

Commerce Commission

Decision No. 327

Determination pursuant to the Commerce Act 1986 (the Act), and in accordance with a delegation given in terms of s 105 of the Act, in the matter of an application for clearance of a business acquisition involving:

HEINZ-WATTIE LIMITED

and

GRIFFINS FOODS LIMITED (ETA FOODS DIVISION)

The Commission: Peter Allport

Commission Staff: Jane Chilcott
Juliet Fletcher

Summary of Proposed Acquisition: The proposed acquisition by Heinz-Wattie Limited or its wholly owned subsidiary of the salad dressing business of Eta Foods, a division of Griffins Foods Limited, including the production facilities, a license of the "Eta" trade mark and brand, and ownership of the "Praise" trade mark and brand.

Determination: Pursuant to s 66(3)(a) of the Act, and in accordance with a delegation granted under s 105 of the Act, the Commission determines to give a clearance for the proposed acquisition.

Date of Determination: 7 July 1998

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CONTENTS

THE PROPOSAL	3
THE PROCEDURES	3
THE INVESTIGATION	4
THE PARTICIPANTS	5
Heinz-Wattie Limited	5
Griffins Foods Limited/Eta Foods Division	6
BACKGROUND INFORMATION	6
THE RELEVANT MARKETS	7
Introduction	7
Market Definition	9
Conclusion on Market Definition	11
ASSESSMENT OF DOMINANCE	11
Overview	11
The Market for the Manufacture and Distribution of Peanut Butter in New Zealand	13
The Market for the Manufacture and Distribution of Tomato-based and Other Sauces in New Zealand	14
The Markets for the Manufacture and Distribution of Salad Dressings in New Zealand	15
OVERALL CONCLUSION	25
RECOMMENDATION	25

THE PROPOSAL

- 1 On 17 June 1998, the Commission registered a notice pursuant to s 66(1) of the Commerce Act 1986 (“the Act”) seeking clearance for the acquisition by Heinz-Wattie Limited (“Heinz-Wattie”) or its wholly owned subsidiary of the salad dressing business of Eta Foods (“Eta”), a division of Griffins Foods Limited (“Griffins”). The acquisition of Eta’s salad dressing business includes the production facilities, a license of the “Eta” trade mark and brand, and ownership of the “Praise” trade mark and brand.

- 2 The proposed acquisition also involves the purchase by Heinz-Wattie of Eta’s peanut butter business including a license of the “Eta” trade mark and brand, and a contract for the sole distribution of “HP” and “Lea & Perrins” sauces in New Zealand [

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- 3 Although the application for clearance relates only to the acquisition of Eta’s salad dressing business, Commission staff have assessed the likely effects of the proposed acquisition in relation to the peanut butter and sauces distribution businesses also. However, any clearance applies only to the acquisition by Heinz-Wattie of the salad dressing business of Eta.

THE PROCEDURES

- 4 Section 66(3) of the Act requires the Commission either to clear, or to decline to clear, a notice given under s 66(1) within 10 working days, unless the Commission and the person who gave the notice agree to a longer period.

- 5 However, in the notice seeking clearance, Heinz-Wattie sought confidentiality for the fact of the proposed acquisition. Following discussions between Commission staff and Heinz-Wattie, it was agreed that a confidentiality order for the fact of the proposed acquisition would be made for five working days, until 5pm, Wednesday 24 July 1998. On the applicant's request, the order was then extended for a further two working days, until 5pm, Friday 26 July 1998, and it was agreed that a determination would be made by Tuesday, 7 July 1998.
- 6 In addition, Heinz-Wattie sought confidentiality for certain information contained in the notice seeking clearance, and a confidentiality order was made in respect of that information for a period of 20 working days from the Commission's determination of the notice. When the confidentiality order expires, the provisions of the Official Information Act 1982 will apply to that information.
- 7 Pursuant to s 105 of the Act, the Commission delegated its powers to consider and determine the notice seeking clearance to the Chairman, Mr Peter Allport.
- 8 This report concludes that Commission staff are satisfied that implementation of the proposed acquisition would not result, and would not be likely to result, in any person acquiring or strengthening a dominant position in a market. It is recommended that in terms of s 66(3)(a) of the Act, and in accordance with a delegation granted under s 105 of the Act, the Commission gives clearance for the proposed acquisition.

THE INVESTIGATION

- 9 Staff contacted the following parties in investigating the proposed acquisition:
- Existing competitors including Bluebird Foods Ltd, Cerebos Greggs Ltd, Effem Foods (NZ) Ltd, French Maid Foods Ltd, GS Lintott & Co Ltd, Natural Products Ltd, Nestle New Zealand Ltd and New Zealand Food Industries Ltd;

- Supermarket groups including Foodstuffs (Wellington) Ltd (“Foodstuffs”), Woolworths NZ Ltd (“Woolworths”) and Progressive Enterprises Ltd (“Progressive”);
 - Quick serve restaurants (“QSRs”) including Burger King, McDonalds, KFC and Wendys; and
 - Rattrays Wholesale Ltd.
- 10 Additional information was also provided by the applicant.

THE PARTICIPANTS

Heinz-Wattie Limited (“Heinz-Wattie”)

- 11 Heinz-Wattie is owned by H J Heinz Company (New Zealand) Ltd, which is ultimately owned by H J Heinz Company in the United States. A diagram setting out the ownership structure of the relevant companies in the Heinz Group is attached as Appendix 1.
- 12 Heinz-Wattie is a foodstuffs manufacturing and distribution company involved in the manufacture of a wide range of canned and bottled foods including fruit, vegetables, soups, baby foods, jams and marmalades, fish, spaghetti, baked beans, sauces, nutritional supplements, as well as frozen foods, fresh pasta, pasta sauces, salad dressings and pet food. Heinz-Wattie, through its ownership of Tegel Foods Limited, is also involved in the processing of poultry and the manufacture of animal feed.
- 13 Heinz-Wattie has salad dressing manufacturing facilities at Hastings and Auckland, and also imports salad dressings from Australia. The company supplies a range of bottled, fresh and bulk salad dressings including mayonnaise, coleslaw dressing, salad dressing, salad cream, tartare sauce, potato salad dressing, French dressing, Italian dressing, French vinaigrette and Italian balsamic

dressing. The salad dressing brands owned and used by the company include “Heinz”, “Watties”, “Kraft”, “Weight Watchers” and “The Good Taste Company”.

Griffins Foods Limited (“Griffins”)/Eta Foods Division (“Eta”)

- 14 Griffins is a wholly owned subsidiary of Danone Asia Pte Limited, a company registered in Singapore. Danone Asia Pte Limited is ultimately owned by the Danone Group in France, a multinational food and beverage company.
- 15 Griffins’ main business activities, through its Eta Foods division, include the manufacture of snack foods, salad dressings, peanut butter, and the distribution of “HP” and “Lea & Perrins” sauces.
- 16 Griffins has one manufacturing facility at Auckland involved in the manufacture of salad dressings and peanut butter. Under its “Eta” and “Praise” brands, the company supplies a range of salad dressings including mayonnaise, coleslaw dressing, salad dressing, potato salad dressing, French dressing, ranch dressing, thousand island dressing, seafood dressing and tartare sauce.

BACKGROUND INFORMATION

- 17 In October 1995, the Commission gave clearance to the proposed acquisition by J Wattie Foods Limited of four business units operated by Kraft General Foods New Zealand Limited.¹ The businesses of these companies are now carried out by Heinz-Wattie. The relevant product markets identified in the report relating to that clearance included the markets for jams and marmalades, salad dressings, tomato sauces, Asian sauces, and other sauces.

¹ Refer J Wattie Foods Limited/Kraft General Foods New Zealand Ltd, 13 October 1995, AUT/BA – J1/1, M2278. See also Heinzco/Wattie Foods Group, 30 September 1992, Decision 268.

- 18 In relation to the jams and marmalades market, comprising part of a wider “spreads” category, Commission staff noted that there is a degree of substitutability between different spreads in the category, (for example, jams, marmalades, honey, other sweet spreads, peanut butter and savoury spreads). However, there is no empirical information available on the extent of this substitutability and the degree to which consumers would regard, for example, sweet and savoury spreads, as being broadly substitutable. Consequently, Commission staff considered it appropriate to define a relatively narrow product market for the purposes of assessing the competition effects of the proposal, without reaching a final view on the precise product market boundaries.
- 19 Similarly, for the purposes of the Commission’s analysis, Commission staff examined the acquisition in terms of separate sauces markets, without concluding that the most appropriate market definitions were necessarily that narrow.

THE RELEVANT MARKETS

Introduction

- 20 The purpose of defining markets is to provide a framework within which the competition implications of a business acquisition can be analysed. The relevant markets are those in which competition may be affected by the acquisition being considered. Identification of the relevant markets enables the Commission to examine whether the acquisition would result, or would be likely to result, in the acquisition or strengthening of a dominant position in terms of s 47(1) of the Act in any of those markets.
- 21 Section 3(1A) of the Act provides that:

... the term ‘market’ is a reference to a market in New Zealand for goods and services as well as other goods and services that, as a matter of fact and commercial common sense, are substitutable for them.

- 22 In a 1984 decision, the Commission, drawing upon the Australian Trade Practices Tribunal decision in *Queensland Co-operative Milling Association*,² defined a market as:

... a field of actual or potential transactions between buyers and sellers amongst whom there can be strong substitution, at least in the long run, if given a sufficient price incentive.³

- 23 Markets are defined in relation to product type, geographical extent, and functional level. With the first two dimensions, market boundaries are determined by testing for substitutability, in terms of the response to a change in relative prices of the good or service in question and possible substitute goods or services. A properly defined market will include products which are regarded by buyers as being not too different (‘product’ dimension), and not too far away (‘geographical’ dimension), and are thus products to which they could switch if a small yet significant and *non-transitory* increase in price (*ssnip*) of the product in question was to occur. It will also include those suppliers currently in production who are likely, in the event of such a *ssnip*, to shift promptly to offer a suitable alternative product, even though they do not do so currently.
- 24 In addition, markets are also defined in relation to functional level. Typically, the production, distribution, and sale of products proceeds through a series of functional levels. For example, that between manufacturers and wholesalers might be called the “manufacturing market”, while that between wholesalers and retailers is usually known as the “wholesaling market”.

² *Queensland Co-operative Milling Association*, (1976) ATPR 40-012 at 17,247.

³ *Edmonds Food Industries/WF Tucker & Co Limited*, 21 June 1984, Decision 84.

Market Definition

- 25 The applicant submits that the proposed acquisition will result in aggregation of market share in the following markets:
- the market for the manufacture/importation of salad dressings in New Zealand;
 - the market for the manufacture/importation of sweet and savoury spreads in New Zealand;
 - the market for the manufacture/importation of sauces in New Zealand.
- 26 As stated above, although the application relates only to the acquisition by Heinz-Wattie of Eta's salad dressings business, the likely effects of the acquisition of Eta's peanut butter business and of the "HP" and "Lea & Perrins" distribution business will also be assessed.
- 27 In relation to salad dressings, the applicant has identified two general categories, pourable dressings and white dressings. Pourable dressings are oil-based free-flowing dressings such as French dressing and Italian dressing. White dressings are viscous dressings with a condensed milk or egg base such as mayonnaise, coleslaw dressing, potato salad dressing and tartare sauce. The commercial manufacturing processes for these dressings are similar and involve the same equipment. In addition to pourable and white dressings, dry dressing mixes are also available.
- 28 Commercially manufactured salad dressings are supplied in jars and bottles to retail outlets including supermarkets and the route trade (dairies, delicatessens and service stations), and in bulk to quick serve restaurants ("QSRs"), wholesalers and other food service providers. The bulk dressings are distributed in containers

- ranging in size from 1 litre to 1,200 litres, in cases of ‘portion controlled’ units⁴, and in 750 gram cartridges. For ease of reference, it is proposed to refer to these segments of the salad dressings market as the retail, QSR and food service segments.
- 29 The applicant submits that pourable, white, dry and home-made dressings are substitutable and are all part of the same salad dressings market. Commission staff accept that there is a degree of substitutability between home-made and commercially manufactured salad dressings, but consider it appropriate to analyse the competition effects of the proposal specifically in relation to commercially manufactured salad dressings only.
- 30 Commercially manufactured salad dressings, which are generally shelf stable, are supplied on a nationwide basis. Fresh salad dressings, which have a shelf life of around 3 weeks, are also distributed nationwide. As such, it is appropriate to define a national market for the manufacture and distribution of these salad dressings.
- 31 Heinz-Wattie submits that peanut butter is part of a sweet and savoury spreads market comprising jams and marmalades, peanut butter, honey, yeast extracts, and other spreads. It is accepted that there is some substitutability in demand between the different spreads. However, for consistency with the Commission’s earlier approach, it is proposed to adopt a narrow peanut butter product market definition.
- 32 As with salad dressings, peanut butter is manufactured and distributed throughout New Zealand, so the geographic extent of the market is nationwide.

⁴ Portion controlled units are small plastic packs containing a range of products including butter, jam, honey, peanut butter, sauces and condiments. In general, they contain an individual serve of the

- 33 The proposed acquisition also involves Heinz-Wattie entering into a contract with Danone Brands International, “a Griffins affiliate”, for the sole distribution of “HP” and “Lea & Perrins” sauces in New Zealand. “HP” sauce is a tomato-based sauce, and “Lea & Perrins” sauce is a vinegar-based sauce generally described as an “English” variety sauce.
- 34 Heinz-Wattie submits that the acquisition will affect the sauces market in New Zealand, comprising tomato, tomato-based, “Lea & Perrins”, Worcestershire, and other variety sauces. In line with the Commission’s views expressed in Decision 268⁵, Commission staff consider that it is appropriate to distinguish tomato and tomato-based sauces from those of other “English” variety sauces.
- 35 These sauce markets are also national markets.

Conclusion on Market Definition

- 36 For the purpose of analysing the competition issues arising from the proposed acquisition, Commission staff conclude that the relevant markets are as follows:
- the market for the manufacture and distribution of salad dressings in New Zealand;
 - the market for the manufacture and distribution of peanut butter in New Zealand; and
 - the markets for the manufacture and distribution of tomato-based and other sauces in New Zealand.

product. Portion controlled units are principally used by commercial meal and snack providers such as cafes, hotels, motels, airlines and QSRs.

⁵ Refer n1.

ASSESSMENT OF DOMINANCE

Overview

37 Section 66(3) of the Act, when read in conjunction with s 47(1) of the Act, requires the Commission to give clearance for a proposed acquisition if it is satisfied that the proposed acquisition would not result, and would not be likely to result, in a person acquiring or strengthening a dominant position in a market. If the Commission is not so satisfied, clearance must be declined.

38 In *Port Nelson Ltd v Commerce Commission* [1996] 3 NZLR 554, the Court of Appeal approved the following dominance standard, adopted by McGechan J in the High Court:

... dominance involves more than “high” market power; more than mere ability to behave “largely” independently of competitors; and more than power to effect “appreciable” changes in terms of trading. It involves a high degree of market *control*.

39 Section 3(9) of the Act states that a person is in a “dominant position” in a market if:

... a person as a supplier or an acquirer of goods or services either alone or together with an interconnected or associated person is in a position to exercise a dominant influence over the production, acquisition, supply, or price of goods or services in that market ...

40 The section also states that, in making a determination on dominance, regard shall be had to the following factors:

- market share, technical knowledge and access to materials or capital;
- the constraint exercised by competitors or potential competitors; and
- the constraint exercised by suppliers or acquirers.

- 41 In reaching a view on whether a person is in a dominant position in a market, the Commission considers the foregoing non-exhaustive factors and any other relevant matters that may be found in a particular case.
- 42 In relation to market shares, it is the Commission's view that a dominant position in a market is generally unlikely to be created or strengthened where, after the proposed acquisition, either of the following situations exist⁶:
- the merged entity (including any interconnected or associated persons) has less than in the order of a 40% share of the relevant market;
 - the merged entity (including any interconnected or associated persons) has less than in the order of a 60% share of the relevant market and faces competition from at least one other market participant having no less than in the order of a 15% market share.
- 43 Except in unusual circumstances, the Commission will not seek to intervene in business acquisitions which, given appropriate delineation of the relevant market(s) and measurement of market shares, fall within these "safe harbours".
- 44 A dominance assessment for each of the relevant markets follows.

The Market for the Manufacture and Distribution of Peanut Butter in New Zealand (the "Peanut Butter Market")

- 45 Heinz-Wattie submits that the acquisition of Eta's peanut butter business raises no dominance concerns as Heinz-Wattie has only a small involvement in the peanut butter market in New Zealand. Specifically, Heinz-Wattie imports and distributes portion controlled units of peanut butter. Heinz-Wattie is also involved in the

⁶ Refer Commerce Commission's Business Acquisitions Guidelines, 1996, p17.

manufacture of other spreads including jams and marmalades.

- 46 Eta is not involved in the supply of portion controlled units of peanut butter.
- 47 The Commission accepts that the proposed acquisition will only result in a minor aggregation of market share, and will not result in Heinz-Wattie acquiring or strengthening a dominant position in the market for the manufacture and distribution of peanut butter in New Zealand. Therefore, it is not proposed to analyse this market in any further detail.

The Markets for the Manufacture and Distribution of Tomato-Based and Other Sauces in New Zealand (the “Tomato-Based Sauces Market” and “Other Sauces Market”)

- 48 As Heinz-Wattie is involved in the manufacture of tomato and tomato-based sauces in New Zealand, the proposed acquisition of the distribution rights for “HP” and “Lea & Perrins” sauces will only result in aggregation of market share in the tomato-based sauces market.
- 49 Heinz-Wattie has a market share of approximately [] in the tomato-based sauces market, with the “HP” brand having a market share of approximately []. Consequently, implementation of the proposal will only result in a very small degree of aggregation.
- 50 Commission staff also note the applicant’s submission that “HP” sauce is not directly substitutable for other tomato sauces manufactured by Heinz-Wattie as “HP” sauce is a premium higher priced sauce.
- 51 In relation to the total sauces category, Heinz-Wattie has a category share of approximately [], and the “HP” and “Lea & Perrins” brands have a category share of less than []. As such, implementation of the proposed acquisition will

result in a minor degree of aggregation in the total sauces category.

- 52 Commission staff conclude that the proposed acquisition of the distribution rights for the “HP” and “Lea & Perrins” sauces will not result in the acquisition or strengthening of a dominant position in the markets for the manufacture and distribution of tomato-based and other sauces in New Zealand.

The Market for the Manufacture and Distribution of Salad Dressings in New Zealand (the “Salad Dressings Market”)

- 53 Heinz-Wattie and Eta are both involved in the manufacture and distribution of pourable and white salad dressings in New Zealand. Eta is also involved in the supply of supermarket house brand salad dressings.
- 54 There are a number of other market participants involved in the manufacture and/or distribution of salad dressings including French Maid Foods, Effem Foods, Bluebird Foods, Natural Products, New Zealand Food Industries, GS Lintott and Cerebos Greggs. Some of the QSRs are also involved in the salad dressings market through the direct importation of some or all of their salad dressing requirements.
- 55 French Maid Foods, based in Lower Hutt, is involved in the manufacture of a range of salad dressings and sauces for distribution to the QSR and food service segments of the market only. For example, French Maid Foods supplies salad dressings to Burger King, Wendys and Subway. The company has no involvement in the retail segment of the market.
- 56 Effem Foods, based in Auckland, is involved in the importation and distribution of a range of salad dressings in both the retail segment, under the “Masterfoods” brand, and the food service segment of the salad dressings market.

- 57 Bluebird Foods, based in Auckland, is also involved in the retail and food service segments of the salad dressings market, supplying “Paul Newmans Own” pourable dressings to supermarkets and “DYC” salad dressings to food service providers.
- 58 Natural Products, wholly owned by Hansells Ltd, is a contract manufacturing company involved in the manufacture of a range of food products including salad dressings, for supermarkets and others. For example, the company manufactures salad dressings under the “Countdown”, “Pams”, “Superpac”, “First Choice” and “No Frills” supermarket house brands.
- 59 New Zealand Food Industries, based in Auckland, is another contract manufacturer of food products including salad dressings. The company currently manufactures salad dressings for Bluebird Foods and Kerry Ingredients (NZ) Ltd.
- 60 GS Lintott, based in Auckland, is involved in the importation and distribution of “Best Foods” mayonnaise to the retail and food service segments of the market.
- 61 Cerebos Greggs, also based in Auckland, manufactures and distributes the “Salad Magic” range of pourable salad dressings.
- 62 Of this total salad dressings market, the retail segment accounts for just over [] in value terms, and approximately [] by volume. In comparison, the QSR segment accounts for approximately [] of the total market in value terms, and [] by volume, with the food service segment accounting for the balance.
- 63 On the basis of AC Nielsen data, Heinz-Wattie’s own management estimates, and market share estimates from existing competitors, market participants would have the following market shares in the salad dressings market:

Market Participant	Estimated Volume (litres 000)	Estimated Market Share (by volume)	Estimated Value (\$000)	Estimated Market Share (by value)
Heinz-Wattie	[]	[]	[]	[]
Griffins	[]	[]	[]	[]
Combined Entity	[]	[]	[]	[]
French Maid Foods	[]	[]	[]	[]
Golden State Foods	[]	[]	[]	[]
GS Lintott	[]	[]	[]	[]
McCormicks	[]	[]	[]	[]
Natural Products	[]	[]	[]	[]
New Zealand Food Industries	[]	[]	[]	[]
TOTAL	[]	100%	[]	100%

64 The market share estimates in the above table show that the combined entity would have a market share of approximately [] by value, and [] by volume. In undertaking an appropriately conservative assessment of market concentration⁷, and in line with the Commission’s usual practice, it is proposed to analyse the market share figures in value terms.

65 Adopting this approach, the combined entity’s market share for the salad dressings market would fall outside the Commission’s “safe harbours”. However, assessing whether a dominant position would exist in a market following implementation of a proposed acquisition is not determined on the basis of market share analysis alone. As Tipping J stated in *New Zealand Magic Millions Ltd & Anor v Wrightson Bloodstock Ltd* (1990) 3 NZBLC 99-175:

... market share is not the sole determinant of the presence or absence of dominance or market power. The most that can be said is that dominance is frequently attended by a substantial market share but all other relevant factors must be brought into account. For example, a substantial market share without barriers to entry will seldom, if ever, be indicative of dominance.

66 Accordingly, the Commission considers a range of additional factors before reaching a conclusion about the acquisition or strengthening of a dominant

⁷ Refer Commerce Commission’s Business Acquisitions Guidelines, 1996, p17.

position in a market, such as the constraint from existing and potential competition, barriers to entry, and the constraint from buyers.

67 Before discussing these additional factors, market shares in the different segments of the market will be briefly analysed.

68 From information provided by multiple sources, it is estimated that the retail segment of the salad dressings market has a value of approximately \$19.8 million. Mayonnaise and other white dressings account for between [] of that total, with pourable dressings accounting for the balance.

69 On the basis of AC Nielsen data on key accounts for the year ended May 1998, and market share figures provided by market participants, market shares in the retail segment of the salad dressings market are estimated as follows:

Salad Dressings - Retail

Supplier	Estimated Volume (000 litres)	Estimated Market Share (by volume)	Estimated Value (\$000)	Estimated Market Share (by value)
Heinz-Wattie	[]	[]	[]	[]
Griffins (including house brands)	[]	[]	[]	[]
Combined Entity	[]	[]	[]	[]
Best Foods	[]	[]	[]	[]
Other house brands	[]	[]	[]	[]
Bluebird Foods	[]	[]	[]	[]
Effem Foods	[]	[]	[]	[]
Cerebos Greggs	[]	[]	[]	[]
Others	[]	[]	[]	[]
TOTAL	[]	100%	[]	100%

70 The combined entity's market share in the retail segment of the market falls outside the Commission's "safe harbours", with a market share of over [] in terms of volume and value.

71 QSRs purchase a large quantity of salad dressings per annum. Heinz-Wattie estimates that QSRs would purchase approximately [] litres per annum, and that over [] of this total would be imported. For example, McDonalds imports all of its salad dressings (including mayonnaise, tartare sauce and “Big Mac” sauce) from Golden State Foods in the United States. The company also imports portion controlled sauces such as ketchup and dipping sauce. It was estimated that McDonald’s would spend around [] per annum on dressings and sauces, although this figure was subject to considerable fluctuation due to exchange rate influences.

72 Market share figures in the QSR segment of the market are estimated as follows:

Salad Dressings - QSRs

Supplier	QSR	Estimated Volume (000 litres)	Estimated Market Share (by volume)
French Maid Foods	[]	[]	[]
Golden State Foods (US)	[]	[]	[]
Griffins	[]	[]	[]
McCormicks (Aust)	[]	[]	[]
New Zealand Food Industries	[]	[]	[]
Others		[]	[]
TOTAL		[]	100%

73 As Heinz-Wattie is not involved in the supply of salad dressings to QSRs, the proposed acquisition will not result in any aggregation of market share in this segment of the market. Further, the combined entity’s market share falls within the Commission’s “safe harbours”, and the combined entity will continue to face strong competition from French Maid Foods and from imports.

74 In relation to the food service segment of the market, Heinz-Wattie estimates that approximately [] litres of salad dressing is supplied to wholesalers and food service providers.

75 Market shares for existing competitors in this segment of the market are estimated as follows:

Salad Dressings – Food Service

Supplier	Estimated Volume (000 litres)	Estimated Market Share (by volume)
Heinz-Wattie	[]	[]
Griffins	[]	[]
Combined Entity	[]	[]
French Maid Foods	[]	[]
Bluebird Foods	[]	[]
Others	[]	[]
TOTAL	[]	100%

76 On the basis of the above estimates, the combined entity’s market share falls within the second of the Commission’s “safe harbours” with a market share of less than 60%, and facing competition from at least one other market participant having no less than in the order of a 15% market share. Commission staff also note that other market participants consider that there is sufficient competition from existing competitors in this segment of the market to constrain the combined entity from attempting to exercise its market power.

Constraints from Existing Competition

77 Heinz-Wattie submits, and Commission staff accept, that competition from existing market participants, imported products, supermarket house brands, and home-made dressings represent a sufficient constraint on the combined entity to alleviate concerns about market dominance in the salad dressings market. For example, there is a wide range of salad dressing brands available in the retail segment of the market including the “Best Foods” brand with a market share of approximately [], and supermarket house brands (not manufactured by Eta) with a market share of [].

78 Imported salad dressings comprise a significant part of the salad dressings market in New Zealand also. There is a range of imported salad dressing brands sold at retail and many QSRs import part or all of their salad dressing requirements.

79 The supply arrangements with QSRs are renegotiated on a regular basis, and there do not appear to be any onerous barriers to switching between suppliers. It is also relevant to note that a number of the QSRs contacted by Commission staff considered that importing all of their salad dressing requirements was economically viable. For example, [

].

80 There are no significant barriers to the importation of salad dressings. Imports from Australia attract no tariffs, and imports from other countries attract a tariff of between 7% and 9%, decreasing on 1 July 1998 to between 6% and 7.5%.

81 Most market participants agreed that imports represent a constraint on domestic manufacturers and would continue to represent a constraint on the combined entity's market behaviour. However, one market participant did not believe imports would provide an adequate constraint on the combined entity, noting that very few imported brands have had any long-term success in the New Zealand market. This lack of success was attributed to a number of factors including the difficulties for an overseas supplier to actively manage and market the product, and to gauge and be responsive to local tastes and preferences.

82 As previously stated, there are a number of imported salad dressing brands successfully competing in the retail segment of the market, including "Masterfoods", "Best Foods" and "Paul Newman's Own" brands, and a large volume of imported salad dressings in the QSR segment of the market. As such, Commission staff consider imports do provide some constraint.

- 83 The combined entity will also continue to face competition from supermarket house brands, which have an increasing share of the retail segment of the market. For example, the market share for house brands has increased from approximately [] as at May 1997 to [] as at May 1998.
- 84 Currently, supermarket house brands are manufactured by Eta and Natural Products. Specifically, Eta manufactures Progressive's "Foodtown" brand, and Natural Products manufactures Progressive's "Countdown" brand, Woolworth's "First Choice" and "No Frills" brands, and Foodstuffs "Pams" and "Budget" brands. Again, there do not appear to be any particularly high barriers to switching between house brand suppliers, and product recipes are either owned by the supermarket or, if necessary, can be matched/reformulated by the new supplier.
- 85 The supermarket chains also have a degree of countervailing power in the market, exercising control over the brands sold and the allocation of shelf space for those brands.
- 86 Further, Commission staff note Heinz-Wattie's submission that the ease with which salad dressings can be made at home, and the ready availability of ingredients for home-made salad dressings, represents a constraining factor on the pricing of commercially manufactured products.

Constraints from Market Entry

- 87 It is necessary to determine whether the combined entity would be subject to significant constraints from the threat of market entry. Potential competition which could act as a constraint could come from either new entry to the market or imports. Before the Commission will consider that new entry will provide an adequate constraint on a merged entity so as to allay dominance concerns, such entry must be shown to be *likely*, of sufficient *extent*, *timely* and *sustainable* (the

“lets” test).⁸

- 88 Heinz-Wattie submits that there are low barriers to entry for the manufacture of salad dressings, and that inputs are readily available. Consequently, if the combined entity was to increase prices, Heinz-Wattie submits that there are a number of New Zealand manufacturers (for example, Nestle) which might be prepared to enter the market to take advantage of this.
- 89 Nestle markets salad dressings in Australia, the United Kingdom and the United States, and is already in the New Zealand market with its “Highlander” condensed milk and “Highlander” dry dressing mix. [
-].
- 90 In addition to the potential for new entrants, Heinz-Wattie submits that current competitors could take advantage of any price increase by increasing capacity. And, as pourables and white dressing are manufactured using similar processes, competitors could switch production from pourables to whites (or vice versa) to react to any increase in the price of one or other salad dressing type. Further, as there is little difference in the manufacturing process of the products supplied to the retail, QSR and food service segments of the market (except in relation to ‘portion controlled’ units which require specialist packaging equipment)⁹, a supplier in one distribution channel could, relatively simply and cheaply, change the form of their packaging to enter into another distribution channel.
- 91 Commission staff have not identified any significant barriers to entry or expansion in the salad dressings market, and have been informed that existing competitors do have excess capacity. For example, [] is presently manufacturing on a [] shift per day, [] day per week schedule, but agrees that it could increase

⁸ Commerce Commission’s Business Acquisitions Guidelines, 1996, pp19-20.

⁹ The only differences in the manufacturing process relate to quantities supplied and packaging.

production by operating on a [] shift per day, [] day per week schedule. Similarly, [] considered that it could increase production by [] without additional investment on plant and machinery.

92 Also, [

].

93 Finally, Commission staff note that Andrew Brands Ltd has recently entered the retail segment of the market with its “Rizzoli” and “Amco” salad dressing brands (manufactured by Natural Products), and has acquired a market share of approximately [] in this segment.

Conclusion on Assessment of Dominance in the Salad Dressings Market

94 While implementation of the proposed business acquisition will result in the combined entity having a strong brand portfolio and product range in the salad dressings market, and a comparatively high market share falling outside the Commission’s “safe harbours”, Commission staff conclude that the constraints from existing and potential competitors, imports, supermarket house brands, and home-made salad dressings would be sufficient to alleviate dominance concerns in the market.

95 Further, Commission staff have not identified any significant entry barriers to the market, so new entry, and expansion by existing market participants, is also likely to act as some constraint on the combined entity.

96 Accordingly, Commission staff conclude that implementation of the proposed acquisition would not result, and would not be likely to result, in any person acquiring or strengthening a dominant position in the market for the

manufacturing and distribution of salad dressings in New Zealand.

OVERALL CONCLUSION

- 97 Although implementation of the proposed acquisition would lead to aggregation of market share in the identified markets, and particularly in the salad dressings market, Commission staff consider that the proposed acquisition would not result, and would not be likely to result, in the combined entity or any other person acquiring or strengthening a dominant position in these markets. There would appear to be low barriers to entry, and sufficient competitive constraints from existing and potential competition, and from imports, to eliminate dominance concerns.
- 98 Having regard to the factors set out in s 3(9) of the Act and all other relevant factors, Commission staff conclude that the proposal would not result, and would not be likely to result, in the combined entity or any other person acquiring or strengthening a dominant position in any of the following markets:
- the market for the manufacture and distribution of salad dressings in New Zealand;
 - the market for the manufacture and distribution of peanut butter in New Zealand; and
 - the markets for the manufacture and distribution of tomato-based and other sauces in New Zealand.

RECOMMENDATION

- 99 It is recommended that in terms of s 66(3)(a) of the Act, and in accordance with a delegation granted under s 105 of the Act, the Commission gives clearance for the proposed acquisition.

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26

Jane Chilcott
Investigator

Juliet Fletcher
Investigator

DETERMINATION ON NOTICE OF CLEARANCE:

HEINZ-WATTIE LIMITED/GRIFFINS FOODS LIMITED (ETA FOODS DIVISION)

I agree/disagree with the recommendation.

I am satisfied/not satisfied that implementation of the proposal would not result, and would not be likely to result, in any person acquiring or strengthening a dominant position in a market.

Accordingly, pursuant to s 66(3) of the Commerce Act 1986, and in accordance with a delegation granted under s 105 of the Act, I hereby give/decline to give clearance for the acquisition by Heinz-Wattie Limited or its wholly owned subsidiary of the salad dressing business of Eta Foods, a division of Griffins Foods Limited, including Eta Foods production facilities, a license of the "Eta" trade mark and brand, and ownership of the "Praise" trade mark and brand.

Dated this day of July 1998

P C Allport
Chairman