

EXECUTIVE SUMMARY

Introduction

This is an application by Bluebird Foods Limited (**Bluebird**) for clearance for it, or any of its interconnected bodies corporate, to acquire Hansells (NZ) Limited's and PLC (NZ) Limited's (**Hansells**) salty snacks businesses, which involve the assets and brands used in the manufacture and wholesale supply of:

- potato chips, corn chips and extrusions under the Krispa, Aztec and Poppajacks brands; and
- house brand or private label products manufactured for supermarkets and other retailers,

(together the **Hansells Salty Snack Foods Business**) (the **Acquisition**).

The Acquisition will result in horizontal aggregation between Bluebird's salty snack foods business and the Hansells Salty Snack Foods Business.

The relevant counterfactual against which the Acquisition should be assessed is a market in which Hansells continues to compete as an independent market participant.

Affected market

For the purposes of this application for clearance, Bluebird has analysed the impact of the Acquisition on the basis that there is a market for the manufacture and wholesale supply of salty snack foods in New Zealand (**Salty Snack Foods Market**). This market includes the manufacture and wholesale supply of:

- potato chips;
- corn chips;
- extrusions (e.g., Twisties and Munchos); and
- nuts; and
- other cereal snacks (e.g., Pita Crisps, Grainwaves, Pretzels, and Popcorn).

In Bluebird's view, the relevant area of competition and constraint is wider than a Salty Snack Foods Market. There are a wide variety of other products that closely compete with salty snack foods, such as: chocolate, sugar based confectionary, biscuits, muesli bars, instant noodles, cup of soups, fruit, ice-cream, pies, burritos and other heat and eat products, cheese and crackers, and increasingly antipasto-style foods (e.g., pastrami, salami etc).

These products all play a role in the market and constrain producers of salty snack foods. However, Bluebird has adopted the more conservative approach of assuming that there is a Salty Snack Foods Market on the basis that if there is no substantial lessening of competition in that narrowly defined market, there is unlikely

to be a substantial lessening of competition in a more broadly defined market. Notwithstanding that narrow market definition, the constraints imposed by those other products are relevant to the competition law analysis.

No substantial lessening of competition

Following the Acquisition, Bluebird's share of the Salty Snack Foods Market will be approximately []%. Bluebird does not believe that the Acquisition will substantially lessen competition in the Salty Snack Foods Market because:

- There are a number of well resourced competitors in the market. Griffins Foods Limited (which is owned by the Danone Group of France) via its ETA and Sancho salty snacks business will be the next largest competitor with approximately []% of the market. (Griffins Foods Limited salty snacks business is referred to as ETA in this document for convenience.) In addition, there are a number of other players in the market who have the potential to expand including Proctor & Gamble, Mexican Supplies and Pro-Life Foods.
- Supermarkets exert a significant amount of countervailing power in the Salty Snack Foods Market. Supermarkets control access to shelf space, which all producers need in order to distribute their products. Approximately []% of all sales of salty snack foods are made through supermarkets – any attempt by a producer of salty snack foods to increase prices would be met by the supermarkets reducing shelf space, reducing SKUs, limiting promotional activity in favour of other competitors and encouraging new entry or expansion. The effectiveness of this countervailing power is enhanced because:
 - the majority of salty snack foods sales are made on promotion, indicating the high price sensitivity of consumers and the low switching costs for supermarkets; and
 - both supermarket chains have salty snack foods house brands businesses – Progressive has around []% of the market (with 33 SKUs) and Foodstuffs []% of the market (with 27 SKUs), which makes switching simple for supermarkets.
- There are no barriers to entry or expansion in the Salty Snack Foods Market.
- There are no barriers to product being imported into New Zealand and, in fact, this is already occurring. Bluebird believes that the level of imports will increase in the future, and any attempt to increase prices would only serve to accelerate that process.
- There are at least two large Australian producers (Arnotts Snackbrands and FritoLay), which Bluebird believes would enter the New Zealand market (either by importing product or establishing New Zealand production capacity) if prices were to increase.

Furthermore, as noted above, Bluebird notes that there are a number of other products that compete with salty snack foods. These include chocolate, confectionary and other convenience foods. Those products impose a real and credible constraint on the behaviour of salty snack foods producers.

For these reasons, Bluebird does not believe that its acquisition of Hansells will have the effect of substantially lessening competition in the Salty Snack Foods Market.

COMMERCE ACT 1986: BUSINESS ACQUISITION
SECTION 66: NOTICE SEEKING CLEARANCE

Date: 29 August 2005

The Registrar

Market Structure Team

Commerce Commission

PO Box 2351

WELLINGTON

Pursuant to s66(1) of the Commerce Act 1986 notice is hereby given seeking **clearance** of a proposed business acquisition.

PART I: TRANSACTION DETAILS

1. **What is the business acquisition for which clearance is sought?**

- 1.1 Bluebird Foods Limited (**Bluebird**), or any interconnected body corporate of Bluebird, seeks clearance to acquire from Hansells (NZ) Limited's and PLC (NZ) Limited's (**Hansells**) all the assets and brands used by Hansells in the manufacture and wholesale supply of:
- potato chips, corn chips and extrusions under the Krispa, Aztec and Poppajacks brands; and
 - house brand or private label products manufactured for supermarkets and other retailers,
- (together the **Hansells Salty Snack Foods Business**) (the **Acquisition**).
- 1.2 In addition, Hansells has agreed not to be involved in the manufacture, distribution or sale of potato chips, corn chips and extrusions for a five year period.

The Person Giving Notice

2. **Who is the person giving this notice?**

- 2.1 This notice is given by:
- 2.1.1 Bluebird. Bluebird requests that all correspondence is directed in the first instance to:
- Bell Gully
48 Shortland Street, Auckland
Telephone: 09 916 8800
Facsimile: 09 916 8801
Attention: Phil Taylor/David Blacktop
Email: phil.taylor@bellgully.com / david.blacktop@bellgully.com

Confidentiality

3. **Do you wish to request a confidentiality order for:**

- 3.1 **The fact of the proposed acquisition**
- 3.1.1 No.
- 3.2 **Specific information contained in or attached to the notice?**
- 3.2.1 Yes. Confidentiality is sought for information contained in bold square brackets in this application (i.e., []).

3.2.2 The information that has been deleted is commercially sensitive and valuable information that is confidential to Bluebird. Disclosure of that information could result in material financial loss and prejudice to the competitive position of Bluebird. In this respect, Bluebird relies on section 9(2)(b) of the Official Information Act 1982. The foregoing applies equally in respect of all additional information (expressed to be confidential) that Bluebird may provide in relation to this application.

Details of the Participants

4. Who are the participants (i.e. the parties involved)?

4.1 The participants are Bluebird and Hansells.

4.1.1 Bluebird:

Bluebird Foods Limited
124 Wiri Station Road
Manukau City
Auckland
Attention: Helen Golding
Director

4.1.2 Hansells:

Hansells (NZ) Limited
Level 2, 323 Great South Road
Greenlane
Auckland
Attention: Stuart Walker
Managing Director

5. Who is interconnected to or associated with each participant?

5.1 Acquirer group/associates

5.1.1 The ownership structure of Bluebird is illustrated in Appendix 1. Bluebird is a wholly owned subsidiary of Goodman Fielder Pty Limited (**Goodman Fielder**). Goodman Fielder is an Australian-based food company. In addition to Bluebird, Goodman Fielder's main activities are the manufacture and supply of:

- bread and baked confectionary in which its largest brands are "Quality Bakers", "Vogels", "Freya's" and "Ernst Adams";
- margarine, in which its largest brands are "Meadow Lea", "Sunrise", "Olivani" and "Gold N Canola";
- cereals and nutritious snacks, in which its largest brand is Uncle Tobys; and
- bakery ingredients for commercial and home baking with its two major brands being "Champion" and "Edmonds".

Burns Philp

5.1.2 Burns Philp is the ultimate owner of 100% of the shares in Goodman Fielder. Burns Philp is listed on the Australian and New Zealand stock exchanges. A copy of Burns Philp's 2004 Annual Report is available at www.burnsphilp.com.au.

Rank Group

5.1.3 Rank Group, through subsidiary companies, owns 53.7% of the voting share capital in Burns Philp.¹ Accordingly, Rank Group is an interconnected body corporate of Burns Philp under the Commerce Act 1986. Rank is the largest individual shareholder in Burns Philp. All other significant shareholdings belong to institutional investors.

5.1.4 In addition to its shareholding in Burns Philp, Rank (through subsidiary companies) owns 100% of New Zealand Dairy Foods Limited (**NZDF**).

5.2 Target company group/associates

5.2.1 ***Identify all subsidiaries of the target company and all companies in which the target company or any subsidiary owns 10% or more of the shares.***

5.2.1 Hansells (N.Z) Limited is a wholly owned subsidiary of Hansells Holdings Limited.

5.2.2 Hansells (N.Z.) Limited owns 100% of the shares in Future Foods Limited and 99% of the shares of PLC (NZ) Limited. Hansells Holdings Limited owns the remaining shares in PLC (NZ) Limited. The Hansells companies will remain members of the Hansells Group post-Acquisition.

5.2.2 ***If any company owns over 10% of the shares in the "target company", and will continue to do so after the proposed acquisition, then identify all of the interconnected bodies corporate of that company and all companies in which it or its interconnected bodies corporate own over 10% of the shares.***

5.2.3 Bluebird will acquire the entire Hansells Salty Snack Foods Business. No other firm will hold interests in those assets.

6. **Does any participant, or any interconnected body corporate thereof, already have a beneficial interest in, or is it beneficially entitled to, any shares or other pecuniary interest in another participant?**

6.1 No.

¹ Correct as at 25 August 2005, the date of Burns Philp's last Annual report.

7. Identify any links, formal or informal, between any participant/s including interconnected bodies corporate and other persons identified at paragraph 5 and its/their existing competitors in each market.

7.1 There are no relevant links.

8. Do any directors of the 'acquirer' also hold directorships in any other companies which are involved in the markets in which the target company/business operates?

8.1 None of Bluebird's (nor any of its interconnected bodies corporates') directors hold directorships in any companies not related to Bluebird in the markets in which Hansells operates.

9. What are the business activities of each participant?

Bluebird

9.1 Bluebird manufactures a range of products in the Salty Snack Foods Market, including: Bluebird Originals; Delisio; Murphy's; Flats; Kettle's; Health Plus; Lites; Grainwaves; Twisties; Burger Rings; Big'Uns; Rashuns; Cheezels; Caramel Corn extrusions; and CCs and Party Corn corn chips.

Hansells

9.2 Hansells is a consumer foods business and competes in a number of product segments, including:

- baking needs (essences, food colours & baking powders);
- powdered drinks (Vitafresh) and concentrates (Quench & Thriftee);
- instant desserts;
- cereal soups (King Old Fashioned Soup);
- home-made yoghurt (Yog-it); and
- artificial sweeteners (Sugromax).

9.3 Hansells Salty Snack Foods Business involves the manufacturing and wholesale supply of salty snack foods under the Krispa, Aztec and Poppajacks brands. These brands include: Krispa Chips Standard; Health Style and Salute potato chips; Krispa Potato Sticks; Poppajacks extrusions; Aztec and Krispa Corn Chips; and Banditos.

10. What are the reasons for the proposal and the intentions in respect of the acquired or merged business?

10.1 Competition in the Salty Snack Foods market is intense. As discussed further in response to Question 16, the Salty Snack Foods Market (as with other

consumer goods markets²) is characterised by manufacturers regularly launching and re-launching salty snack food brands. This regular launching and re-launching of products serves to underline the intensity of competition in the market.

10.2 The intensity of competition in the market is reflected by the very intense level of competition in the lower mainstream/value segment of the market. []³ []

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10.3 []

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² See *Proctor and Gamble Distributing New Zealand Limited and Wella New Zealand Limited*, 10 June 2003, (**Decision 500**), paragraphs 47 and 135; and *Colgate-Palmolive Limited and Campbell Brothers Limited*, 20 July 2004 (**Decision 529**), paragraph 6.

³ [] ETA's (owned by Griffins Foods Limited and ultimately by the Danone Group) move in September 2004 to reduce the packet size of its flagship ETA Ripples brand from 190g to 150g. []

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PART II: IDENTIFICATION OF MARKETS AFFECTED

Horizontal Aggregation

11. Are there any markets in which there would be an aggregation of business activities as a result of the proposed acquisition?

- 11.1 The Acquisition will result in horizontal aggregation between Bluebird's salty snack foods business and the Hansells Salty Snack Foods Business. Accordingly, for the purposes of this application, Bluebird has proceeded on the conservative assumption that there is a market for the manufacture and wholesale supply of salty snack foods in New Zealand (**Salty Snack Foods Market**). The Salty Snack Foods Market includes the manufacture and supply of potato chips, extrusions,⁴ corn chips, nuts, and other cereal snacks.
- 11.2 Bluebird considers that there is strong substitution on both the demand and the supply side of the Salty Snack Foods Market. There is a price interdependence between all of the various products in the market. Adjacent products constrain each other and consumers purchasing those products find other products substitutable. The extent of product differentiation is not sufficient to affect this market definition. For the majority of consumers, price is the paramount consideration.
- 11.3 Furthermore, a Salty Snack Foods Market reflects commercial commonsense and reflects the way in which the industry views the area of competition as illustrated by the fact that:
- Bluebird prepares all of its internal financial management reports on the basis of a Salty Snack Foods Market;
 - Competing suppliers' marketing material demonstrates that they view the market as a Salty Snack Foods Market;⁵
 - AC Neilson prepares its market information reports on the basis of a Salty Snack Foods Market because the grocery industry and salty snack foods suppliers demand the information in that form; and
 - Supermarkets (which account for []% of all sales of salty snack foods) generally group all salty snack foods together in one aisle reflecting consumer substitution between these products.
- 11.4 A Salty Snack Foods Market is also consistent with the approach adopted by the Commission in Decision 156 where the Commission cleared Fielder

⁴ "Extrusions" are snack foods where the ingredients are cooked under pressure in an extruder. As the cooked dough leaves the extruder its water content disperses as steam leaving a relatively light textured product. Extruded snack foods come in a variety of shapes, including rings, curls, curves and round balls.

⁵ See <http://www.eta.co.nz/Eta/Products/>

Gillespie Davis Limited to acquire Goodman Group Limited. In that decision, the Commission defined a “market for snack foods”, which included potato chips, corn or maize based extrusions, and nuts.⁶

11.5 A Salty Snack Foods Market is also consistent with the definition adopted by the ACCC when considering Arnott’s Biscuits Limited’s proposed acquisition of Snack Foods Limited in 2002. In that decision, the ACCC defined a national market for the manufacture and distribution of salty snacks.

11.6 However, notwithstanding that, in Bluebird’s view, the relevant area of competition and constraint may be wider than a Salty Snack Foods Market. There are a wide variety of other products that closely compete with salty snack foods in different situations. For example, consumers acquire salty snack foods to be eaten in one of three settings:

- As an ‘on the go’ snack food. In this context, salty snack foods compete with a range of other snack foods including (but not limited to) chocolate, sugar based confectionary, biscuits and muesli bars;
- At home snacking (i.e., snacking between meals and after school snacks). In this context, salty snack foods compete with products including (but not limited to) instant noodles, cups of soups, fruit, ice-cream, pies and burritos and other heat and eat products; and
- In a social setting, often to accompany both alcoholic and non-alcoholic drinks. In this context, salty snack foods compete with products including (but not limited to) cheese and crackers, and increasingly antipasto-style foods (e.g., pastrami, salami etc).

11.7 There is considerable scope for supply side substitution between salty snack foods and other products. In this respect, Bluebird notes that Griffin’s (ETA’s parent) is New Zealand’s largest biscuit producer.

11.8 As noted by the High Court in *Brambles v Commerce Commission* (2003) 10 TCLR 868 in a situation where there are differentiated products (as in this case), applying the *ssnip* test can be difficult and, hence, a commonsense evaluation (based on the evidence available) should be used. In Bluebird’s view, from a commercially realistic and commonsense perspective, the market cannot be narrower than a Salty Snack Foods Market because:

- Consumers can and do substitute between competing salty snack foods; and
- Suppliers can easily produce different types of salty snack foods.

11.9 While Bluebird has taken this conservative approach to aid the Commission’s analysis, for the reasons outlined above, it considers the relevant market, and the constraints imposed upon Bluebird, come from a wider range of products than purely salty snack foods. Consumers can and do switch between salty

⁶ Decision 156, paragraph 252.

snack foods and other competing products, such as: biscuits, cheese, chocolate and confectionary. Furthermore, suppliers of other types of products could switch production to potato chips without facing any material barriers to doing so.

Differentiated Product Markets

12. Please indicate whether the products in each market identified in question 11 are standardised (buyers make their purchases largely on the basis of price) or differentiated (buyers make their purchases largely on the basis of product characteristics as well as price).

12.1 Consumers at the retail level purchase salty snack foods based primarily on price. However, consumers do consider other product attributes and, hence, salty snack foods are differentiated.

12.2 Competition on price is particularly evident in the everyday chip segment of the market (e.g., Bluebird Originals, ETA Ripples, house brand and Krispa Standard) where approximately []% of product is sold on promotion. As with many other consumer goods markets, demand for premium brands (such as ETA Uppercuts) and unique products (such as Grainwaves) tend to be less price-sensitive, with higher percentages of product sold at list price. However, that is not to say that market participants do not compete strongly on price or that consumers have inelastic demand for certain products. Throughout the market, consumers are extremely price sensitive and a material percentage of all products are sold on promotion. For example, [

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12.3 For the majority of consumers, price is the paramount consideration.

13. For differentiated product markets

13.1 Please indicate the principle characteristics of products that cause them to be differentiated one from another.

13.1.1 Salty snack foods are (principally) differentiated on the basis of:

- Product format and ingredients (e.g., snack type);
- Flavour;
- Method of cooking (e.g., kettle fried, baked etc);
- Ingredients: for example: salty snacks vary according to the amount of fat contained in a product. Lites, for instance, are marketed as being lower in fat than standard chips; and, in the context of nuts, the type of nut (e.g., cashew nuts, peanuts, pistachio) etc;
- Shape and texture: for example, different cuts of potato chips, different shapes of extrusions and nut sizes;

- Size of package;
- Type of package: for example, Pringles potato chips are sold in ‘tubes’ as opposed to traditional packaging;
- Single or multi-packs: for example, multi-packs, which contain a number of small packets, are popular for school lunches and after-school snacks;
- Positioning: for example, ‘premium’ brands (e.g., ETA Uppercuts) or ‘healthier’ brands (e.g., Health Plus); and
- Purchase type: for example, premium, everyday or value.

13.1.2 There is a high degree of competition from a number of suppliers right across the salty snack foods product space. Barriers to switching along the continuum of differentiated products are non-existent for consumers, and are very low for existing suppliers (or new entrants). In any event, this is not a merger of the two closest firms in the differentiated product space but represents [].

13.2 To what extent does product differentiation lead firms to tailor and market their products to particular buyer groups or market niches?

13.2.1 Firms do tailor their products to target particular customer groups. For example, pita chips are primarily targeted at adults, while extrusions are targeted at teenagers.

13.3 Of the various products in the market, which are close substitutes for the products of the proposed combined entity and which are more distant substitutes?

13.3.1 There is a strong price relationship among all products in the Salty Snack Foods Market. However, naturally, that price relationship is stronger between salty snack foods of the same type. For example, substitution between different potato chips brands is likely to be greater than the market average. This is illustrated in Figure 1 below.

Figure 1: []

13.3.2 Having said that, there remains a strong relationship between the different types of salty snack foods, and each type acts as a constraint on the other. For example, potato chips and “cheezels” extrusions would display a very high degree of price constraint on one another, as would pretzels and nuts.

13.3.3 Accordingly, as noted above, if a supplier of potato chips increased prices, a significant number of consumers would switch

to purchase competing salty snack foods, such as extrusions or nuts (in addition to other products).

- 13.3.4 In addition, an attempted increase in price would be defeated by high supply side substitution. ETA, Bluebird and Hansells all produce potato chips, corn chips and extrusions and ETA also produces nuts (and Griffins produces biscuits). Progressive and Foodstuffs also sell potato chips, extrusions and nuts under their house brands using third party manufacturers.

13.4 Given the level of product differentiation, to what extent do you consider that the merged entity would be constrained in its actions by the presence of other suppliers in the affected market(s)?

- 13.4.1 The level of product differentiation in the Salty Snack Foods Market is indicative of competitors seeking to stand out from the other firms in the market-place. There is a high degree of competition right across the salty snack foods product space from a number of suppliers, and, in particular, from ETA, Pringles, Prolife, Mexican Foods, Progressive and Foodstuffs.

- 13.4.2 This is not a merger of the two closest firms in the differentiated product space. As noted above, [

]. In any event, the Applicant notes that barriers to switching for consumers are non-existent, and are very low for existing suppliers (or new entrants).

- 13.4.3 For these reasons, Bluebird would be constrained from increasing prices or decreasing quality post-Acquisition.

Vertical Integration

14. Will the proposal result in vertical integration between firms involved at different functional levels?

14.1 No.

14.2 Both Bluebird and Hansells are principally involved in the manufacture and wholesale supply of salty snack foods. While Bluebird has a limited involvement at the retail level via its vending machine business, there is no aggregation in that market as a result of the Acquisition.

15. In respect of each market identified in questions 11 and/or 14 identify briefly:

15.1 All proposed acquisitions of assets of a business or shares involving either participant (or any interconnected body corporate thereof) notified to the Commission in the last three years.

- 15.1.1 The only relevant acquisitions are:

- Burns Philp's acquisition of Goodman Fielder in February 2003; and
- Rank Group's sale and purchase agreement with Fonterra relating to NZDF and Mainland, notified to the Commission in August 2005.

15.2 Any other acquisition of assets of a business or shares which either participant (or any interconnected body corporate) has undertaken in the last three years.

15.2.1 There are no acquisitions in addition to those listed in 15.1.1.

PART III: CONSTRAINTS ON MARKET POWER BY EXISTING COMPETITION

Existing Competitors

16. In the market or markets, who are the suppliers of competing products, including imports?
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Market share

- 16.1 Bluebird's estimates of the market shares of existing competitors in the Salty Snack Foods Market are set out in Table 1. These shares are calculated using AC Nielsen supermarket scan data. Bluebird believes that this data provides a good proxy for overall market shares given that supermarkets account for []% of all sales. However, Bluebird notes that it would be likely to have a slightly higher share of the route trade segment.

Table 1: Existing Competitors – share of supermarket supply (MAT 17 July 2005)

Supplier	Value Share of supermarket sales ([]% of all sales)
Bluebird	[]%
Hansells	[]%
Bluebird / Hansells (combined share)	[]%
ETA	[]%
Progressive Housebrands ⁷	[]%
Pro-Life Foods	[]%
Foodstuffs Housebrands ⁸	[]%

⁷ [

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⁸ [

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Supplier	Value Share of supermarket sales ([]% of all sales)
Proctor & Gamble	[]%
Pita Bread Company	[]%
Harvest Traders	[]%
Pop n Good	[]%
Trumps	[]%
Mexican Supplies	[]%
Healtheries	[]%
Other	[]%

Source: AC Nielson

16.2 Salty snack foods are already imported into New Zealand. Bluebird understands that Proctor & Gamble imports its salty snacks from Belgium, and that Progressive Enterprises imports its Signature Range extrusions from an Australian producer.

Constraint from existing competitors

16.3 While Bluebird's post-Acquisition market share would fall outside the Commission's safe harbour guidelines, Bluebird would remain significantly constrained by existing competitors in the Salty Snack Foods Market after the Acquisition.

16.4 The Salty Snack Foods Market is intensely competitive. None of the factors that give rise to this intense level of competition will change as a result of the Acquisition. Bluebird will remain constrained in the Salty Snack Foods Market due to:

- The continuing presence of ETA, which is a feature of the factual and the counterfactual;
- The continuing presence of a large number of 'other' and niche players in the market, which is a feature of the factual and the counterfactual;
- The price sensitive nature of consumers who will readily switch products, which is a feature of the factual and the counterfactual;

- The continued strong presence of house brands, which is a feature of the factual and the counterfactual; and
- The countervailing power of large purchasers, which is a feature of the factual and the counterfactual (see further discussion in response to Question 41 below).

16.5 In Decision 529 (Colgate-Palmolive Limited and Campbell Brothers Limited), the Commission made a number of observations in concluding that Colgate’s acquisition of Campbell Brothers would not substantially lessen competition. It referred to a number of factors that it considered were indicative of a competitive market. Each of these factors is applicable to the Salty Snack Foods Market:

Factor identified in Decision 529⁹	Application to Salty Snack Foods Market
High promotional spend of participants and regular re-launching of laundry products.	<p>Salty snack foods are the subject of high promotional spend and frequent product re-launching:</p> <ul style="list-style-type: none"> ▪ []; ▪ []; and ▪ Most suppliers regularly introduce new brands (e.g., ETA has launched Uppercuts and Bluebird has launched Delisio).
Price sensitivity of the laundry detergent market and the tendency of consumers to switch according to price.	Consumers of salty snack foods are very price sensitive and will switch brands in response to price changes. Between []% and []% of all product is sold on promotion.
Presence of large global players in the market.	<p>ETA is ultimately owned by the large French multinational, Groupe Danone, and has a stable of well known salty snack brands, including ETA Ripples, Uppercuts O’Ryans, Munchos, and Cheese Balls.</p> <p>Proctor & Gamble competes in the market through the global brand Pringles.</p>

⁹ Colgate-Palmolive Limited and Campbell Brothers Limited, 20 July 2004 (**Decision 529**) paragraphs 5 and 6.

Factor identified in Decision 529 ⁹	Application to Salty Snack Foods Market
Effective competition from house branded products.	There are a wide range of house branded products. As evidenced by Table 1, house brands account for just under []% of the market based on value and, accordingly, are likely to make up a significantly greater share of the market based on volume.
Likely existence of near competitors due to the high degree of supply-side substitutability.	There are a number of potential entrants which could and would enter the market should prices increase. As explained below, these entrants could commence supply by importing product, by contracting a third party manufacturer, or by establishing production capacity in New Zealand.

16.6 The constraints in the market are evidenced by the volatility of segment shares in the large potato chip pack segment (which accounts for []% of the market) over a 12 month period. This is illustrated in Figure 2 below, which shows that all participant's shares vary over time. [

] as competition between Bluebird and ETA has intensified, house brand sales have declined, as consumers have moved from house brands into branded products due to the decrease in the relative price of branded products, again evidence of consumers' responsiveness to prices in this market.

Figure 2: []

ETA

16.7 ETA is an operating division of Griffins Foods Limited (**Griffins**), which is, in turn, wholly owned by the Danone Group of France. Griffins has annual revenues of approximately NZ\$270 million, making it one of New Zealand's largest branded packaged consumer food companies. Griffins manufactures and markets a portfolio of products in addition to salty snack foods, including biscuits under the Griffin's label, with its leading brands including:

- Mallowpuffs;
- Gingernuts;
- Wines;
- Chocolate Wheaten;
- Cameo Cremes;

- Huntley and Palmers Cream Crackers;
- Snax;
- Toffee Pops; and
- Cookie Bear.

16.8 ETA supplies the bulk of its product from its manufacturing facility in Wiri, Auckland, and has a strong and established sales and distribution capacity. Griffin's website states that:

"The company operates a national sales and merchandising structure at store level and, with this highly motivated organisation, Griffin's enjoys a very high level of distribution for its products.

"A distribution network centred around two strategically located warehouses backs this selling and merchandising effort. This provides the company with the capacity to deliver to any customer outlet in New Zealand within 24 hours of receiving their order".¹⁰

16.9 In summary, ETA has a strong position in the Salty Snack Foods Market as well as having a strong position in other constraining product markets such as biscuits. It currently enjoys a value share of []% of the Salty Snack Foods Market, and has a number of well known and reputable brands such as:

- ETA Ripples;
- O'Ryans;
- Uppercuts;
- Naturals;
- ETA Corn Chips;
- Sancho (corn chips);
- Munchos (extrusions); and
- ETA Nuts.

16.10 ETA faces no barriers to expansion in the market. It has an established presence in all segments of the Salty Snack Foods Market. As evidenced by Figure 2 above, in the 12 months to 22 May 2005, ETA's value share of the large pack potato chip segment increased from []% to []%. The large pack potato chip segment is the largest segment in the market, accounting for approximately []% of all sales. [

] ETA's launch of the Uppercuts brand] has been

¹⁰ <http://www.eta.co.nz/Corporate/CompanyInformation/>

[]. ETA launched Uppercuts in August 2004 and that brand now accounts for just under []% of the Salty Snack Foods Market in a little over 12 months.

Progressive Enterprises and Foodstuffs

16.11 The ownership structures of Progressive Enterprises (**Progressive**) and the Foodstuffs companies (**Foodstuffs**) are outlined in response to Question 40 below.

16.12 As well as exercising significant countervailing purchasing power, Progressive and Foodstuffs are important competitors in their own right in the Salty Snack Foods Market via sales of their house brand ranges. As the Commission is aware:

- Progressive has two main house brands: “Signature Range” as its higher end range, and “Basics” as its lower cost brand.
- Foodstuffs has two main house brands: “Pams” as its higher end range, and “Budget” as its lower cost brand.

16.13 House brands compete across the full spectrum of products in the Salty Snack Foods Market, and both Progressive and Foodstuffs have proven that they are able to competitively supply a wide variety of products. For example, Progressive sells:

- 12 different varieties of potato chips (including 3 multi-packs) under its “Signature Range”;
- Three varieties of extrusions (Signature Range);
- Nine varieties of corn chips (six Signature Range and three Basics);
- Nine varieties of nuts (eight Signature Range and one Basics);¹¹ and
- one nut mix,

while Foodstuffs sells:

- 10 varieties of potato chips (including three multipack sizes);
- Five varieties of corn chips under the Pams label;
- One mix and four vege crisps products; and
- Seven varieties of nuts (six Budget and one Pam’s).

¹¹ www.woolworths.co.nz, 21 July 2005.

16.14 Salty snack foods manufacturers compete vigorously to obtain the contracts to manufacture house brands. Supermarkets award house brand supply contracts using a tender process, which guarantees that the supermarket receives the best price. These supply contracts are generally for a period of [] and are re-tendered at the end of that period.

16.15 In Decision 529, the Commission made a number of observations about the competitive impact of house brands:

“House brands are produced to generate customer loyalty to a supermarket, and so are used by a supermarket to gain market share from another supermarket. They are also used as a competitor against branded products in a specific market itself.”¹²

“Industry participants spoken to by the Commission consistently said that house brands were effective and realistic competitors. There appears to be an international trend in relation to house brands becoming market leaders in themselves. For example, of the total store offering by one UK supermarket chain, Tesco, 45% is house branded products. New Zealand industry players like [] and BEE consider it likely that New Zealand supermarkets will follow this trend, and they anticipate that in the future supermarkets will supply two branded products and one house brand per category only.”¹³

“As discussed above, house brands are becoming particularly strong competitors. [], said house brands are used by supermarket chains throughout the world to keep downward pressure on prices of branded players. [] house brands were also used to gain leverage in terms of getting more promotional spend from suppliers on the basis that they will have to promote their brands to compete with the house brand. House brands serve the additional purpose of creating customer loyalty to the particular store, and can therefore be viewed as another mechanism supermarkets use to compete with each other.”¹⁴

16.16 Bluebird agrees with the Commission’s findings and considers them to be highly relevant to the Salty Snack Foods Market. In addition, Bluebird considers that supermarkets receive a further advantage by promoting house brands sales in that those sales that are likely to generate higher margins for supermarkets than sales of branded products. Given the increasingly competitive nature of the supermarket industry in New Zealand following Woolworths Australia’s proposed acquisition of Progressive, Bluebird believes that supermarkets will increasingly (and more aggressively) promote their own house brands.

16.17 The existence of house brands as a strong and credible alternative in the market place is evidenced by recent research conducted by AC Nielson. In its Online Consumer Opinion Survey, AC Nielson asked consumers what they thought about supermarket house brands and private labels as an alternative to other brands in terms of their quality, value for money, packaging, and positioning. AC Nielson found:

¹² Decision 529, paragraph 59.

¹³ Decision 529, paragraph 61.

¹⁴ Decision 529, paragraph 208.

“Kiwis are in similar agreement when it comes to Private Label Quality and Value for Money, with 80 percent agreeing they were extremely good value for money compared to a global average of 69 percent, and 72 percent considering their quality to be at least as good as the big brands compared to 62 percent globally.

....

“When asked, just under half of Kiwis (49%) disagreed that Private Label products had cheap, off-putting packaging compared to a global average of 42 percent of consumers, 50 percent of Europeans, 46 percent of North Americans, and 42 percent of consumers in Australia.

.....

“When asked if they thought Private Label products were meant for people on tight budgets who can't afford the best brands, 58 percent of Kiwis disagreed, compared to a global average of 42 percent and more than half of consumers in North America (56%), Europe (50%) and Australia (51%).

“Our survey clearly showed that the longer consumers have been exposed to Private Label in terms of years in the market and how highly penetrated it is as a percentage of in store total category volume sales - the better they think about them”, commented Mr Smith. “The challenge for product marketers in New Zealand is to strengthen loyalty through increased brand equity, protecting their brand and the category against Private Label”.¹⁵

16.18 For these reasons, Bluebird believes that Progressive’s and Foodstuffs’ respective house brand products provide a substantial constraint in the market.

Other competitors

16.19 As noted above, the Salty Snack Foods Market is characterised by a high number of smaller niche participants. However, these participants face no barriers to expansion (and faced no barriers to entry).

16.20 In particular, Bluebird notes the existence of Proctor & Gamble via its Pringles brand. Proctor & Gamble currently engage Arnotts as its distributor of Pringles in New Zealand and Australia.

16.21 Proctor & Gamble is a large multinational manufacturer and distributor of consumer goods and is listed on the New York Stock Exchange. Internationally, Proctor & Gamble’s portfolio consists of around 300 product brands in 50 product categories supplied to almost 160 countries. Proctor & Gamble has an annual turnover in excess of US\$40 billion and invests approximately US\$1.6 billion each year in research and development. It spends in excess of US\$5 billion on advertising, two thirds of which is applied outside of the United States.¹⁶ Proctor & Gamble faces no barriers to

¹⁵ AC Nielsen Press Release, 12th August 2005, “Private Label: A 'Good Alternative' to Other Brands, Offering The Same Quality & Value”.

¹⁶ Decision 529, paragraphs 34-36.

expansion and its presence in the market and the threat of its expansion (particularly if encouraged by supermarkets) provides a constraint upon Bluebird.

16.22 Furthermore, there are a number of other very successful competitors, which have established niche positions in the market. For example:

- Prolife Foods, which imports, manufactures and markets nuts, dried fruits, snacks, cereals and confectionery products; and
- Mexican Supplies, which manufactures Mexicano brand corn chips and other corn-based foods.

Other constraining factors

16.23 As noted by the High Court in *Brambles*, notwithstanding that some products do not fall within the market as defined, the constraint imposed by those products is still a relevant and mandatory consideration for the Commission in assessing the extent to which competition will be lessened. Market definition is an analytical tool and should not determine the outcome of the competition analysis. In this respect, producers of salty snack foods are constrained by a number of other competing products such as:

- chocolate;
- sugar based confectionary;
- biscuits;
- muesli bars;
- cheese and crackers; and
- antipasto-style foods.

Conclusion

16.24 There is strong existing competition in the Salty Snack Foods Market. That competition will continue and will not be substantially lessened post-Acquisition. In addition, there are ancillary constraints provided by other competing products.

17. Conditions of expansion and entry

17.1 There are no significant barriers to expansion (or to entry) in the Salty Snack Foods Market.

17.2 There are no technological or intellectual property-based barriers to entry or expansion. Bluebird estimates that the cost of developing and supporting a new product in the market would be between NZ\$[]. This investment is not significant given the size of Salty Snack Foods Market, which is approximately NZ\$[]m per year.

- 17.3 The only condition of expansion is whether a manufacturer is able to expand production within its existing plant capacity or whether it would need to invest in new plant capacity. However, Bluebird is not aware of any capacity constraints faced by any of its existing competitors.
- 17.4 In any event, investment in new plant would not amount to a barrier to expansion for existing competitors (or, indeed a barrier to new entry). Bluebird estimates that the investment required for new plant (i.e., greenfields entry) would be in the order of NZ\$[]. This investment is not significant given the size of the Salty Snack Foods Market.
- 17.5 Furthermore, Bluebird considers that existing competitors could increase supply materially and quickly by a variety of alternative means, including:
- By sourcing third party manufacturing, as is already done by Progressive and Foodstuffs; or
 - By importing product into New Zealand. As noted above, salty snack foods are already imported into New Zealand, and the level of imports could be increased quickly and economically.
18. **Please name any business which already supplies the market - including overseas firms - which you consider could increase supply of the product concerned in the geographic market by any of the following means:**
- **diverting production into the market (e.g., from exports)**
 - **increasing utilisation of existing capacity**
 - **expansion of existing capacity.**
-
- 18.1 Bluebird believes that any (and all) of the existing competitors in the Salty Snack Foods Market could increase supply quickly in response to any attempt by Bluebird to increase prices post-Acquisition.
- 18.2 In addition, regardless of Bluebird's behaviour, Bluebird believes:
- Imports are likely to increase in the future, particularly with the continued growth in extruded snacks sourced mainly from Asia and in the large pack potato chips, corn chips, multi-packs and nuts segments.
 - Supermarket promotion of house brands is likely to increase given the increasingly competitive nature of the supermarket industry.
- 18.3 Accordingly, any attempt by Bluebird to increase prices or decrease quality post-Acquisition would only serve to accelerate these processes.
19. **Of the conditions of expansion listed above, which do you consider would influence the business decision in each case to increase supply?**
-
- 19.1 Bluebird does not consider that any of the conditions listed above would have a significant impact on a firm's decision to expand in the market if prices were

to increase. Such a price increase would attract immediate expansion by existing competitors and, and in all likelihood, would attract new entry.

20. How long would you expect it to take for supply to increase in each case?

- 20.1 Supply of a current product by an existing competitor could be increased almost immediately. Likewise, supply of an existing product supplied by a third party manufacturer could be increased almost immediately.
- 20.2 A current manufacturer, or a supplier using a third party manufacturer, could develop and supply a new product using existing plant capacity and technology within 12 weeks.
- 20.3 If an existing competitor needed to source new or additional equipment to manufacture either an existing product or a new product, it could acquire and commence production using that equipment within six months to one year.

21. In your opinion, to what extent would the possible competitive response of existing suppliers constrain the merged entity?

- 21.1 As there are no material barriers to expansion, the threat of expansion by existing competitors currently maintains prices at competitive levels. The Acquisition will not raise barriers to expansion. Accordingly, the threat of expansion will continue to maintain prices at competitive levels post-Acquisition.

22. Looked at overall, and bearing in mind the increase in market concentration that would be brought about by the acquisition, to what extent do you consider that the merged entity would be constrained in its actions by the conduct of existing competitors in the markets affected?

- 22.1 Bluebird would remain significantly constrained in the Salty Snack Foods Market post-Acquisition. There are a large number of existing players in the market, all of whom could increase supply quickly and easily if Bluebird sought to increase prices. There are simply no barriers to expansion in this market.

22.2 In particular, Bluebird will be constrained by:

- ETA;
- The large number of other players in the market;
- Foodstuffs and Progressive and their likely increase in promotion of house branded products and their control of access to shelf space in supermarkets;
- The likely increase in imports of salty snack foods into New Zealand; and
- The existence of other competing products outside the Salty Snack Foods Market.

Coordinated Market Power

23. Identify the various characteristics of the market that, post-acquisition, you consider would either facilitate or impede coordination effects.

23.1 The Salty Snack Foods Market does not currently show any evidence of tacit collusion. The market is characterised by:

- differentiated products;
- a lack of price transparency;
- price sensitive customers; and
- countervailing power from supermarkets.

23.2 None of these factors will change post-Acquisition.

23.3 In its Mergers and Acquisitions Guidelines, the Commission identifies a number of factors it considers relevant in determining whether any Acquisition will enhance the scope for co-ordinated market power. As detailed below, with the exception of relatively high market concentration, these factors do not currently exist in the Salty Snack Foods Market. Nor will the Acquisition change any of these factors. Consequently, the Acquisition cannot be considered to enhance the likelihood of the exercise of co-ordinated market power.

Factor	Presence of factor in Salty Snack Foods Market
High seller concentration	Medium While the market has a concentration ratio greater than 70%, there are a large number of suppliers in the Salty Snack Foods Market, including a number of smaller niche participants
Undifferentiated product	No
Static production technology	No Changes in production technologies have not been rapid, but suppliers are constantly developing and deploying innovations
Slow speed of new entry	No Entry and expansion can occur

	rapidly
Lack of fringe competitors	No There are a number of smaller fringe competitors in the market place
Acquisition of a maverick business	No Hansells is not a maverick business as evidenced by its long standing and relatively unchanged position in the market
Price inelastic market demand	No Demand is highly price elastic as evidenced by the fact that a high proportion of salty snack foods are sold on promotion
History of anti-competitive behaviour	No
Small buyers with no countervailing power	No Foodstuffs and Progressive have significant countervailing power, which is enhanced by the promotion of their house branded products

24. Identify the various characteristics of the market that, post-acquisition, you consider would facilitate or impede the monitoring and enforcement of coordinated behaviour by market participants.

24.1 None of the factors relevant in determining whether co-ordinated conduct can be detected are enhanced by the Acquisition.

Factor	Presence of factor in Salty Snack Foods Market
High seller concentration	No There are a number of suppliers in the Salty Snack Foods Market, including a number of smaller niche participants
Frequent sales	Yes This factor is unchanged by the

	Acquisition
No vertical integration	No
Stable/slow growth in demand	No Sales growth in the 12 months to January 2005 was []% by value and []% by volume
Cost similarities	Yes Costs are likely to be similar
Multi-market contact	No
Price transparency	No Prices are agreed between individual customers and individual manufacturers. In addition, the ultimate price paid will comprise discounts, growth incentives, loyalty programmes, rebates and undertakings as to promotional spending, which makes the ultimate price paid very difficult to gauge.

25. **Indicate whether the markets identified in paragraph 9 above show any evidence of price coordination, price matching or price following by market participants.**

25.1 No.

26. **Please state the reasons why, in your opinion, the transaction will not increase the risk of coordinated behaviour in the relevant market(s).**

26.1 For the reasons outlined above, the combination of factors necessary for co-ordinated market power is not present in the Salty Snack Foods Market. Furthermore, the Acquisition will not enhance any of these factors. The Salty Snack Foods Market is characterised by strong competition and low barriers to expansion. The products supplied are all differentiated, and it is not a market where firms are willing to accept their prevailing level of market shares as evidenced by the continual process of product innovation and re-invention.

PART IV: CONSTRAINTS ON MARKET POWER BY POTENTIAL COMPETITION

Conditions of Entry

27. Which, if any, of the following conditions do you consider would be likely to act as a barrier to the entry of new competitors, where they otherwise would have the incentive to do so in response to a sustained effort by the combined entity to raise price, or to lower service or product quality?

27.1 Bluebird does not believe that there are any barriers to entry into the Salty Snack Foods Market for the following reasons:

- There are no frontier entry conditions into the market. There are already imports of salty snack foods into New Zealand, which indicates that tariffs, quarantine requirements and international freight costs do not constitute barriers to entry.
- There are no legislative/regulatory conditions that would act as barriers to entry into the Salty Snack Foods Market.
- As noted in response to Question 17, the costs of establishing production capacity within New Zealand are not significant given the size of the market. Bluebird estimates that the cost of establishing production capacity is between NZ\$[]. In any event, there are a number of other ways that a firm could supply the New Zealand market, such as by contracting a third party manufacturer or by importing product.
- Promotional costs are not significant given the size and value of the market. Bluebird estimates the cost of promoting a new product without establishing production capacity would be in the order of NZ\$[].
- New entrants are likely to be able to access supermarket shelf space. Supermarkets themselves control shelf space and would be unlikely to deny shelf space to a new entrant if the merged entity sought to increase prices. The rational reaction to an attempt to increase prices or decrease service levels would be for the supermarket to encourage or sponsor a new entrant (or make additional shelf space available to other suppliers or to its own house brands) to undermine any attempt to increase prices.

28. **Please name any businesses (including overseas businesses) which do not currently supply the market but which you consider could supply the relevant market(s) by:**
- **investing in new production facilities to produce the product;**
 - **overseas companies diverting production to New Zealand;**
 - **domestic companies expanding, or changing the utilisation of, existing capacity to produce the relevant products (where this would involve substantial new investment)**
-
- 28.1 In addition to increased imports from Asia and Australia, the most likely new entrants into the market would be either of the two large Australian producers:
- FritoLay; or
 - Arnotts “Snackbrands”.
- 28.2 Frito-Lay is the convenience foods division of PepsiCo, which is headquartered in Purchase, New York. FritoLay’s brands include:
- Frito-Lay;
 - Lay’s;
 - Dorito’s;
 - Quaker Chewy Bars;
 - Quakes and Fruit & Oatmeal Bars; and
 - Twisties, Burger Rings and Cheetos.¹⁷
- 28.3 Arnotts already competes in New Zealand via its soups, sauces, beverages, biscuits and confectionery brands. Arnotts is owned by the Campbell Soup Company. Campbell’s is one of the world’s largest food companies. Arnotts Snackfoods’ brands include Arnotts Thins, Cheezels and Kettle Chips.¹⁸ Arnott’s Snackfoods is also the distributor for Pringles in Australia and New Zealand.¹⁹

¹⁷ Bluebird owns the Twisties and Burger Rings brands in New Zealand. However, the Twisties and Burger Rings products sold by Frito Lay in Australia could be sold in New Zealand under a different brand.

¹⁸ Bluebird owns the Cheezels and Kettlefries brands in New Zealand. However, Arnotts could supply the products it markets in Australia under these brands in New Zealand under a different brand name.

¹⁹ Bluebird does not consider that this distributorship would prevent Arnotts from competing in New Zealand in its own right.

29. What conditions of entry do you consider would most influence the business decisions to enter in each case?

29.1 In Bluebird's view, none of the factors listed above would deter either of these two competitors from entering the Salty Snack Foods Market were prices to increase post-Acquisition.

Likelihood, Sufficiency and Timeliness of Entry

30. How long would you expect it to take for entry to occur, and for market supply to increase, in respect of each of the potential business entrants named above?

30.1 See response to Question 20.

31. Given the assessed entry conditions, and the costs that these might impose upon an entrant, is it likely that a potential entrant would consider entry profitable at pre-acquisition prices?

31.1 Yes.

32. Would the threat of entry be at a level and spread of sales that it is likely to cause market participants to react in a significant manner?

32.1 Yes.

33. What conditions of entry do you consider would influence the business decision to enter the market by setting up from scratch, i.e. *de novo* entry?

33.1 The costs of establishing manufacturing capacity in New Zealand relative to the cost of utilising contract manufacturers or sourcing imports.

34. How long would you expect it to take for *de novo* entry to occur?

34.1 See response to Question 20.

35. In your opinion, to what extent would the possibility of *de novo* entry constrain the merged entity?

35.1 The potential for *de novo* entry from Australian producers and Asian manufacturers by importing products already constrains Bluebird and would continue to do so post-Acquisition. In addition, given the relatively small level of investment needed to establish manufacturing capacity in New Zealand, Bluebird views entry via New Zealand based manufacturing capacity as an additional significant constraint.

PART V: OTHER POTENTIAL CONSTRAINTS

Constraints on Market Power by the Conduct of Suppliers

36. Who would be the suppliers of goods or services to the merged entity in each market identified in questions 11 and/or 14?

36.1 Bluebird's major suppliers are suppliers of raw materials and packaging. They are:

- Packaging: Huhtamaki, Amcor Carton, and Amcor Kiwi Packaging;
- Potatoes and corn: Chapman Onion Exports and Corson Grain; and
- Other Ingredients: Kerry Ingredients and International Flavours and Fragrances.

37. Who owns them?

37.1 The owners of those suppliers are:

- Amcor: Amcor Australasia;
- Huhtamaki: Huhtamaki International; and
- Chapman Onion Exporters: John Chapman.

37.2 Corson Grain, Kerry Ingredients International, and International Flavours and Fragrances are private companies.

38. In your opinion, to what extent would the conduct of suppliers of goods or services to the merged entity constrain the merged entity in each relevant market?

38.1 Suppliers do not act as a constraint.

Constraints on Market Power by the Conduct of Acquirers

39. Who would be the acquirers of goods or services supplied by the merged entity in each of the markets identified in questions 11 and/or 14?

39.1 Manufacturers of salty snack foods sell product to supermarkets and the route trade (e.g., oil companies, dairies and convenience stores etc). Bluebird estimates that approximately []% of all sales are made via supermarkets, with the remaining []% made via the route trade.

39.2 This means that Bluebird's position in the Salty Snack Foods Market is dependent on the continued support of its supermarket customers, Foodstuffs, and Progressive Enterprises and the major fuel companies. These companies account for a material proportion of Bluebird's sales:

- Progressive accounts for approximately []% of all Bluebird's salty snack food sales;
- Foodstuffs accounts for approximately []% of all Bluebird's salty snack food sales; and
- The four fuel companies together account for approximately []% of all Bluebird's salty snack food sales.

40. **Who owns them (where appropriate)?**

Foodstuffs²⁰

40.1 Foodstuffs comprises three separate, regionally based, retailer-owned co-operative companies and a Federation body, Foodstuffs (NZ) Ltd, which is based in Wellington. The regional co-operatives are:

- Foodstuffs (Auckland) Ltd, which covers the North Island from Turangi and Taumarunui north;
- Foodstuffs (Wellington) Co-operative Society Ltd, which covers the southern half of the North Island; and
- Foodstuffs (South Island) Ltd, which covers the entire South Island.

40.2 Each regional company is owned by its retail members.

Progressive Enterprises Limited

40.3 Progressive Enterprises Limited operates the Foodtown, Woolworths and Countdown supermarket banner groups. Progressive is also the franchise co-ordinator for the FreshChoice and SuperValue banner groups. Progressive is currently an operating division of the Foodland Associated Limited (**FAL**) group of companies. However, Woolworths Australia Limited has recently offered to buy Progressive from FAL. That sale and purchase is expected to be ratified at FAL's shareholders' meeting in October this year.

41. **In your opinion to what extent would the conduct of acquirers of goods or services to the merged entity constrain the merged entity in each affected market? How would this happen?**

41.1 For the reasons outlined below, supermarkets exert a significant amount of countervailing power in the Salty Snack Foods Market. Any attempt by a supplier to increase prices would result in supermarkets responding by:

- Reducing shelf space;
- Reducing SKUs;

²⁰ <http://www.foodstuffs.co.nz/OurCompany/WhoWeAre>.

- Limiting promotional activity in favour of other competitors; and
- Encouraging new entry or expansion.

Use of promotional slots and shelf space and positioning

41.2 The Commission's description of supermarkets' use of promotions to secure low supply prices in Decision 487 broadly reflects the process in respect of salty snack foods:

“...in-store price promotions are characterised by supermarket operator-induced price competition between suppliers to obtain promotion slots. Suppliers submit a three monthly promotion calendar. This calendar is reviewed by supermarkets' category managers, who choose the best offers (discounts) for each week or attempt to persuade suppliers to offer greater discounts. Supermarkets play off suppliers against one another for promotions to get the best deals, and then confirm the promotion calendar”.²¹

41.3 The supermarket chains use salty snack foods as an advertised line to attract shoppers via their price offerings. Accordingly, supermarkets offer a limited number of promotional and display slots to suppliers and assign them based on the most attractive offering. In relation to salty snack foods, price and value are the main factors for allocating promotional and display slots.

41.4 Competition among suppliers for access to promotional slots is fierce and will continue to remain fierce post-Acquisition. If Bluebird attempted to increase prices post-Acquisition, the supermarkets would simply decline to promote Bluebird products for a period and instead promote a competing product or their own house brands. This would result in a significant erosion in Bluebirds' sales. If Bluebird raised prices, it is likely that it would lose a number of promotional and display slots, and hence sales.

41.5 Shelf space, presence and positioning, also plays an important role in respect of salty snack foods. The manner in which shelves are stocked was outlined in Decision 529, where the Commission accepted that the supermarkets choose the products that are stocked and determines the shelf space and positioning of goods. Accordingly, the ability to reposition or restrict the shelf space available to a particular product allows the supermarkets to constrain a supplier.

Manufacturers are reliant on supermarkets as a distribution channel.

41.6 In the Salty Snack Foods Market, []% of sales (by value) are made through supermarkets. Those sales are split between Foodstuffs, which purchases approximately []%, and Progressive, which purchases approximately []%. Accordingly, manufacturers are heavily reliant on supermarkets as ongoing customers. This allows both supermarket chains to leverage that reliance to exert countervailing power. This level of reliance on supermarkets will not change as a result of the Acquisition.

²¹ Burns Philp & Co Ltd and Goodman Fielder Ltd, 21 February 2003 (**Decision 487**), paragraph 124.

Consumers are price sensitive

41.7 The ability to exert countervailing power is greater where buyers can switch their purchases to an alternative supplier if prices are increased.²² In Bluebird's view, supermarkets can and do switch purchasers regularly and, hence, can and do exert a significant amount of countervailing market power.

41.8 As can be seen below, a material proportion of non-house brand salty snack foods are sold on promotion.

Table 2 - Proportion of Supermarkets sales made on promotion for 3 months to 22 May 2005

Bluebird Brand	% sold on promotion
Original	[]
Murphy's	[]
Health Plus	[]
Kettle Fry	[]
Party Corn Chips	[]
CC'S	[]
Biguns	[]
Twisties	[]
Rashuns	[]
Cheezels	[]
Burger Rings	[]
10 Pack	[]
12 Pack	[]
18 Pack	[]

Source: AC Nielson

41.9 This indicates that consumers are highly price sensitive, which reduces any switching costs for supermarkets as between suppliers.

²² PMI Mortgage Insurance Australia (Holdings) Pty Limited and CGU Lenders Mortgage Insurance Limited, 30 July 2001 (**Decision 439**); Fletcher Building Products Limited and Carter Holt Harvey Doors, 31 May 2001 (**Decision 430**).

Supermarket house brands

41.10As noted above, both Progressive and Foodstuffs stock their own house brands in the Salty Snack Foods Market. The existence of strong and viable supermarket house brands amplifies the constraint that supermarkets can impose as the house brands provide a viable alternative source of supply.

41.11House brands are generally sold at lower prices than branded salty snacks, which imposes downward pressure on the prices of branded salty snack foods products.

Supermarkets' incentives to exert countervailing power

41.12Supermarkets have high incentives to reduce the price at which they acquire goods from their suppliers. Obviously, the lower a supermarket's supply cost the greater its margin at any given retail price. However, the highly competitive nature of the retail grocery market creates an added incentive to lower upstream acquisition costs in order to remain price competitive at the retail level. The Commission acknowledged this high level of competition in Decision 529:

"... the Commission notes the two supermarket chains compete vigorously between themselves for the New Zealand consumer's grocery dollar.

"[] described "the supermarket fight between Progressive and Foodstuffs as a war." To maintain competitiveness, the supermarkets adopt such practices as pricing products competitively, developing their own house brands to encourage customer loyalty, sponsoring 'price fighters', offering a wide range of products and different levels of customer service."²³

41.13Supermarket competition is only likely to intensify given Woolworths' imminent acquisition of Progressive, and the potential entry of international food giant, Aldi, into New Zealand. Bluebird believes that this entry will mean further pressure on supplier prices.

41.14Consequently, supermarket category managers enter negotiations with suppliers, such as Bluebird, from a superior bargaining position. Supermarkets exercise their countervailing power by a number of means; for example, by using promotional slots.

²³ Decision 529, paragraphs 42 and 43.

THIS NOTICE is given by:

Bluebird Foods Limited

The company hereby confirms that:

- * all information specified by the Commission has been supplied;
- * all information known to the applicant/s which is relevant to the consideration of this application/notice has been supplied;
- * all information supplied is correct as at the date of this application/notice.

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

Dated this 29th day of August 2005.

Helen Golding
Director

I am a director of the company and am duly authorised to make this application/notice.

Appendix 1: Bluebird Foods Limited Ownership Structure

