Public Competition Assessment

13 September 2011

Asahi Holdings (Australia) Pty Ltd - proposed acquisition of P&N Beverages Australia Pty Ltd and P&N Australia Pty Ltd

Introduction

1. On 9 March 2011, the Australian Competition and Consumer Commission (**ACCC**) announced its decision to oppose the proposed acquisition of P&N Beverages Australia Pty Ltd (**P&N**) by Asahi Holdings (Australia) Pty Ltd (**Asahi**) (the **original proposal**).

2. The ACCC decided that the original proposal would be likely to have the effect of substantially lessening competition in the national market for the manufacture and wholesale supply of carbonated soft drinks (**CSDs**) and the national market for the manufacture and wholesale supply of cordial in contravention of section 50 of the *Competition and Consumer Act 2010* (the **Act**). The ACCC considered that the original proposal was unlikely to result in a substantial lessening of competition in the national markets for the manufacture and wholesale supply of fruit juice and bottled water.

3. Subsequently, Asahi lodged a revised proposal to acquire P&N Beverages Australia Pty Ltd and P&N Australia Pty Ltd (together, **P&N**). Asahi also proffered a section 87B undertaking (the **Undertaking**) to give effect to the revised proposal and to remedy the ACCC's competition concerns. Pursuant to the Undertaking, Asahi will simultaneously divest the cordial and CSD business of P&N to Tru Blu Beverages Pty Ltd (**TBB**) and retain the water and juice business of P&N (the **revised proposal**).

4. On 11 August 2011, the ACCC announced its decision not to oppose the revised proposal and to accept the Undertaking. The ACCC was of the view that the Undertaking would address the ACCC's competition concerns in the national markets for the manufacture and wholesale supply of CSDs and cordial.

5. The ACCC made its decisions on the basis of information provided by the merger parties and information obtained from the ACCC's market inquiries. This Public Competition Assessment outlines the basis on which the ACCC reached its decisions on the original proposal, the revised proposal and the Undertaking, subject to confidentiality considerations.

Public Competition Assessment

6. To provide an enhanced level of transparency and procedural fairness in its decision making process, the ACCC issues a Public Competition Assessment for all transaction proposals where:

   - a merger is opposed;
   - a merger is subject to enforceable undertakings;
   - the merger parties seek such disclosure; or
   - a merger is not opposed but raises important issues that the ACCC considers should be made public.

7. This Public Competition Assessment has been issued because the original proposal was opposed by the ACCC and the revised proposal was not opposed subject to a court enforceable undertaking. The proposals are also considered to raise issues of interest to the public.

8. By issuing Public Competition Assessments, the ACCC aims to provide the public with a better understanding of the ACCC's analysis of various markets and the associated merger and competition issues. It also alerts the public to circumstances where the ACCC's assessment of the competition conditions in particular markets is changing, or likely to change.

9. Each Public Competition Assessment is specific to the particular transaction under review by the ACCC, including revisions to those transactions as in this case. While some transaction proposals may involve the same or related markets, it should not be assumed that the analysis and decision outlined in one Public Competition Assessment will be conclusive of the ACCC's view in respect of other transaction proposals, as each matter will be considered on its own merits.

10. Public Competition Assessments outline the ACCC's principal reasons for forming views on a proposed acquisition at the time the decision was made. As such, Public Competition Assessments may not definitively identify and explain all issues that the ACCC considers arise from a proposed acquisition. Further, the ACCC's decisions generally involve consideration of both non-confidential and confidential information provided by the merger parties and market participants. In order to maintain the confidentiality of particular information, Public Competition Assessments do not contain any confidential information or its sources.

The parties

The Acquirer – Asahi Holdings (Australia) Pty Ltd

11. Japanese-based Asahi Group Holdings Ltd owns Asahi, the proposed acquirer, which in turn owns Schweppes Australia Pty Ltd (**Schweppes**). Asahi acquired Schweppes from Cadbury Schweppes in April 2009.

12. Schweppes manufactures and sells, at the wholesale level, a range of non-alcoholic beverages including CSDs, bottled water, fruit juice, energy drinks, cordials, sports drinks and iced tea. **Table 1** lists the main categories of products and brands manufactured by Schweppes.

Table 1 – Summary of Schweppes product categories and brands

Product category	Brands	
Soft drink	Pepsi	Schweppes
	Solo	Sunkist
	7-Up	Mountain Dew
	Passiona	Tarax
Bottled water	Cool Ridge	Fiji Water
	Spring Valley	
Fruit juice	Spring Valley Juice	
Energy drink	Monster	
Cordials	Cottee's	
Sports drinks	Gatorade	

Source: Schweppes

13. Schweppes sells its products to a wide range of retail outlets including supermarket chains, convenience stores, petrol stations and fast food outlets. Schweppes is also the manufacturer of the Pepsi range of CSDs in Australia, which it produces under licence from PepsiCo.

14. Schweppes does not presently produce beverage products that are sold under brand names owned by retailers (referred to as '**private label products**'), however Schweppes has the necessary facilities and expertise to commence manufacturing and supplying private label products.

The Target - P&N Beverages Australia Pty Ltd

15. P&N is a privately owned manufacturer and wholesaler of non-alcoholic beverages including CSDs, bottled water, fruit juice, energy drinks, sports drinks and cordials. P&N's product range includes products which are sold using P&N's own brands (referred to as '**branded products**') and private label products. P&N supplies private label products to Woolworths, Aldi, Metcash and Franklins.

16. **Table 2** lists the branded products supplied by P&N for each beverage category.

Table 2 – Summary of P&N's product categories and brands

Product category	**P&N's brands**	
Soft drink	LA Ice	Ceda Creaming Soda
	Diet Rite	Brewer's Choice Ginger Beer
	Tru Blu	Crush
	Waterfords	McSars Sarsaparilla
	Pub Squash	Club
	Lido Lemonade	
Bottled water	Frantelle	Tru Blu
Fruit juice	Mini Pops	Pop Tops
	Glo	Apple Time
	Extra Juicy	Smart Juice
Energy drink	Wicked	
Cordials	Extra Juicy	Diet Rite
Sports drinks	Play	

Source: P&N Beverages

17. P&N sells the majority of its products through the supermarket chains. The remainder of its products are sold through smaller, traditional retail outlets such as milk bars and take-away stores.

Tru Blu Beverages

18. TBB (ACN 151 411 764) is a newly incorporated entity owned by the founder and managing director of P&N. Pursuant to the Undertaking, the cordial and CSD business of P&N will transfer to TBB, along with key P&N management and personnel, including P&N's founder and managing director.

19. The effect of the revised proposal and Undertaking is that TBB will continue the operation of P&N's current cordial and CSD business.

Industry background

20. Both Asahi and P&N supply products in what may broadly be described as the 'non-alcoholic ready-to-drink' beverage industry (the **industry**). Estimates provided to the ACCC indicate that annual sales in the industry for the 2009-10 financial year were between five and six billion dollars.

21. The industry includes product categories such as CSDs, fruit juice, bottled water, cordials, sports drinks, energy drinks and iced tea. The industry's key features include:

a) a small number of large, national firms that account for the vast majority of manufacturing and wholesale supply for each of the relevant products, with the remainder made up of a large number of small state-based or regional manufacturers;

b) the majority of sales being attributed to branded products, but a growing market share of private label products;

c) the use of different supply channels at the retail level to distribute and sell products; and

d) the existence of a small number of significant buyers in the grocery channel.

Carbonated soft drink

22. CSD products are by far the largest segment of the industry. They account for annual retail sales of around $3.2 billion, or around 50% of total industry revenue.[1] The products included in this category are cola and non-cola varieties, flavoured mineral waters and drink mixers.

23. Coca Cola Amatil (**CCA**) and Schweppes are the largest suppliers of CSDs. P&N is the third largest supplier, and the only other significant national manufacturer of branded products. Private label products account for a significant and growing proportion of CSD revenue.

Fruit juice

24. Fruit juice (chilled and ambient) accounts for annual retail sales of between $700 million and $800 million, or approximately 15% of industry revenue.[2] Significant suppliers of fruit juice include National Foods (Berri), HJ Heinz (Golden Circle), P&N, Schweppes and Campbell's Australia. Private label products account for around 7% of total juice sales by revenue.

Bottled water

25. Bottled water accounts for annual retail sales of between $600 million and $700 million, or approximately 10% of industry revenue.[3] Large manufacturers of bottled water include CCA, P&N and Schweppes. Private label products also make up a significant proportion of the sales of bottled water.

Cordial

26. Cordial accounts for annual retail sales of between $150 million and $160 million, or approximately 3-5% of industry revenue.[4] Large manufacturers of cordial include Schweppes (Cottee's), HJ Heinz (Golden Circle), P&N and Bickfords. Private label products account for a significant proportion of sales.

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[1] ACCC estimate based on figures provided by market participants.
[2] ACCC estimate based on figures provided by market participants.
[3] ACCC estimate based on figures provided by market participants.
[4] ACCC estimate based on figures provided by market participants.

Other beverages

27. Sports drinks, energy drinks and iced teas collectively account for annual retail sales of approximately $1 billion, or 20% of industry revenue. P&N accounts for approximately $4 million of these sales, or less than 0.4% of sales for these products. P&N does not supply an iced tea product.

Branded and private label products

28. Another important feature of the industry is the historical dominance of branded products and the relatively recent and increasing challenge to that sector by private label products.

Branded products

29. Branding has developed as one of the most important factors on which firms compete across each of the relevant products. The industry's top firms use brands to differentiate their products and invest significantly in marketing and advertising to create and protect brand loyalty.

30. The most recognisable brands in the industry are found in the CSD market, namely Coca-Cola, Pepsi and Schweppes. There are also a number of well known fruit juice brands (Berri and Golden Circle), cordial brands (Cottee's) and bottled water brands (Mount Franklin and Pump).

31. There are a number of benefits associated with having well known brands within a manufacturer's portfolio. Well known brands tend to be priced much higher than lesser known brands and private labels. Customer awareness, familiarity and preference for these branded products generally allow suppliers to charge a premium over the prices of lesser known products.

Private label

32. While brand is considered to be a key point of differentiation in the various product markets, price is another key area in which firms compete. Each of the product markets has seen an increase in consumer acceptance of private label beverages in recent years which has resulted in an increase in competition between branded and private label products.

33. P&N is the largest supplier of private label beverages in Australia while the remaining suppliers of private label beverages tend to be smaller, regional based suppliers.

34. Private label products perform an important role in each of the relevant markets, as they enable retailers to offer consumers greater choice and variety across a broader range of price points. In particular, the lowest priced products in any given category are typically private label products.

35. In order to achieve economies of scale, a private label manufacturer needs to have the capacity to produce large volumes of product to minimise fixed and procurement costs per unit of output. In P&N's case, additional scale has been

achieved through supplying multiple private label customers as well as producing products under its own brands.

Supply channels

36. The products manufactured by the merger parties are distributed and sold through supply channels referred to as either the ‘measured market’ or the ‘non-measured market’.

37. The measured market consists of the following distribution channels:

    a) **Grocery channel**: Consists mainly of supermarkets and accounts for approximately 60% (approximately $3 billion) of gross annual revenue for the industry. The grocery channel is characterised by higher turnover and lower margins compared to the other channels. The grocery channel is by far the largest of the supply channels and is characterised by the existence of a number of large buyers of the relevant products such as Coles, Woolworths, Metcash and Aldi.

    b) **Traditional route**: Refers to milk bars, restaurants, take-away food outlets, bakeries and other outlets with accessible drinks fridges and accounts for approximately 30% (approximately $1.5 billion) of gross annual revenue. The traditional route is characterised by lower turnover and higher margins than the grocery channels as well as providing an avenue for manufacturers to trial new beverages.

    c) **Petrol station and convenience store channel**: Accounts for approximately 10% (approximately $0.5 billion) of gross annual revenue for the industry.

    d) **New channels**: Refers to outlets such as schools, sporting events, video shops and food courts for which minimal data is available.

38. The non-measured market consists of channels such as bars, clubs, hotels, cafes, restaurants and cinemas where beverages are less likely to be sold in measured quantities. P&N does not supply the non-measured market (all of its products are bottled and it does not supply post-mix product).

The proposed transactions

Original proposal

39. Under the original proposal, Asahi proposed to acquire 100% of the shares in P&N. As indicated above, the ACCC opposed the original proposal on the basis that it would be likely to substantially lessen competition in the national market for the manufacture and wholesale supply of CSDs and in the national market for the manufacture and wholesale supply of cordial. In its decision on the original proposal the ACCC did not identify any competition concerns with respect to the manufacture and supply of fruit juice or bottled water.

Revised proposal

40. Following the ACCC's decision on 9 March 2011 to oppose the original proposal, Asahi lodged a revised proposal to acquire P&N and simultaneously divest P&N's CSD and cordial business to TBB pursuant to a section 87B undertaking. The undertaking also provides for divestiture of P&N's energy drink business as this was unable to be easily separated from the CSD business.

41. Under the revised proposal, Asahi will retain only the P&N assets (including manufacturing plants, production lines, brand names, trade marks and staff transfers) required to conduct P&N's fruit juice and bottled water business.

42. TBB will retain one of P&N's manufacturing plants and will build two new manufacturing plants in Queensland and Western Australia. In addition, Schweppes will transfer certain production lines to TBB and will provide TBB with contract packing services until TBB's new manufacturing sites are established and Schweppes' production lines are transported and installed in TBB's new facilities. This arrangement, including the structure of both entities post-acquisition, is discussed in the analysis of the Undertaking section below.

43. As part of the revised proposal, TBB will retain the "P&N" and "Pure & Natural" trade marks, although Asahi will have a six month transitional licence to use these names while labels and packaging are changed. TBB will also retain all brand names and trade marks associated with P&N's CSD and energy drink products. P&N will not retain the brand name 'Extra Juicy' but will retain the brand name 'Diet Rite'.

Timeline

44. The following table outlines the timeline of key events in this matter.

Date	Event
01-Sep-2010	ACCC commenced review under the Merger Review Process Guidelines.
27-Sep-2010	Closing date for submissions from interested parties.
02-Dec-2010	ACCC published a Statement of Issues outlining preliminary competition concerns.
20-Dec-2010	Closing date for submissions relating to Statement of Issues.
09-Mar-2011	ACCC announced it would oppose the original proposal.
13-July-2011	Draft section 87B undertaking proffered by Asahi. ACCC commenced market inquiries on the draft undertaking.
11-Aug-2011	ACCC announced it would not oppose the revised proposal subject to the court enforceable undertaking offered by Asahi.

Market inquiries

45. The ACCC considered information gathered from market participants and conducted targeted market inquiries on the original proposal, revised proposal and Undertaking. Submissions were sought in relation to the substantive competition issues arising from the original proposal, revised proposal and the Undertaking.

With/without test

46. In assessing a merger pursuant to section 50 of the Act, the ACCC must consider the effects of the transaction by comparing the likely competitive environment post-merger if the transaction proceeds (the “with” position) to the likely competitive environment if the transaction does not proceed (the “without” position).

47. Based on confidential information, the ACCC considered that if the original proposal or revised proposal did not proceed, it was likely that P&N would be acquired by an alternative bidder or, in the event that P&N was not acquired by an alternative bidder, P&N would continue to operate as an independent supplier of beverages.

Market Definition

48. The ACCC considered there to be separate national markets for the manufacture and wholesale supply of: CSDs, cordial, fruit juice, bottled water, energy drinks and sports drinks.

49. The ACCC formed the view that the extent of demand side substitutability between these products was insufficient to define a broader product market. While consumers may purchase products from several product categories, information obtained from market inquiries suggested that switching between different beverage categories in response to a price increase was limited and not of a scale that would suggest that such products operate in the same product market.

50. Similarly, the ACCC considered it unlikely that retailers would substitute from one product category to another category in response to a price increase. Retailers need to stock a range of product categories to best meet consumer demand.

51. The ACCC also considered the extent of supply side substitutability between CSDs, cordial, fruit juice, bottled water, energy drinks and sports drinks. The ACCC noted that the overlap in terms of equipment which can produce more than one type of beverage is limited and significant new investment would be required to switch a production line between beverage categories. Manufacturing lines generally require specific pieces of equipment to be incorporated to produce specific types of beverages (to carbonate or pasteurise a beverage, for example).

52. The ACCC noted that, particularly for branded products, significant time and investment is required to create brand loyalty and establish a successful brand.

The ACCC considered that the need to invest heavily in brands and differentiate products from those of other suppliers would be likely to limit the extent of switching between product categories from a supply side perspective. The ACCC recognised that branding is less relevant to value conscious consumers, in particular those consumers which place a greater importance on value for money when comparing products from the same category that deliver similar functionality or benefits.

53. Within product categories, the ACCC considered that private label and branded beverages operate in the same product market. While not perfect substitutes, the ACCC found the extent of customer substitution between private label and branded products is sufficient to include such products in the same product market. Further, the ACCC considered that private label products provide a significant and increasing competitive constraint on branded products.

54. With respect to the relevant geographic markets, information provided by the merger parties and information arising from market inquiries suggested that the markets for the above beverages are national markets. The beverages sold by P&N and Asahi and their major competitors are branded and marketed nationally. Similarly, P&N's and Asahi's major customers in the grocery channel generally acquire these products on a national basis rather than on a state or regional basis.

55. The ACCC noted, however, the existence in some instances of regional competitive dynamics with some small industry players operating in certain regions and not on a national basis.

56. In light of the above, the ACCC concluded that there were separate national markets for the manufacture and wholesale supply of CSDs, cordial, fruit juice, bottled water, energy drinks and sports drinks.

Statement of Issues

57. As part of its review of the original proposal, the ACCC published a Statement of Issues on 2 December 2010 identifying a number of competition issues. In the Statement of Issues the ACCC's preliminary view was that the original proposal raised competition concerns in a number of markets. In particular, the ACCC identified concerns in the CSD, cordial, water and juice markets.

Competition analysis – original proposal

Competition analysis – National market for the manufacture and wholesale supply of CSDs

58. In its review of the original proposal, the ACCC concluded that it would have the effect, or be likely to have the effect, of substantially lessening competition in the national market for the manufacture and wholesale supply of CSDs.

59. The ACCC was concerned that the original proposal would remove P&N as a vigorous and effective competitor in the national market for the wholesale supply

of CSDs. The ACCC considered that P&N acts to constrain the prices of branded CSDs supplied by its competitors, including key players Schweppes and CCA.

60. P&N is the third largest supplier of CSDs in Australia. P&N's brands are the only CSDs sold in the grocery channel other than CCA, Schweppes and private label products, with a notable share of sales across a variety of different types of CSDs. Based on confidential information, the ACCC found that Schweppes responds competitively to the pricing, sales and promotional activities undertaken by P&N in relation to its branded products.

61. Outside of its branded products, P&N is the largest supplier of private label CSDs in Australia. The ACCC noted that private label CSDs are an important part of a retailer's product portfolio and are sold side-by-side with the beverages of Schweppes and CCA. The competitive supply of private label CSDs enables retailers to offer consumers greater choice and variety of CSD products across a range of price points.

62. The ACCC considered that a competitive tension exists between proprietary brands and private label CSDs. In particular, private label is a growing category within the CSD market and in most instances acts as a competitive threat to rival brands.

63. The ACCC found that CSD suppliers compete closely on price as well as brand, and that private label CSDs (including P&N's low price branded CSDs) provide downward pressure on the prices of branded CSDs. The ACCC noted that P&N provokes a competitive response from rivals in terms of discounting, product innovation and promotional activities.

64. The ACCC considered that barriers to entry and expansion in the CSD market, for both branded and private label beverages, are significant and would likely deter new entry in the market. As such, the ACCC considered it unlikely that, post-acquisition, a new manufacturer would enter the market for the national wholesale supply of CSDs to effectively constrain the merged entity. The ACCC also considered it unlikely that an existing manufacturer of CSDs would expand its operations so as to provide an effective competitive constraint on the merged entity.

65. The ACCC considered that scale requirements constitute a barrier which would deter new entry or expansion in the national market for wholesale supply of CSDs. Private label CSD manufacturers submitted that economies of scale are required to supply CSDs and compete effectively on a national basis. Having a national presence requires the establishment of multiple manufacturing sites to minimise transportation costs. It also requires high-volume production to minimise fixed costs per unit of output.

66. Establishing a national presence would add significant additional capacity to the existing market and present a significant business risk in terms of sunk costs. Furthermore, small manufacturers would be unlikely to be able to expand to a sufficient scale within a reasonable time so as to provide an effective competitive constraint in the market.

67. In relation to branded CSDs, the ACCC considered the key barrier to entry to be the sunk costs and risks associated with CSD brand development. The market for CSDs is characterised by strong brand loyalty with substantial market shares held by the branded offerings of CCA and Schweppes. The ACCC considered that these factors act as further barriers to entry in the market for CSDs.

68. On the basis of confidential information obtained from market participants, the ACCC concluded that retailers would face significant barriers in successfully supporting new entry for the wholesale supply of private label or branded CSDs.

69. Schweppes currently does not produce any private label CSDs. If the original proposal were to proceed, it would result in Schweppes having a significant presence in both branded CSDs and private label CSDs.

70. In light of the competitive constraint provided by P&N and the relatively high barriers to entry and expansion for both branded and private label CSDs, the ACCC concluded that the merged entity would have the ability and incentive to unilaterally increase the wholesale price of either branded CSDs, private label CSDs or both post-acquisition such that the original proposal would result in a substantial lessening of competition in this market.

Competition analysis – National market for the manufacture and wholesale supply of Cordial

71. The ACCC concluded that the original proposal would have the effect, or be likely to have the effect, of substantially lessening competition in the national market for the manufacture and wholesale supply of cordial.

72. As neither P&N nor Schweppes produce private label cordial the ACCC's analysis of this market focused on the branded product offerings from the merger parties and other market participants.

73. The ACCC considered that Schweppes and P&N are close competitors in the cordial market and that Schweppes responds competitively to the pricing, sales and promotional activity of P&N.

74. P&N is an aggressive discounter and has been successful in winning market share from Schweppes. The ACCC noted examples of where P&N has acted as a market leader in terms of price, product innovation and development, provoking a competitive response from Schweppes. The ACCC was concerned that if the original proposal were to proceed, it would remove P&N as a vigorous and effective competitor in the cordial market.

75. Post-acquisition, the merged entity would have an aggregate market share of around 53% by revenue and would be approximately three times as large as its nearest competitor, Golden Circle (17%). While there are other sources of competition such as Golden Circle, the ACCC considered that these are limited and the constraints would be insufficient to replace the competition lost by the removal of P&N such that Schweppes would have the ability and incentive to unilaterally increase the prices of cordial products.

76. In addition, the ACCC considered that barriers to entry or expansion in this market are high and would deter new entry. In relation to branded cordial products, the ACCC considered that there are significant sunk costs in establishing a successful brand. The ACCC also considered that achieving the necessary minimum efficient scale of production is a key barrier to entry.

77. In light of the above, the ACCC concluded that the original proposal was likely to result in a substantial lessening of competition in the national market for the manufacture and wholesale supply of cordial.

Competition analysis – National market for the manufacture and wholesale supply of fruit juice

78. The ACCC concluded that the original proposal was unlikely to substantially lessen competition in the market for fruit juice.

79. The ACCC concluded that Schweppes was unlikely to gain any significant additional market power as a result of the original proposal. National Foods and HJ Heinz (Golden Circle) account for 34% and 18% of fruit juice sales respectively while the merged entity would account for 16% of sales for its branded products. Furthermore, Schweppes' fruit juice products are predominantly sold through the traditional route trade while P&N's fruit juice products are predominantly sold through the grocery channel.

80. Based on information obtained from market participants, the ACCC considered that National Foods and HJ Heinz are strong competitors in the fruit juice market. The ACCC concluded that, post-acquisition, the merged entity would continue to be constrained by National Foods and HJ Heinz such that any attempt by the merged entity to increase the price of its branded fruit juice products would likely result in sales being diverted to either National Foods or HJ Heinz.

Competition analysis – National market for the manufacture and wholesale supply of bottled water

81. The ACCC concluded that the original proposal was unlikely to substantially lessen competition in the market for bottled water.

82. The ACCC considered that the original proposal would not result in a significant aggregation of market shares in the bottled water market. If the original proposal were to proceed, the merged entity would have a market share of around 18%. Other notable market participants include CCA which has a market share of around 50% and Frucor with a market share of around 4.9%.

83. The ACCC noted that the market for bottled water is characterised by a large number of small competitors which have a significant degree of excess capacity. The ACCC considered that this excess capacity would act to competitively constrain the merged entity in response to a price increase.

84. The ACCC concluded that it was unlikely that the merged entity would have the ability or incentive to unilaterally increase prices in this market.

Competition analysis – National market for the manufacture and wholesale supply of energy drinks

85. The ACCC concluded that the original proposal was unlikely to substantially lessen competition in the market for energy drinks.

86. While both P&N and Schweppes manufacture energy drinks, three other manufacturers, Frucor Beverages Ltd (manufacturer of ‘V’), Red Bull Ltd and CCA (manufacturer of ‘Mother’) account for around 90% of sales.

87. Schweppes is the fourth largest manufacturer of energy drinks with a 4% share of sales. P&N accounts for less than 1% of sales and it is not considered to be a vigorous competitor in this market.

Competition analysis – National market for the manufacture and wholesale supply of sports drinks

88. The ACCC concluded that the original proposal was unlikely to substantially lessen competition in the market for sports drinks.

89. Schweppes’ (Gatorade) and CCA’s (Powerade) products account for around 93% of sports drink sales. P&N (Play) accounts for less than 1% of sales and information obtained through market inquiries suggested that it is not an especially well known or vigorous and effective competitor in this market.

Conclusion – original proposal

90. On the basis of the above, the ACCC formed the view that the original proposal would have the effect, or be likely to have the effect, of substantially lessening competition in the national market for the manufacture and wholesale supply of CSDs and the national market for the manufacture and wholesale supply of cordial in contravention of section 50 of the Act.

Undertaking

91. On 13 July 2011 Asahi proffered a draft section 87B undertaking to address the ACCC's competition concerns with the original proposal in the markets for cordial and CSDs.

92. The Undertaking provides for Asahi to give effect to the revised proposal by divesting the CSD and cordial business (the **C&C Business**) of P&N to the ACCC Approved Purchaser, TBB, on the same day as, and interdependent with, the simultaneous completion of Asahi's acquisition of P&N. The assets to be divested to TBB include brands, relevant intellectual property rights, certain manufacturing facilities and the transfer of employees (the **Divestiture Business**).

93. Asahi must also comply with an ACCC approved co-packing agreement with TBB. This is discussed below at paragraphs 102-103.

94. The effect of the Undertaking will be that Asahi will retain only the water, sports drink and juice business (**W&J Business**) of P&N.

95. The Undertaking aims to maintain the competition which existed before Asahi's proposed acquisition of P&N through:

    - the maintenance of a viable, effective, stand-alone independent and long term competitor in the CSD and cordial markets;
    - ensuring that TBB has the necessary assets, rights and agreements to compete effectively with Asahi;
    - maintaining the economic viability, marketability, competitiveness and goodwill of the Divestiture Businesses prior to divestiture;
    - enabling TBB to supply the product and service offerings which are part of the Divestiture Businesses independently and without ongoing reliance upon Asahi;
    - ensuring that any approved co-packing agreements between Asahi and TBB will be for a short period, at arm's length and on terms no less favourable than normal commercial terms; and
    - the effective oversight of Asahi's compliance with the Undertaking.

96. The impact of the Undertaking in the CSD and cordial markets is discussed below.

Impact of the Undertaking in cordial and CSD markets

97. Under the revised proposal and pursuant to the Undertaking, TBB will simultaneously acquire the manufacturing facilities, brands, personnel, intellectual property rights and other assets necessary to operate the C&C Business.

98. TBB will effectively retain one of P&N's manufacturing plants and will build two new manufacturing plants in Queensland and Western Australia. In addition, Schweppes will transfer certain production lines to TBB which are necessary for the operation of the C&C Business and will provide TBB with contract packing services until TBB's new manufacturing sites are established and Schweppes' production lines are transported and installed in TBB's new facilities.

99. The co-packing agreement is intended to enable TBB to operate the Divestiture Business on an ongoing basis, and on terms no less favourable than normal commercial terms, from the date Asahi acquires P&N and during the period in which the supply chain of the C&C Business is separated from the W&J Business of P&N.

100. The ACCC considered whether TBB would have sufficient capacity in cordial and CSDs to be a viable, effective, independent and long term competitor in the cordial and CSD markets. Based on confidential information obtained from the merger parties the ACCC concluded that TBB's capacity in CSDs and cordial will be larger than P&N's current capacity in those markets.

101. TBB will retain all trade marks and brand names associated with P&N's CSD business under the revised proposal and, as such, the ACCC concluded these brands will continue to provide a competitive constraint on other market participants.

102. The ACCC also concluded that TBB will remain a vigorous and effective competitor in the cordial market. The ACCC considered that the loss of the 'Extra Juicy' brand in relation to P&N's cordial assets to be acquired by TBB would not substantially diminish TBB's ability to act as a strong competitor in this market given TBB's retention of the Diet Rite brand and its future re-branding of what is currently Extra Juicy cordial.

103. In its review of the original proposal, the ACCC considered that P&N's low cost, high volume structure was an important factor in its ability to compete vigorously and effectively in its relevant markets — particularly in relation to private label beverage manufacturing. The ACCC therefore considered what impacts the revised proposal, including the interim co-packing arrangement with Schweppes and the reduced overall production volumes from the cessation of TBB's juice and water businesses, would have on TBB's cost structure and ability to manufacture at low cost. Based on confidential information obtained from P&N, the ACCC concluded that the revised proposal will not prevent TBB from becoming an effective low-cost, high volume manufacturer of CSDs and cordial.

Conclusion

104. On 11 August 2011, the ACCC accepted the court enforceable Undertaking given by Asahi, pursuant to section 87B of the Act, to remedy the competition concerns that arise as a result of the original proposal in the national markets for the manufacture and wholesale supply of CSDs and cordial.

105. Based on the results of market inquiries and its assessment of TBB as the Approved Purchaser of the Divestiture Business, the ACCC formed the view that

TBB would be likely to provide an ongoing and effective competitive constraint in the national markets for the manufacture and wholesale supply of CSDs and cordial.

106. The Undertaking is available on the Section 87B Undertakings Register on the ACCC website at www.accc.gov.au.

Conclusion

107. The ACCC decided that the original proposal by Asahi to acquire 100% of the issued shares in P&N would be likely to substantially lessen competition in the national market for the manufacture and wholesale supply of CSDs and the national market for the manufacture and wholesale supply of cordial in contravention of section 50 of the Act.

108. The ACCC subsequently concluded that the Undertaking offered by Asahi would address the ACCC's competition concerns in the national markets for the manufacture and wholesale supply of CSDs and cordial. Accordingly, the ACCC announced its decision on 11 August 2011 not to oppose the revised proposal and to accept the Undertaking.