a market in New Zealand.
46. Under s 66(3)(a) of the Commerce Act 1986, the Commission gives clearance to Mayborn Group Limited to acquire from Jackel Pty Limited and related entities, insofar as they relate to New Zealand, the Tommee Tippee brand and related assets.

Dated this 29th day of January 2015

Dr Mark Berry
Chairman

Attachment A: Individual products or product groups

- A1. Table 1 lists the individual products and product groups that Mayborn and Jackel both supply (ie, the overlapping products) and, for each product and product group, details the extent of aggregation in the supply of that product with the proposed acquisition and lists some of the competing brands currently sold in New Zealand.⁶²

Table 1: Aggregation in product groups and other suppliers of overlapping products

Product group	Product	Sales	Merged share	Competing brands
Baby bottles and associated products	Bottles, including replacement teats	Jackel \$[], Mayborn \$[]	[]%	AVENT, Nuby, Medela, NUK, Pigeon, Munchkin, MAM, Dr Browns
	Bottle sterilisers	Jackel \$[], Mayborn \$[]	[]%	AVENT, Munchkin, MAM, First Years, Dr Browns, NUK
	Thermal bottle bags	Jackel \$[], Mayborn \$[]	[]%	AVENT, Munchkin, MAM, Dr Browns
	Share for product group:		[]%	
Breastfeeding products	Breast pumps	Jackel \$[], Mayborn \$[]	[]%	AVENT, Medela, NUK, Pigeon, MAM
	Breast pads	Jackel \$[], Mayborn \$[]	[]%	AVENT, Medela, NUK, Pigeon, MAM, Johnson & Johnson
	Share for product group:		[]%	
Formula feeding products	Milk formula dispensers	Jackel \$[], Mayborn \$[]	[]%	AVENT, Nuby, Heinz
Toddler feeding products	Cups	Jackel \$[], Mayborn \$[]	[]%	AVENT, Nuby, NUK, Pigeon, Munchkin, MAM, Heinz, Dr Browns
	Cutlery, utensils and tableware	Jackel \$[], Mayborn \$[]	[]%	
	Food processors	Jackel \$[], Mayborn \$[]	[]%	AVENT, Munchkin
	Share for product group:		[]%	
Other baby and toddler products	Soothers	Jackel \$[], Mayborn \$[]	[]%	AVENT, Nuby, NUK, Pigeon, Munchkin, MAM, Dr Browns
	Bibs	Jackel \$[], Mayborn \$[];	[]%	Nuby, NUK, Munchkin, Heinz
	Share for product group:		[]%	

Source: Mayborn, Jackel and industry participants

- A2. Table 1 shows that the merged entity has a market share of approximately []% in a narrow market for baby bottles and []% in a narrow market for bottle sterilisers.

⁶² Table 1 lists all the major competing brands, but is not necessarily a complete list of all suppliers. The market shares listed for the merged entity are estimates only based on estimated size of total market.