

PUBLIC VERSION

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15 November 2004

The Registrar
Business Acquisitions & Authorisations
Commerce Commission
PO Box 2351
WELLINGTON

PURSUANT TO SECTION 66 (1) OF THE COMMERCE ACT 1986 NOTICE IS HEREBY
GIVEN SEEKING **CLEARANCE** OF A PROPOSED BUSINESS ACQUISITION

PART 1 – TRANSACTION DETAILS

The Proposed Business Acquisition

1 The Business Acquisition for Which Clearance is Sought

- 1.1 The acquisition for which clearance is sought is the acquisition by Gallagher Holdings Limited ('Gallagher Holdings'), or a nominee being a wholly owned subsidiary of Gallagher Holdings of up to 100% of the ordinary shares of Tru-Test Corporation Limited (**Tru-Test**).
- 1.2 Gallagher Holdings have previously submitted to the Commission an application, dated 19th May 2004 seeking clearance for the proposed business acquisition referred to in 1.1 above.
- 1.3 Gallagher Holdings have previously submitted to the Commission an amendment to the Original Application, dated 20th July 2004.
- 1.4 The application referred to in 1.2 above and the amendment referred to in 1.3 above shall be together referred to as the 'Original Application'.
- 1.5 The Commission have in the matter of the Original Application made a Determination, dated 26th August 2004 ('Determination').
- 1.6 As at the date of this application Gallagher Holdings owns 4,743,352 of the 32,849,552 Tru-Test shares on issue (14.44%). (Previously 4,743,352 of the 32,284,552 shares on issues (14.69%) in the Original Application).

2 The Person Giving This Notice

2.1 This notice is given by:

Gallagher Holdings Limited
Private Bag 3026
Hamilton
New Zealand
Telephone: (07) 838 9800
Facsimile: (07) 838 9899
Attention: Steve Tucker/Stephen Hoffman
Email: stevet@gallagher.co.nz or stephenh@gallagher.co.nz

2.2 All correspondence and notices in respect of this application should be directed in the first instance to:

Quigg Partners
Level 7 The Bayleys Building, 28 Brandon Street
PO Box 3035
Wellington
Telephone: (04) 472 7471
Facsimile: (04) 472 7871
Attention: David Quigg/John Horner
Email: davidquigg@quiggpartners.com or johnhorner@quiggpartners.com

Confidentiality

3 Requested Confidentiality

- 3.1 Gallagher does not require the fact of the proposed acquisition to be kept confidential.
- 3.2 Gallagher does request that specific information contained in or attached to the notice is kept confidential. Gallagher seeks confidentiality for the information in this application that is contained within square brackets and written in italics (e.g., []). We have provided a copy of this application with such confidential information deleted for the assistance of the Commission.
- 3.3 Gallagher requests that, on expiry of any confidentiality order that the Commission may make, the confidential information continues to be withheld under section 9 of the Official Information Act 1992. Confidentiality is sought on the grounds that:
- (a) The information is commercially sensitive and valuable and its disclosure is likely to unreasonably prejudice the commercial position of Gallagher; and
 - (b) There are no other considerations that render it desirable in the public interest to make the information available under the Official Information Act 1982.

Details of the Participants

4 The Participants

4.1 The acquirer of the shares is:

Gallagher Holdings Limited, details of which are set out in paragraph 2.1 above, or a wholly owned subsidiary. Refer www.gallaghergroup.co.nz for further information.

4.2 The target company is:

Tru-Test Corporation Limited ('**Tru-Test**'). Refer www.tru-test.com for further information.

The suggested contact person and details for Tru-Test is:

Desmond Scott
 Managing Director
 Tru-Test Corporation Limited
 PO Box 51078
 Pakuranga
 Auckland
 Telephone: 09 978 8888
 Facsimile: 09 978 8889

4.3 The proposed transaction is a full or partial takeover offer in accordance with the Takeovers Code, for the shares in Tru-Test. In the event that some shareholders do not accept an offer such shareholder will retain a shareholding in Tru-Test. The applicant believes, of the current shareholders, only two have 10% or more of the ordinary shares in Tru-Test. They are the applicant and ANZ Banking Group (NZ) Ltd, Private Equity Division which held [] as at 31 August 2004.

5 Inter-Connected to or Associated Parties

5.1 Gallagher Group/Associates:

- (a) Gallagher Holdings Limited is based in Hamilton and wholly owns Gallagher Group Limited ('Gallagher'), which is the principal operating company of Gallagher Holdings.
- (b) There has been no change to the corporate wiring diagram of Gallagher from that provided in the Original Application.

5.2 Tru-Test Group/Associates:

- (a) There has been no change to the corporate wiring diagram of the Tru-Test Group, as the applicant understands it, from that provided in the Original Application.

6 Existing Beneficial Interests

- 6.1 Gallagher currently holds 4,743,352 of the ordinary shares of Tru-Test (14.44%).

7 Links Between Participants and their competitors

- 7.1 There has been no material change to the information provided in Section 7 of the Original Application which the Applicant considers have an effect on this Application.

8 Common Directorships

- 8.1 There has been no change to the information provided in Section 8 of the Original Application.

9 Business Activities of the Participants

- 9.1 There has been no change to the information provided in Section 9 of the Original Application.

10 Reasons for Proposal and Intentions in Respect of the Acquired Business

- 10.1 The primary reason for the acquisition remains that Gallagher sees the proposed acquisition as expanding offshore competitiveness through a lower average product cost and a larger local manufacturing base. This could be achieved through a merger with the Tru-Test manufacturing and other overhead operations.
- (a) Gallagher notes that this retention of offshore competitiveness is becoming increasingly critical. Since the Original Application, Zareba Systems of the USA has acquired Rutland Electric Fencing Company Ltd of the U.K. [].

PART 2: IDENTIFICATION OF MARKETS AFFECTED

Horizontal Aggregation

11 Markets Where There Would be an Aggregation of Business Activities

- 11.1 In the Determination, the Commission concluded that the following markets were relevant to the Original Application (Executive Summary, para.2, p.7 of the Determination).
- (a) the national manufacture and wholesale supply of rural and security electric fencing products (the electric fencing market);
- (b) the national market for the manufacture and wholesale supply of rural conventional wire fencing products (the conventional wire fencing market);

- (c) the national market for the manufacture and wholesale supply of rural fence posts (the fence posts market);
 - (d) the North Island market for the manufacture and wholesale supply of rural gates and gate hardware (the North Island gates market);
 - (e) the South Island market for the manufacture and wholesale supply of rural gates and gate hardware (the South Island gates market);
 - (f) the national market for the manufacture and wholesale supply of animal weighing systems and accessories (the animal weighing systems market);
- 11.2 The Commission, in the Determination, was satisfied that the proposed acquisition would not have, nor would be likely to have, the effect of a substantially lessening of competition in the fence posts market, the conventional wire fencing market, the North Island gates market, the South Island gates market, and the animal weighing systems market (Executive Summary, para.6, p.8). These markets are not considered further in this Application.
- 11.3 Accordingly, only the electric fencing market is considered further in this Application.
- 11.4 The Applicant has not answered the remainder of Part 2 on the basis that this is covered in the Determination and elsewhere in this Application.

PART 3: CONSTRAINTS ON MARKET POWER BY EXISTING COMPETITION

12 Constraints Provided By Divestment Undertaking

- 12.1 Gallagher agree to execute a divestment undertaking by way of Deed in favour of the Commerce Commission ('Commission'), as set out in Appendix 1 to this amendment ('Stafix Divestment'), where such divestment shall be treated as a condition of any clearance granted by the Commission in respect of the Application.
- 12.2 The Stafix Divestment will establish a constraint on the merged entity which is considered under this section of constraints from existing competition.

Market Share

- 12.3 The below table shows the Applicants estimate of the current market share breakdown for the electric fence market. Note, this is the combination of tables 2 and 7 provided in the Original Application for the rural electric fence product group and the industrial electric fence product group.

Table 1: Electric Fencing Market Share

<u>Company</u>	<u>\$M</u>	<u>%</u>
Gallagher	/	/
Tru-Test		
Others		/
Total Market	\$ /	100%

- 12.4 The below table shows the Applicants estimate of the market share breakdown for the Tru-Test brands within the electric fence market.

Table 2: Tru-Test Electric Fencing Market Share by Brand

<u>Company</u>	<u>\$M</u>	<u>%</u>
Staffix	/	
Speedrite		
PEL		
Other/Security		
Total		/

- 12.5 The competitor information provided in Table 1 and 2 above is estimated based on shelf space allocations in rural resellers as a percentage of the total estimated account size and is considered to have a medium-high level of accuracy
- 12.6 The Participants in the electric fence market are as listed in the Original Application.
- 12.7 Following the Stafix Divestment the market share of the combined entity is estimated to be [/]. This compares with the market share estimate of the combined entity in the Original Application (after taking into account the proposed PEL divestment) of [/]. Further the market share of the Stafix brand at [/]

Viability of the Divestment

- 12.8 The Applicant considers that the Stafix Divestment will be able to be achieved within the timeframe given in the undertaking, based on previous expressions of interest in the relation to the proposed PEL divestment in the Original Application.
- 12.9 In Appendix 3, the Applicant has prepared a forecast of future profitability for a stand-alone purchaser of the Stafix Brand. This shows that the new business would be a long term economically viable and profitable business.

- 12.10 The Applicant considers that a purchaser from an existing supplier to the rural industry or from an existing competitor (both within New Zealand and internationally), is a more likely scenario than a stand-alone purchaser. In this case, the viability and profitability would be improved over that estimated in Appendix 3.

Terms of the Undertaking

- 12.11 In the Determination, the Commission considered the terms of the proposed Divestment of the PEL brand and the effect that these have on practicality and viability. These points are considered below and their relevance to the Stafix Divestment considered.
- 12.12 The Commission considered that ‘even though PEL has been heavily integrated into Tru-Test’s production lines, it could still be practical for a new owner of PEL to outsource PEL’s manufacturing’ (Determination, para.240, p.49). The Applicant considers that this assumption would hold true for the Stafix Divestment.
- 12.13 The Commission raised concern over clause 3.3 of the proposed PEL divestment which provided for ‘the substitution of a “similar but alternative product” in the event that the plant and equipment...is necessary for the manufacture of any other Tru-Test products worldwide branded other than PEL...’ (Determination, para.242, p.49). The Commission noted that this clause ‘raises potential issues and therefore casts doubt as to whether in fact the divestment of PEL would be practical’ (Determination, para.240, p.49) and further that ‘the Commission cannot properly analyse the divestment of PEL and whether it would be the competitive influence the Applicant claims’ (Determination, para.251, p.50).
- 12.14 In contrast, the Stafix Divestment does not provide the substitution referred to in 12.13 above (refer Appendix 1, clause 3.3) and therefore provides;
- (a) A higher degree of certainty to the products referred to in the Divestment Undertaking.
 - (b) Consistency between the products marketed under the Stafix brand both before and after the Divestment.
 - (c) Removal of the opportunity for Gallagher to ‘cherry pick’ any icon products from the Stafix range. This was a concern raised by industry participants in the proposed PEL divestment (Determination, para.243, p.49) and a concern raised by the Commission (Determination, para 247, p.50) that products allocated could be of an inferior quality, or lack the market presence.
- 12.15 In Determination, para 537, p.91, the Commission ‘also notes that due to the restricted territory under the divestment undertaking (which is limited to New Zealand and Australian markets), could reduce the scope of recovery via sales in other international markets. This may limit the extent to which an acquirer of PEL would be prepared to invest in research and development’.

12.16 The Stafix Divestment in Appendix 1 provides for the use of the Stafix brand worldwide, without limitation. This should add significant value to a potential acquirer, as well as provide a critical mass from which to justify continuing research and development.

Possible Expansion of Stafix

12.17 In the Determination, the Commission considered the following to be high barriers to the possible expansion of the PEL divestment as proposed in the Original Application (Determination, para. 546, p.92)

- (a) limited short to medium term access to the large rural resellers;
- (b) restoring brand and reputation;
- (c) high capital costs and a two year plus timeframe to develop and upgrade PEL's range of energisers;
- (d) volume-based rebates;
- (e) bundling; and
- (f) vigorous incumbent response.

12.18 The Applicant considers that the Stafix brand will not face the same barriers to expansion and comments on each of these areas below;

Short and medium term access to the large rural resellers

12.19 The Stafix brand has the largest market share of any Tru-Test electric fencing brand in New Zealand.

- 12.20 The table below shows the Applicants estimate of the market share of the Stafix brand by rural resellers.

Table 3: Rural Electric Fencing Brand Market Share by Rural Reseller

	\$M Total	\$M Stafix	Share %
RD1			
Williams and Kettle			
Pyne Gould			
Other			
CRT			
Allied Farmers			
Farmlands			
Wrightsons			
Goldpine			
Total			

Source : The competitor information provided in Table 3 is estimated based on shelf space allocations in rural resellers as a percentage of the total estimated account size and is considered to have a medium-high level of accuracy.

- 12.21 The Stafix brand has a significant position [], and the most market share of any other Tru-Test brand of electric fencing, in 6 of the 8 large rural resellers.
- 12.22 At Williams and Kettle, Gallagher electric fencing products are not stocked and Stafix is positioned as a complete alternative to Gallagher.
- 12.23 Rural resellers place a high emphasis on any supplier being capable of offering a full energiser range before they would consider stocking the brand (Determination, para.122, p.30). The Stafix product range satisfies this requirement and is discussed further in 12.29.
- 12.24 In Determination, para 518, p.88, 'All resellers acknowledged to the Commission the likely long term benefits of creating competitive tension by supporting an alternative supplier of electric fencing products (particularly energisers) to the combined entity, post acquisition'. They went further to say 'resellers also advised the Commission that support for a potential acquirer of the PEL brand in the long run would be conditional on, or at least be made more likely if the acquirer were to invest in research and development to extend and upgrade the technology and appearance of the PEL energiser range to match that of competing brands'. Given that Stafix is one of the competing brands being referred to, it is implied that they recognise the value in giving the support and further would give such support, or would at least be more likely to give support, to Stafix as compared to PEL.
- 12.25 The applicant concludes that the access to short and medium term support from rural resellers would not be a barrier to expansion of the Stafix brand following the Stafix Divestment.

Brand and Reputation

- 12.26 The current support of the Stafix brand by rural resellers and the current brand and reputation are intricately intertwined. The current rural reseller support of the Stafix brand is demonstrated in 12.19 to 12.22 above.
- 12.27 The Stafix brand has been associated with electric fencing in New Zealand for over 25 years and has strong brand awareness and reputation.
- 12.28 The applicant concludes that brand and reputation would not be a barrier to expansion of the Stafix brand following the Stafix Divestment.

Complete range of Energisers

- 12.29 It was noted in the Determination, para.504, p.86 that ‘resellers, when making stocking decisions, place great importance on suppliers of electric fencing products being able to offer a full range’ and that ‘the PEL Energiser range was incomplete relative to competing brands’ with particular reference being made to the top end offering of Stafix and Speedrite.
- 12.30 It was further noted in the Determination, para 508, p.87 that the omission of a top-end 36 Joule (output) energiser ‘appears to be a pivotal barrier to gaining acceptance and support from resellers’.
- 12.31 The Stafix Divestment includes the complete range of Stafix Energisers, which includes the Stafix M36 (36 Stored Joule and 52 Output Joule)) top end energiser.
- 12.32 In Determination, para.510, p.87 it was advised to the Commission that at the top end the Stafix products are competing directly with the Gallagher Products.
- 12.33 Resellers identified missing features in the PEL energiser range (Determination, para.512, p.87) which are not missing in the Stafix energiser range.
- 12.34 Based on the findings in the Determination, the Stafix range of energisers provides a consistent and more up to date range, technologically superior, better performing, and more marketable range of energisers than PEL, and in the applicants view, than compared to Speedrite.
- 12.35 The Commission identified the cost of research and development required in the PEL range, and the greater than 2 year timeframe to develop, as significant barriers to competition. The Stafix Divestment does not present these barriers.
- 12.36 In relation to electric fencing for security applications, the Commission noted in Determination, para.160, p.36 that ‘a high degree of supply-side substitution is possible between rural and security electric fence’ and was therefore sufficient to bring into the same product market. The Commission also found possible demand side substitution with rural electric fencing products for non-electric items (Determination, para.148, p.34) and with single zone energisers (Determination, para.152, p.35).

- 12.37 The Applicant concludes that in relation to security electric fencing, the Stafix Divestment will provide a higher technology base and a larger critical mass. This will allow the threat of supply side substitution to control the merged entity in relation to multi-zone security energisers. It should be noted that multi-channel energisers are likely to represent [].
- 12.38 The applicant concludes that there are no technology barriers to expansion of the Stafix brand following the Stafix Divestment.

Volume based rebates

- 12.39 The Commission concluded that volume based rebates represent a very high barrier to expansion of the PEL brand as resellers ‘could incur a substantial loss of discounts in giving an existing supplier, such as PEL, more shelf space at the expense of the combined entity...which could foreclose the market to existing competitors’(Determination, para.538, p.91).
- 12.40 The applicant contends that volume based rebates are as much likely to be offered by the minor supplier, as opposed to the supplier whom has the majority share. To the minor supplier, the business is incremental business and therefore more likely to have lower targets and higher rebate offerings.
- 12.41 The applicant considers that volume based rebates will not be a barrier to expansion for the Stafix brand, as unlike the PEL divestment proposed in the Original Application;
- (a) Stafix has a higher market share than any other Tru-Test electric fence brand and consequently the combined entity will have a lower market share than that proposed in the PEL divestment.
 - (b) Stafix does not have any material technical or market disadvantages which would pose a risk to the rural reseller in giving additional shelf space.
 - (c) Stafix has a complete product range which would provide a short term and credible alternative to the combined entity.
 - (d) Through the above, Stafix would be operating in an environment where rural resellers would be in a stronger position to create competitive tension by supporting an alternative supplier of electric fencing products to the combined entity and are likely to be desirous of doing so (refer 12.24).

Strategic Incumbent Response

- 12.42 Strategic responses such as those proposed by the Commission in Determination, para.540, p.91 are less likely to be barriers to the expansion of the Stafix brand than compared to the PEL divestment proposed in the Original Application for the reasons proposed in 12.41 above.

Summary of Stafix Divestment

12.43 Overall, for the reasons outlined above, the Stafix Divestment provides for a constraint on the merged entity. The threat of market expansion by Stafix would further add to this constraint.

Further Constraints On Market Power By Existing Competition

12.44 The applicant considers further competitive constraint on the combined entity will be provided from existing competition, and the threat of their expansion, as outlined in the Original Application.

12.45 As outlined in the Original Application, the primary constraint on the expansion of existing competition is access to distribution and shelf space. With the Stafix Divestment creating a viable alternative to the Gallagher brand, it would not be possible for either Stafix or Gallagher to singly exert strategic incumbent pressure (e.g., refusals to supply) against the existing competitor. The Stafix Divestment strengthens the rural resellers countervailing power.

PART 4: CONSTRAINTS ON MARKET POWER BY POTENTIAL COMPETITION

13.1 The possibility of expansion by existing competitors is noted in 12.44 and 12.45 above, and detailed in the Original Application.

13.2 The Applicant considers that the possibility of expansion into New Zealand by overseas competitors will constrain the merged entity and this is detailed in the Original Application. Additional information to support this view is;

(a) The acquisition of Rutland by Zareba (refer 10.2). This merger will create a larger and international competitor with clear growth plans outside Zareba's home market. The Zareba/Rutland merger will create an electric fence competitor of []

(b) []

(c) []

13.3 Constraints from potential competition are covered in the Original Application.

PART 5: CONSTRAINTS ON MARKET POWER BY OTHER CONSTRAINTS

14.1 Other constraints on the merged entity are covered in the Original Application.

14.2 As noted in the Original Application, the Applicant considers the countervailing power of the rural resellers to provide an effective constraint on the combined entity.

- 14.3 The Commission considered that the large rural resellers currently have strong countervailing power (Determination, para.565, p.95). The proposed Stafix Divestment should provide a credible alternative to Gallagher for rural resellers and hence restore this countervailing power (refer 12.45 above).

THIS NOTICE is given by Gallagher Holdings Limited.

I hereby confirm that:

- all information specified by the Commission has been supplied;
- all information known to Gallagher Holdings Limited which is relevant to the consideration of this notice has been supplied;
- all information supplied is correct as at the date of this notice.

The Company undertakes to advise the Commission immediately of any material change in circumstances relating to the application/notice.

Dated this day of November 2004.

Signed for and on behalf of
Gallagher Holdings Limited

William M. Gallagher
Chairperson & Chief Executive Officer

I am an officer of the company and am duly authorised to make this notice.

APPENDIX 1: DIVESTMENT UNDERTAKING

DIVESTMENT UNDERTAKING PURSUANT TO SECTION 69A OF THE COMMERCE ACT 1986

This **Deed** is made on the day of 2004

By

1. **Gallagher Group Limited**, a duly incorporated company under the Companies Act 1993 having its registered office at Hamilton, New Zealand (“Gallagher”)

in favour of

2. **The Commerce Commission**, a body corporate established by section 8 of the Commerce Act 1986 (“Commission”)

INTRODUCTION

- A. On 18th October 2004, Gallagher gave notice to the Commission pursuant to section 66(1) of the Commerce Act 1986 (“**Act**”) seeking clearance for the proposed acquisition by Gallagher of all the shares in Tru-Test Corporation Limited (“**Application**”).
- B. The Application included, under section 69A of the Act, an undertaking to divest certain assets in the form of this Deed.

COVENANTS

- 1 Subject to the conditions described in clause 2 of this Deed, Gallagher will, if required in writing by the Commission, sell or procure the sale of the Stafix electric fence business assets in New Zealand (hereinafter defined), as a going concern, (including any existing sales contracts between Tru-Test and customers exclusive to the Stafix brand) to a purchaser which is not an interconnected body corporate (as defined by section 2(7) of the Act) or an associated person (as defined by section 47(3) of the Act) of Gallagher within one year of the date that Gallagher declares a formal offer pursuant to the Takeovers Act 1993 to all shareholders of Tru-Test Corporation Limited (“**Offer**”) to be unconditional in all respects (“**Unconditionality**”).
- 2 The covenants contained in this Deed are subject to Gallagher attaining Unconditionality in respect of the proposed Offer.
- 3 The Stafix electric fence business assets the subject of clause 1 above, are the range of electric fencing products sold in New Zealand and shown in the Stafix Electric

Fencing Catalogue, as the date of the Application, and attached as Appendix 2 (the “Products”) which include;:

- 3.1 the Stafix brand for use worldwide;
 - 3.2 available documentation with respect to the technical know how and royalty free access to all intellectual property (where this is the property of Tru-Test), necessary to manufacture the range of Products manufactured by Tru-Test as at the date of this Deed;
 - 3.3 any plant and equipment which is the property of Tru-Test, specific to the manufacture of the Products and which is required to manufacture the Products in sufficient quantity to supply the average volume of the Products manufactured in the five years immediately prior to the acquisition, including all injection moulding tools, dies and test jigs specific to the Products but not including generic equipment where necessary capacity can be readily accessed through outsourcing (e.g. moulding machines).
- 4 Gallagher will advise the Commission of the sale on completion.
 - 5 Gallagher confirms that in entering into the agreement recorded in this Deed it intends to create binding and enforceable legal obligations in relation to the Commerce Commission.
 - 6 This Deed is governed by New Zealand law and the parties accept the exclusive jurisdiction of the New Zealand courts and any court which may hear appeals from those courts.
 - 7 This Deed may be executed in any number of counterparts each of which is deemed an original, but all of which together are to constitute an instrument. It is acknowledged that this Deed may be executed by an exchange of facsimile copies and executing of this Deed by that means is valid and sufficient execution

APPENDIX 2: STAFIX FENCE SYSTEMS BROCHURE