Public Competition Assessment

26 July 2013

Heinz – proposed acquisition of Rafferty's Garden

Introduction

1. On 6 June 2013, the Australian Competition and Consumer Commission (**ACCC**) announced its decision to oppose the proposed acquisition by H J Heinz Company Australia Limited (**Heinz**) of Rafferty's Garden Pty Ltd (**Rafferty's Garden**) (the **proposed acquisition**). The ACCC decided that the proposed acquisition would have or be likely to have the effect of substantially lessening competition in the relevant markets in contravention of section 50 of the *Competition and Consumer Act 2010* (Cth) (the **Act**).

2. The ACCC made its decision on the basis of information from a number of sources including the information provided by the parties to the proposed acquisition (the **parties**) and information arising from its market inquiries. This Public Competition Assessment outlines the basis on which the ACCC has reached its decision on the proposed acquisition, subject to confidentiality considerations.

Public Competition Assessment

3. To provide an enhanced level of transparency in its decision making process, the ACCC issues a Public Competition Assessment for all proposals where:
   - an acquisition is opposed;
   - an acquisition is subject to enforceable undertakings;
   - the parties to the acquisition seek such disclosure; or
   - an acquisition is not opposed but raises important issues that the ACCC considers should be made public.

4. This Public Competition Assessment has been issued because the proposed acquisition was opposed by the ACCC.

5. 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.

6. Each Public Competition Assessment is specific to the particular transaction under review by the ACCC. 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 a case-by-case basis.

7. 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 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

Heinz

8. Heinz is a global manufacturer of a range of food and beverages, including infant food, and has manufacturing operations at various locations around Australia.

9. Heinz is the only supplier of wet infant food in cans and glass jars in Australia, aside from McCallums, which manufactures wet infant food in glass jars in New Zealand for supply in Australia. Heinz also supplies wet infant food in pouch-and-spout packaging and supplies a range of dry infant food, including rice cakes and teething rusks.

10. Heinz supplies wet infant food under the 'Heinz', 'Heinz Organic', 'Heinz Simply', 'Heinz Little Kids' and 'Homemade Heroes' brands. It supplies dry infant food under the 'Heinz Little Kids Snacks', 'Heinz Organic' and 'Farex' brands.

Rafferty's Garden

11. Rafferty's Garden is an Australian business which commenced in October 2007 and supplies both wet and dry infant food in Australia. Rafferty's Garden only supplies wet infant food in pouch/pouch-and-spout packaging.

12. It supplies a variety of wet infant food products under the following sub-brands: 'Smooth', 'Puree', 'Lumpy', 'Yoghurt Smoothy' and 'Flavours of the World'. Rafferty's Garden supplies a range of dry infant food, including rusks, snack bars and freeze dried fruits.

The transaction

13. Heinz proposed to acquire 100% of the shares of Rafferty's Garden.

14. The proposed acquisition was conditional on obtaining informal clearance from the ACCC.

Industry background

Infant food

15. Packaged infant food may be used in addition to, or as a replacement for, home-cooked meals and snacks. There is no fixed age range for wet infant food products, but they are generally targeted at infants aged above the age of four months. Within dry infant food, infant snacks are generally intended for infants from the age of approximately 12 months.

16. Infant food can be broadly categorised into 'wet' and 'dry', accounting for approximately 75% and 25% respectively of the value of infant food products sold in Australia. This categorisation is based on the consistency of the product:

    - **Wet infant food** comprises products such as purees, custards, gels and jellies in sweet and savoury varieties.
    - **Dry infant food** includes a range of products, which can be categorised as snacks (such as rusks, fruit bars and rice cakes) and cereals (such as muesli and porridge). Snacks and cereals account for approximately 75% and 25% respectively of the value of the dry infant food category.

17. Wet infant food is supplied in a variety of packaging types:

    - **Cans**: Infant food in cans is the least expensive in the wet infant food category and tends to be consumed at home given that cans cannot be resealed.
    - **Glass jars**: Infant food in glass jars is more expensive than cans, has the advantage of being visible through the packaging and resealable and may be consumed in and out of home.
    - **Pouch/pouch-and-spout**: Infant food in pouch/pouch-and-spout packaging is more expensive than glass jars but has the advantage of being light and relatively unbreakable. Infant food in pouch-and-spout packaging may be consumed in and out of home. Some infant food products designed for infants 10 months of age and above have a thicker consistency and may therefore be packaged in pouches without a spout.

Figure 1 - Examples of wet infant food in pouch-and-spout packaging

18. Dry infant food is generally packaged in packs and boxes, but also in pouch or pouch-and-spout packaging for certain products.

19. The vast majority of infant food is sold through Coles and Woolworths (the 'major supermarket chains' or **MSCs**), with the remainder supplied through other grocery retailers (such as IGA and ALDI), discount department stores (such as BigW), baby and infant specialist stores (such as Toys'R'Us/Babies'R'Us), pharmacies and petrol and convenience stores.

Other industry participants

20. Other suppliers of infant food in Australia include:
    - **McCallums**: A New Zealand-based company which supplies wet and dry infant food under the 'Only Organic' (organic) and 'Natureland' (non-organic) brands.
    - **Organic Baby Food Company**: Supplies organic wet infant food under the 'Organic Bubs' brand.
    - **Woolworths**: Sells organic infant food under its 'Baby Macro' brand.
    - **Ella's Kitchen**: A UK-based company which currently supplies organic wet infant food exclusively to Coles.
    - **Amyson**: Supplies dry infant food under the 'Baby Mum-Mum' brand.
    - **Bellamy's**: Supplies organic dry infant food under the 'Bellamy's Organic' brand.
    - **Nestlé**: Supplies infant cereals under the 'Cerelac' brand.

Industry trends

21. Until 2007, all wet infant food in Australia was supplied in cans and glass jars. In September 2007, Heinz had an approximate 90% share of the supply of wet infant food in Australia (by value).

22. In October 2007, Rafferty's Garden commenced supplying wet infant food in pouch-and-spout packaging. Since then, this form of packaging for wet infant food has grown considerably in popularity in Australia.

23. Pouch-and-spout infant food is priced as a 'premium' product, meaning that its increasing popularity has increased the value of wet infant food sales, while overall volumes of wet infant food sold in Australia have remained relatively stable.

24. Heinz, McCallums and Organic Bubs started supplying competing ranges of wet infant food in pouch-and-spout packaging in 2010. By that time, Rafferty's Garden had achieved a share of approximately 25% of the supply of wet infant food (by value across all packaging formats).

25. Since Rafferty's Garden entered the market, every new entrant for the supply of wet infant food has utilised the pouch-and-spout packaging format.

26. In March 2012, Ella's Kitchen started supplying wet infant food to Coles. In July 2012, Woolworths commenced selling private label wet infant food under its own 'Baby Macro' brand.

Review timeline

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

Date	Event
29 October 2012	ACCC commenced review under the Merger Review Process Guidelines.
16 November 2012	Closing date for submissions from interested parties.
22 November 2012	ACCC requested further information from the merger parties. ACCC timeline suspended. Former proposed decision date for announcement of ACCC's findings of 6 December 2012 delayed pending receipt of information requested.
20 December 2012	ACCC received further information from the merger parties following ACCC's request for information on 22 November 2012. ACCC timeline recommenced.
7 February 2013	ACCC published a Statement of Issues outlining preliminary competition concerns.
28 February 2013	Closing date for submissions relating to Statement of Issues.
28 February 2013	ACCC timeline suspended at the request of Heinz to allow the merger parties to provide further information. Former proposed decision date of 21 March 2013 delayed.
14 March 2013	ACCC received further information from the merger parties. ACCC timeline recommenced. Former proposed decision date of 21 March 2013 postponed to allow the ACCC time to consider the further information.
17 May 2013	ACCC timeline suspended at the request of Heinz to allow it to provide further information. Former proposed decision date of 23 May 2013 delayed.
28 May 2013	ACCC timeline suspended at the request of Rafferty's Garden to allow it to provide further information. Former proposed decision date of 30 May 2013 delayed.
6 June 2013	ACCC announced it would oppose the proposed acquisition.

Market inquiries

28. The ACCC sought submissions from interested parties and conducted extensive market inquiries in relation to the proposed acquisition with a range of industry participants, including competitors, potential competitors, customers (i.e. retailers) and co-packers (i.e. third party manufacturers).

With/without test

29. Section 50 of the Act prohibits mergers or acquisitions that would have the effect or be likely to have the effect of substantially lessening competition in any market. In assessing a proposed acquisition pursuant to section 50 of the Act, the ACCC considers the effects of the acquisition by comparing the likely future competitive environment post-acquisition if the acquisition proceeds (the "with" position) to the likely future competitive environment if the acquisition does not proceed (the "without" position) to determine whether the proposed acquisition is likely to substantially lessen competition in any relevant market.

30. In the absence of the proposed acquisition, the ACCC considered that the likely future competitive environment would be the status quo, that is, Rafferty's Garden would continue to operate as an independent, viable and effective competitor in the relevant markets.

Statement of Issues

31. The ACCC published a Statement of Issues (**SoI**) on 7 February 2013 identifying a number of competition issues and expressing the ACCC's preliminary view that the proposed acquisition was likely to raise competition concerns in the relevant markets.

32. The ACCC expressed the preliminary view that there were two relevant markets:
    - the national market for the wholesale supply of wet infant food; and
    - the national market for the wholesale supply of dry infant food (comprising infant cereals and infant snacks).

33. The ACCC was concerned that the proposed acquisition would result in:
    - a substantial increase in concentration in the relevant markets, with a merged Heinz/Rafferty's Garden having a share of sales (by value) of between 70% and 80%; and
    - the removal of a close – and particularly vigorous and effective – competitor in the relevant markets.

34. The ACCC considered that the merged entity would not be likely to be sufficiently constrained post-acquisition by:
    - the remaining suppliers in the relevant markets;
    - the threat of new entry or expansion; or
    - countervailing power exerted by the MSCs.

35. The ACCC's preliminary view was therefore that the proposed acquisition was likely to result in a substantial lessening of competition in the relevant markets. Following the release of the SoI, the ACCC continued to consider whether the proposed acquisition would provide Heinz with the ability and incentive, relative to the future without the proposed acquisition, to raise wholesale prices, reduce the level or frequency of price promotions and/or reduce the quality or level of innovation relating to infant food products. The SoI is available on the ACCC's website at the following address: http://www.accc.gov.au/content/index.phtml/itemId/750995.

Market definition

36. In the SoI, the ACCC expressed the preliminary view that infant cereals and infant snacks ought to be assessed within an overall market for the wholesale supply of dry infant food. Following further market inquiries, the ACCC considered it appropriate to treat infant cereals and infant snacks as distinct dry infant food markets.

37. Following publication of the Statement of Issues, the ACCC also closely considered the extent to which the wholesale supply of wet infant food in different packaging types ought to be regarded as separate markets. The ACCC reached

the view that it was not appropriate to do so. The ACCC considered that there is a material level of demand-side substitutability between wet infant food sold in conventional formats (i.e. glass jars and cans) and pouch/pouch-and-spout packaging. While there is likely to be a higher degree of substitutability between wet infant food products sold within a given packaging type, the ACCC considered that wet infant food products sold in different packaging types are likely to continue to pose a competitive constraint on one another.

38. However, the ACCC had regard to the level of product differentiation based on packaging in its competition analysis relating to the wet infant food market.

39. Accordingly, the ACCC considered that the following three markets were most relevant to the assessment of the competitive impact of the proposed acquisition:

- the national market for the wholesale supply of wet infant food;
- the national market for the wholesale supply of infant cereals; and
- the national market for the wholesale supply of infant snacks.

40. In any case, the ACCC considered that competition concerns were likely to arise regardless of whether broader markets for wet/dry infant food were defined, or alternatively, narrower markets for wet infant food (by packaging type) and/or dry infant food (by product categories). Accordingly, market definition was not determinative of the competition assessment for the proposed acquisition.

Competition analysis

41. The ACCC's market inquiries post-SoI did not raise any issues which would lead the ACCC to depart from the preliminary views expressed in the SoI (except in relation to the scope of the product dimension of the dry infant food market/s, as outlined above).

42. The ACCC's competition analysis outlined below is applicable for each of the relevant markets identified above. Any divergence in the ACCC's findings which is specific to a particular market is noted.

Removal of a close competitor and increased concentration

43. The ACCC considered that the proposed acquisition would result in the removal of a close competitor and a substantial increase in concentration in already concentrated markets, where barriers to entry and expansion are high.

44. The ACCC's investigation of the proposed acquisition indicated that a key driver of infant food sales, and a focus of competition between infant food suppliers, was competition on promotional activity, including both the frequency of price promotions and the depth of price reductions. The ACCC's investigation indicated that product and packaging innovation was similarly a key area of competitive focus. Such innovation encourages customers to switch to, and remain loyal to, particular brands.

45. Sales data for the latter part of 2012 and early 2013 indicated that, post-acquisition, the merged entity would account for approximately:

- 80% of sales of wet infant food (Table 1);
- 74% of sales of infant cereals (Table 2); and

- 66% of sales of infant snacks (Table 2).

46. The ACCC took into account the fact that Rafferty's Garden does not supply wet infant food in glass jars or cans. The ACCC therefore considered suppliers' shares of supply of wet infant food across the broader market as well as for each packaging type.

47. Post-acquisition, the merged entity would have a significant position in the supply of wet infant food products and in the pouch/pouch-and-spout segment, accounting for approximately 77% of pouch-and-spout sales (Table 1).

Table 1 – Percentage shares of supply by value – Wet infant food (September 2012 to March 2013)

Supplier	Wet infant food	Pouch-and-spout	Glass jars and cans
Heinz	40	15	84
Rafferty's Garden	39	62	N/A
Merged entity	79	77	84
Baby Macro (Woolworths private label)	6	10	N/A
Ella's Kitchen (supplied only through Coles)	3	5	N/A
McCallums	9	5	15
Organic Bubs	2	3	N/A
Green Monkey	<1	<1	N/A

Source: AC Nielsen Scan Data (Aldi infant food products are not covered by AC Nielsen Scan Data).

Table 2 – Percentage shares of supply by value – Infant cereals and Infant snacks (September 2012 to January 2013)

Supplier	Infant cereals	Infant snacks
Heinz	45	36
Rafferty's Garden	29	30
Merged entity	74	66
Nestlé	21	N/A
Bellamy's	5	7
Amyson	N/A	9
McCallums	N/A	9
Hampden Trading	N/A	5
Health Culture	N/A	3
Baby Macro (Woolworths only)	N/A	2

Source: AC Nielsen Scan Data (Aldi infant food products are not covered by AC Nielsen Scan Data).

48. The ACCC recognised that there were features of the relevant markets that meant it was appropriate to consider a range of sales data in addition to the national market shares shown above. Sales data considered by the ACCC included the following:

- **Sales data at each MSC –** Since the vast majority of infant food is sold through the MSCs, the ACCC considered it appropriate to have regard to the relevant field of rivalry specific to each MSC. In the case of wet infant food, this analysis took into account Ella's Kitchen only being sold at Coles and Woolworths' private label range (Baby Macro) only being sold at Woolworths. The ACCC undertook this analysis as a complement to (i.e. not to the exclusion of) market-based analysis, since consumers are able to switch between retailers and therefore even products sold exclusively at one retailer can act as a constraint on products sold at another.
- **Trend sales data –** The ACCC observed that there have been two key developments in the supply of infant food, particularly wet infant food. The first key development is the trend away from conventional types of wet infant food packaging towards pouch/pouch-and-spout packaging. The other key development has been the introduction of private label infant food by Woolworths and the introduction of Ella's Kitchen by Coles. In order to assess the significance of these developments and their likely longer-term impact on the relevant markets, the ACCC considered both historic (i.e. pre-FY2013) sales data and more granular (e.g. monthly) sales data in 2012 and 2013.
- **Monthly and weekly sales data** – The ACCC found that promotional activity is a key element of competition between infant food suppliers, in particular for wet infant food products. Monthly and weekly sales data assisted with identifying the extent to which suppliers engage in promotional activity. It also assisted with drawing out the significance of that promotional activity for suppliers' respective market positions.

49. In addition to the sales data analysis described above, the ACCC reviewed a wide range of quantitative and qualitative information and documents obtained from the merger parties and third parties. On the balance of that analysis, the ACCC made the following findings regarding the market position of the merger parties and other suppliers:

- Rafferty's Garden has acted as a particularly vigorous and effective competitor, particularly in the wet infant food market. It has led innovation in the wet infant food market, initially through its use of pouch-and-spout packaging which facilitated its entry and later through on-going improvements to its brand positioning, packaging and flavour varieties.
- Heinz has a strong brand reputation in the relevant markets, based on trust and safety; qualities which consumers highly value in the infant food category. In addition, the strength of Heinz's position in the supply of wet infant food in conventional packaging types provides an on-going constraint on pouch-and-spout suppliers.
- Heinz and Rafferty's Garden are particularly close competitors in relation to:
  - **Brand equity** – Rafferty's Garden and Heinz are the most recognised brands of infant food.
  - **Range of flavours** – Heinz and Rafferty's Garden supply the greatest number of distinct products (as measured by the number of stock keeping units) and primarily supply non-organic products (whereas most other suppliers focus on the smaller organic segment).
  - **Promotions** – Heinz and Rafferty's Garden engage in a high level of promotional activity. Much of this activity appears to be driven by competition between suppliers of proprietary brands (**branded suppliers**).

    - **Shelf space** – Heinz and Rafferty's Garden often have prominent shelf positioning and more shelf space than other suppliers.
    - **Innovation** – Heinz and Rafferty's Garden compete to supply new packaging formats and products (flavours/recipes).
- Rafferty's Garden's entry and on-going innovation have prompted new and existing suppliers to imitate these innovations and to seek their own innovative points of difference.
- Baby Macro (Woolworths' private label) and Ella's Kitchen (supplied only through Coles) provide a material competitive constraint in relation to wet infant food. While these private label and sponsored brands have significantly increased their presence in the wet infant food market since their entry in 2012, the ACCC's investigation indicated that competition between branded suppliers remains an important constraint on prices and promotional activity. Furthermore retailers, through their private label products, do not necessarily provide a strong competitive constraint on branded suppliers in relation to innovation and non-price aspects of infant food products. The limitations upon the constraint posed by private label products are further discussed at paragraph 58 below.
- Other suppliers have been unable to establish a comparable presence in the wet infant food market.
- Nestlé has been a relatively successful entrant in the supply of infant cereals, gaining a significant market position since it entered in 2010, however no other supplier has obtained a similarly strong market position in the supply of infant cereals or infant snacks.

50. The ACCC considered that these findings tended to support the view that the proposed acquisition would lead to a significant increase in concentration in the relevant markets and the removal of one of Heinz's closest competitors in those markets. The remaining suppliers in the markets would not be likely to impose a sufficient competitive constraint on the merged entity post-acquisition to overcome the loss of competitive constraint in the relevant markets resulting from the proposed acquisition.

Barriers to entry and expansion

51. The ACCC formed the view that barriers to entry and expansion are high in the relevant markets. Those barriers arise primarily from limitations on access to shelf space in the MSCs and the challenges of overcoming entrenched brand loyalty to incumbent suppliers' products.

52. The ACCC's investigation did not indicate that access to infant food manufacturing presents a significant challenge to a potential new entrant or to expansion by an existing supplier. The ACCC found that manufacturing capacity for infant food products is readily available, for example at third party co-packers who currently provide manufacturing services for infant food suppliers.

53. With respect to access to shelf space, the MSCs are an important avenue to market for a new entrant or existing supplier seeking to expand. With limited shelf space available to display products, the MSCs determine how to allocate that shelf space based on a range of factors, primarily (but not exclusively) focussed around consumer demand. Information available to the ACCC indicated that:

   - brand loyalty is highly relevant to MSCs' decisions on range. Consumer trust and perceptions of quality are very important to an infant food product's success. Brand loyalty and reputation is a more significant factor in the infant food category than many other grocery categories due to consumers' heightened desire to trust that products will be safe and healthy to feed their children;
   - in deciding whether to stock a new product (whether introduced by a new or existing supplier), MSCs are more likely to trial products that have a sufficient point of difference or unique selling proposition. There is greater product differentiation in the supply of infant snacks, potentially facilitating new entry and expansion for this market; and
   - incumbent suppliers typically have an advantage over new entrants when seeking to introduce new products, particularly due to their established brand reputation. MSCs may also perceive a lower risk associated with having a range of products from suppliers with an established track record of sales.

54. The combination of limited shelf space at the MSCs and the factors of brand loyalty, the need for a point of difference and incumbency advantages limits the opportunities for new suppliers to enter the relevant markets as well as constraining the expansion of existing smaller suppliers.

55. The ACCC considered that the competitive constraint imposed by the prospect of new entry or expansion of existing suppliers was not likely to be sufficient to overcome the loss of competitive constraint in the relevant markets resulting from the proposed acquisition. With respect to infant snacks, the ACCC's investigation indicated that barriers to entry and expansion are not as high as a result of the higher level of product differentiation which exists in this market and wider opportunities to introduce new products with a point of difference.

Countervailing power

56. Countervailing power exists when buyers have special characteristics that enable them to credibly threaten to bypass the merged entity, such as by vertically integrating into the upstream market, establishing import operations or sponsoring new entry.

57. The ACCC considered whether retailers, and in particular the MSCs, would have sufficient countervailing power to constrain any attempt by a merged Heinz/Rafferty's Garden to raise wholesale prices, reduce the level or frequency of price promotions and/or reduce the quality or level of innovation relating to infant food products.

58. The ACCC considered the extent of retailer countervailing or buyer power arising from three sources:

- **Retailers' bargaining position, i.e. the number and strength of alternative infant food suppliers, as against the number and strength of alternative retailers** – Retailers would have a number of suppliers available to them as alternatives to a merged Heinz/Rafferty's Garden and suppliers have limited alternatives to the MSCs since they account for the vast majority of overall market demand. However, the level of profit that retailers can achieve by stocking products of those alternative suppliers (relative to a merged Heinz/Rafferty's Garden), and therefore the credibility of threatening to redirect their demand, is limited by factors such as their relative brand strength and focus on niche customer segments. As explained above, the ACCC's investigation indicated that Heinz and Rafferty's Garden have superior brand strength relative to alternative infant food suppliers, having gained strong consumer trust and support. These brands are the most recognised brands of infant food, supply the greatest number of distinct products and primarily supply non-organic products (whereas most other suppliers focus on the smaller organic segment).
- **The ability of retailers to vertically integrate into supply of infant food** – Woolworths and Aldi sell infant food under their own brands and the ACCC considers that there is the potential for further private label entry or expansion in the relevant markets. The ACCC particularly had regard to the example of private label entry by Woolworths. The entry of Baby Macro was considered a unique example, where a pre-existing brand with strong consumer acceptance (the 'Macro' organic food range) had been successfully leveraged in the supply of a private label infant food range. The ACCC notes that Coles and Metcash have not vertically integrated to date. The ACCC found that barriers to entry and expansion applying to infant food, such as the need for a trusted brand, limit the extent to which vertical integration is likely to act as a strong competitive constraint on major suppliers of infant food.
- **The ability of retailers to sponsor new entry or expansion of infant food suppliers** – The ACCC considered that retailer demand is ultimately a function of consumer demand. The ACCC recognised that retailers have means to influence consumer demand, for example by providing prominent shelf space to a particular brand or range of products, by funding introductory promotional programs, or by removing a brand. However, the ACCC found that the ability of the MSCs to remove (or credibly threaten to remove) the products of a merged Heinz/Rafferty's Garden and replace them with a sponsored new entrant or expansion of an existing supplier is limited. Relevant factors included the strong brand equity of the merger parties' infant food products and that retail consumers that purchase infant food products are typically high value grocery customers, meaning that retailers will have a particular incentive to maintain the infant food brands preferred by these customers in order to keep the overall "basket" spend of these customers. The ACCC had regard to the limited success of Ella's Kitchen, an example of sponsored entry by Coles of a wet infant food supplier. The ACCC also had regard to the more successful example of private label entry by Woolworths.

59. In addition, information and documents obtained through the ACCC's review indicated that:

- since promotional programs and innovation affect consumer demand for a product and induce consumer switching, competition between branded suppliers is a more important constraint on prices (including promotional activity) than any countervailing power held by retailers and is the primary driver of innovation;
- wholesale prices and promotional funding are set in bilateral negotiations between suppliers and retailers where the parties' bargaining strength depends on the viability of their respective outside options. Retailers' bargaining position when dealing with Heinz therefore depends on the closeness of the competitive constraint provided by other suppliers, which is limited (as described above) and would be substantially reduced by the removal of Rafferty's Garden as an independent constraint;
- the MSCs' countervailing power (including market entry through private label) generally does not drive innovation and non-price product improvements to the same extent as competition between branded suppliers. In addition, private label products are only able to provide a direct competitive constraint in the retailers where they are sold; and
- even with a sufficiently strong brand proposition to support private label entry, the competitive constraint that retailers impose through private label products is not likely to be sufficient to overcome the loss of competitive constraint resulting from the proposed acquisition. In addition, there is a limit to the extent to which retailers can expand their private label presence without adopting a business model such as that of Aldi (to a large extent, only stocking private label products), which does not appear likely in the foreseeable future.

60. The ACCC formed the view that, while the MSCs have a degree of countervailing power as against infant food suppliers, for the reasons outlined above, the degree of countervailing power held by the MSCs would not constrain a merged Heinz/Rafferty's Garden post-acquisition sufficiently to overcome the loss of competitive constraint in the relevant markets resulting from the proposed acquisition.

Conclusion

61. On the basis of the above, the ACCC formed the view that the proposed acquisition of Rafferty's Garden by Heinz would have the effect, or be likely to have the effect, of substantially lessening competition in the relevant markets in contravention of section 50 of the Act. Such a substantial lessening of competition could provide the merged entity with the ability and incentive to raise wholesale prices, reduce the level or frequency of price promotions and/or reduce the quality or level of innovation relating to infant food products (relative to the future without the proposed acquisition).