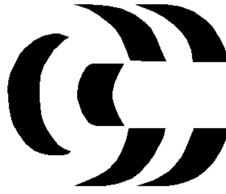
-ISSN NO. 0114-2720
J4248
Public version



COMMERCE COMMISSION

Decision No. 406

Determination pursuant to the Commerce Act 1986 in the matter of an application clearance application involving:

LION NATHAN LIMITED

and

MONTANA GROUP (NZ) LIMITED

The Commission: J Belgrave
P R Rebstock
C Harrison

Summary of Application: The acquisition by Lion Nathan Limited through its wholly owned subsidiary Lion Nathan Enterprises Limited, of all of the shares of Montana Group (NZ) Limited

Determination: Pursuant to section 66(3)(a) of the Commerce Act 1986, the Commission determines to give clearance for the proposed acquisition.

Date of Determination: 8 December 2000

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THE PROPOSAL

1. On 30 October 2000, the Commerce Commission ("the Commission") registered a notice pursuant to section 66(1) of the Commerce Act 1986 ("the Act"), in which clearance was sought by Lion Nathan Limited ("Lion"), through its wholly owned subsidiary Lion Nathan Enterprises Limited to acquire all of the shares of Montana Group (NZ) Limited ("Montana").

THE PROCEDURES

2. The notice was registered on 30 October 2000. Section 66(3) of the Act requires the Commission either to clear or to decline to clear a notice given under section 66(1) within 10 working days, unless the Commission and the person who gave notice agree to a longer period. An extension was sought by the Commission. Accordingly, a decision was required by 8 December 2000.
3. In its application, Lion Nathan sought confidentiality for the fact of the application, and confidentiality for specific aspects of the application. A confidentiality order was made in respect of that information for a period of 20 working days from the Commission's determination notice. When that order expires, the provisions of the Official Information Act 1982 will apply to the information.
4. The Commission's determination is based on an investigation conducted by staff. In the course of its investigation, Commission staff discussed the application with the following parties:
   - Progressive Enterprises
   - Foodstuffs
   - Woolworths
   - Fosters
   - DB Group
   - Allied Liquor
   - Super Liquor Holdings
   - Tasman Liquor
   - Restaurant Association
   - Hospitality Association
   - National Liquor Distributors
   - Glengarry Hancocks
   - Maxxium
   - Babich Wines
   - Delegats Wines
   - Hunter Wines

PARTIES

Lion Nathan

5. Lion Nathan is an Australian company registered under the Australian Corporations law, and listed on both the Australian and New Zealand stock exchanges. Approximately 46% of the issued share capital of Lion Nathan is owned by the Kirin Brewery Company Limited. For the 1999 financial year, Lion Nathan had earnings before interest and tax (EBIT) of $356 million in New Zealand.
6. Lion Nathan is involved in brewing and importing beer in New Zealand, Australia, and China. Within New Zealand its brands include:
   - Lion Red
   - Steinlager
   - The Speights range
   - The Macs range
   - Stella Artois
   - Canterbury Draught
   - Guinness
   - Kilkenny
7. Lion Nathan has a 100% owned subsidiary, New Zealand Wines and Spirits (“NZWS”). NZWS is involved in the importation, distribution and marketing of liqueurs, spirits, imported beers and premium wines. It is the biggest importer of spirits in New Zealand. Its major brands include Gordons Gin, Johnnie Walker Scotch, Smirnoff Vodka, and Kahlua Liqueur. Of the wines NZWS imports, most are premium sparkling wines such as Laurent Perrier and Moet et Chardon.
8. Lion Nathan has a retail presence in liquor through its 100% subsidiary, Lion Liquor Retail Limited, which owns the Liquor King and Smugglers retail chains. There are around 30 Liquor King outlets nationwide and around 5 Smugglers outlets in the North Island.
9. This year Lion Nathan has started up Lion Nathan Liquor, which is a distribution company supplying on-premise outlets. It offers products from Lion Nathan, NZWS, and Montana.
10. Other liquor interests that Lion Nathan has are a 28.3% share of Montana, and a 20% share in Glengarrys Hancocks (“Glengarrys”), which is a wine and spirits importer, distributor, and retailer. Its shareholdings in Montana and Glengarrys Hancocks entitle it to one director on each of the respective boards.

Montana Group (NZ) Ltd

11. Montana is a domestic producer of wine and importer of international wines. It is involved in growing grapes, buying grapes, making grapes into wine, wholesaling, and retailing wine. Montana acts as a national distributor for five other New Zealand wine companies and ten foreign wine companies.

12. Montana owns wineries and vineyards situated in Gisborne, Hawkes Bay, and Marlborough, and one bottling/finishing plant in Auckland. It also purchases grapes from independent growers in these regions on contract.
13. Montana first started producing grapes in 1934 although it only became incorporated as a company in 1961. It was floated in 1973 and is currently a publicly listed company. Its main shareholders are Lion Nathan, which has a stake of 28.3%, and Mr P H Masfen (Executive Chairman, Montana), who owns around 19.9%.
14. Montana recently purchased Corbans Wines, and is the biggest wine company in New Zealand. Its turnover is likely to be around $350 million (combining respective turnovers for Corbans and Montana 2000 financial year). This equates to around [ ]% of the total wine market.

Glengarry Hancocks

15. Lion Nathan has a 20% holding in Glengarry, and one director on a board of six. The director is Paul Lockey, who is Lion Nathan's chief financial officer. Glengarry has advised the Commission that [ ]. The largest shareholder is the Jakicevich family, which holds 60% of the shares. Remy Cointreau owns the remaining 20%.
16. The Commission will consider Glengarry as associated with Lion for the sake of prudence. That is, if the Commission finds no dominance is likely to be acquired or strengthened, assuming Glengarry's association, then it is unlikely that dominance would be found if Glengarry was not associated.

MARKET DEFINITION

Introduction

17. The purpose of defining a market is to provide a framework within which the competition implications of a business acquisition can be analysed. The relevant markets are those in which competition may be affected by the acquisition being considered. Identification of the relevant markets enables the Commission to examine whether the acquisition would result, or would be likely to result, in the acquisition or strengthening of a dominant position in any market in terms of section 47(1) of the Act.

18. Section 3(1A) of the Act provides that:

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

19. Relevant principles relating to market definition are set out in *Telecom Corporation of New Zealand Ltd v Commerce Commission*,[1] *Commerce Commission v Carter Holt Harvey Building Products Limited*,[2] and in the Commission's *Business Acquisition Guidelines* ("the Guidelines").[3] A brief outline of the principles follow.

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[1] (1991) 4 TCLR 473.
[2] Williams J, 18 April 2000, HC, yet to be reported.
[3] Commerce Commission, *Business Acquisition Guidelines*, 1999, pp. 11-16.

20. Markets are defined in relation to three dimensions, namely product type, geographical extent, and functional level. A market encompasses products that are close substitutes in the eyes of buyers, and excludes all other products. The boundaries of the product and geographical markets are identified by considering the extent to which buyers are able to substitute other products, or across geographical regions, when they are given the incentive to do so by a change in the relative prices of the products concerned. A market is the smallest area of product and geographic space in which all such substitution possibilities are encompassed. It is in this space that a hypothetical, profit maximising, monopoly supplier of the defined product could exert market power, because buyers, facing a rise in price, would have no close substitutes to which to turn.
21. A properly defined market includes products which are regarded by buyers or sellers as being not too different ('product' dimension), and not too far away ('geographical' dimension), and are therefore products over which the hypothetical monopolist would need to exercise control in order for it to be able to exert market power. A market defined in these terms is one within which a hypothetical monopolist would be in a position to impose, at the least, a "small yet significant and non-transitory increase in price" (the *"ssnip"* test), assuming that other terms of sale remain unchanged.
22. Markets are also defined in relation to functional level. Typically, the production, distribution, and sale of products takes place through a series of stages, which may be visualised as being arranged vertically, with markets intervening between suppliers at one vertical stage and buyers at the next. Hence, the functional market level affected by the application has to be determined as part of the market definition. For example, that between manufacturers and wholesalers might be called the "manufacturing market", while that between wholesalers and retailers is usually known as the "wholesaling market".

Relevant Market

23. As noted earlier, Lion Nathan is involved in the following areas:
    - production, importation, and distribution of beer;
    - retailing of liquor (through its Liquor King and Smugglers chains, and its 20% shareholding in Glengarry);
    - distribution of liquor (through its distribution division, Lion Liquor); and,
    - importation and distribution of wine and spirits (through its ownership of New Zealand Wine and Spirits, and its 20% shareholding in Glengarry).
24. Montana is involved in the following areas:
    - production and importation of wine; and,
    - distribution of wine
25. The areas of aggregation, therefore, are likely to be relating to wine. Accordingly, no direct consideration is given to the effect of the proposed merger in relation to beer and spirits.
26. The most recent investigation relating to wine was Decision 401 (Montana/Corbans), 6 September 2000. In this decision, the following markets were defined:

- The national market for the supply of wine producing grapes;
- The national market for the importation or production of white wine for distribution;
- The national market for the importation or production of red wine for distribution;
- The national market for the importation or production of sparkling wine for distribution;
- The national market for the importation or production of fortified wine for distribution; and
- The national market for the distribution of wine.

27. The Commission is satisfied these markets still apply.

COMPETITION ANALYSIS

Introduction

28. Section 47(1) of the Act provides that:

> "no person shall acquire assets of a business or shares, if, as a result of the acquisition, -
>
> (a) That person or another person would be, or would be likely to be, in a dominant position in a market: or
>
> (b) That person's or another person's dominant position in a market would be, or would be likely to be, strengthened."

29. Section 3(9) of the Act states that:

> "For the purposes of sections 47 and 48 of this Act, a person has, or 2 or more persons that are interconnected or associated together have, as the case may be, a dominant position in a market if that person as a supplier or acquirer, or those persons as suppliers or acquirers, of goods or services, is or are in a position to exercise a dominant influence over the production, acquisition, supply or price of goods or services in that market…".

30. Section 3(9) also states that a determination of dominance shall have regard to:

> (a) The share of the market, the technical knowledge, the access to materials or capital of that person or those persons:
>
> (b) The extent to which that person is, or those persons are, constrained by the conduct of competitors or potential competitors in that market:
>
> (c) The extent to which that person is, or those persons are, constrained by the conduct of suppliers or acquirers of goods or services in that market."

31. In the Commission's view, as expressed in its *Business Acquisitions Guidelines 1999* (page 17), a dominant position in a market is generally unlikely to be created or strengthened, where, after the proposed acquisition, either of the following situations exist:

- The merged entity (including any interconnected or associated persons) has less than in the order of a 40% share of the relevant market; or

- The merged entity (including any interconnected or associated persons) has less than in the order of a 60% share of the relevant market, and faces competition from at least one other market participant having no less than in the order of a 15% market share.

32. The test for dominance has been considered by the High Court. McGechan J stated[4]:

> "Dominance includes a qualitative assessment of market power. It involves more than 'high' market power: more than mere ability to behave ' largely' independently of competitors: and more than power to effect 'appreciable' changes in terms of trading. It involves *a high degree of market control*."

This test was approved by the Court of Appeal[5].

33. The Commission acknowledged this test in its Business Acquisition Guidelines 1999, where it stated that:

> "A person is in a dominant position in a market when it is in a position to exercise a high degree of market control. A person in a dominant position will be able to set prices or conditions without significant constraint by competitor or customer reaction[6]".

34. The Commission's role in respect of an application for clearance of a business acquisition is prescribed by the Commerce Act. Where the Commission is satisfied that a proposed acquisition would not result, or would not be likely to result, in an acquisition or strengthening of a dominant position in a market, the Commission must give a clearance. Where the Commission is not satisfied, clearance is declined. This test is applied in the following analysis.

Market Concentration

35. The Commission has assessed market shares for the markets in which aggregation would occur following the acquisition. The estimates are based on volume figures acquired during the Montana/Corbans investigation, as well as figures provided by NZWS and Glengarry Hancocks. These are as follows:

Table 1:
Market Shares for the National Market for Production or Importation of White Wine for Distribution

Firm	Volume (000 Litres)	Market Share
Montana	[ ]	[ ]
NZWS	[ ]	[ ]
Glengarrys	[ ]	[ ]
Sub-Total	**[ ]**	**[ ]**
Nobilo	[ ]	[ ]
Villa Maria	[ ]	[ ]

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4 *Commerce Commission v Port Nelson Ltd* (1995) 5 NZBLC 103, 762 103, 787 (HC).
5 Commerce Commission v Port Nelson Ltd (1996) 5 NZBLC 104, 142 104, 161 (CA).
6 *Business Acquisition Guidelines 1999*, p 21.

Orlando Wyndham	[ ]	[ ]
Southcorp	[ ]	[ ]
Other	[ ]	[ ]
Total	**[ ]**	**[ ]**

Table 2:

Estimated Market Shares for the National Market for the Production or Importation of Red Wine for Distribution

Company	Volume (000 litres)	Market Share (%)
Montana	[ ]	[ ]
NZWS	[ ]	[ ]
Glengarrys	[ ]	[ ]
Sub-total	**[ ]**	**[ ]**
Nobilo	[ ]	[ ]
Villa Maria	[ ]	[ ]
Southcorp	[ ]	[ ]
Orlando	[ ]	[ ]
Other	[ ]	[ ]
Total	**[ ]**	**[ ]**

Table 3:

Estimated Market Shares for the National Market Production or Importation of Sparkling Wine for Distribution

Company	Volume (000 litres)	Market Share (%)
Montana	[ ]	[ ]
NZWS	[ ]	[ ]
Glengarry	[ ]	[ ]
Sub-Total	**[ ]**	**[ ]**
Nobilo	[ ]	[ ]
Villa Maria	[ ]	[ ]
Southcorp	[ ]	[ ]
Orlando	[ ]	[ ]

Other	[ ]	[ ]
Total	**[ ]**	**[ ]**

Table 4:

Estimated Market Share for the National Market for the Distribution of Wine

Company	Volume (000 litres)	Market Share (%)
Montana	[ ]	[ ]
NZWS	[ ]	[ ]
Glengarry	[ ]	[ ]
Sub-total	**[ ]**	**[ ]**
National Liquor Distributors	[ ]	[ ]
Foodstuff NZ (various)	[ ]	[ ]
Rattrays	[ ]	[ ]
Others	[ ]	[ ]
Total	**[ ]**	**100**

36. Lion's presence in wine relates to its ownership of NZWS and its shareholding in Glengarrys. Both NZWS and Glengarrys respective market shares of the various markets are relatively small, and thus no significant aggregation occurs.

Constraints from Existing Competitors

37. The merged entity will continue to face competition from those identified in Decision 401. These include New Zealand based suppliers, such as Nobilos and Villa Maria, and Australian importers, such as Orlando Wyndham and Southcorp.

Constraints from Entry/Expansion

38. In Decision 401, the Commission considered constraints from market entry and concluded that the "lets" test was met. In typical circumstances, slight aggregation, such as has occurred in this acquisition, is unlikely to change the conditions of entry and expansion in the wine markets.
39. However, concerns have been raised by some parties that despite minimal aggregation occurring in the markets defined, the combination of Montana's high market share in the wine market, Lion's strong presence in the beer market, and NZWS's strong position in the spirit market, could raise barriers to a significantly higher level than prior to the acquisition. These concerns are addressed below.

Access to Distribution Channels

40. For entry and expansion to occur, the producer or importer of the good must be able to get its product to where the consumer is. For liquor, the distribution channels can be

described as being off-premise (including supermarkets and traditional liquor stores) or on-premise (including, restaurants, bars, cafes). The two distribution channels are discussed below.

Off-Premise

41. Off-premise distribution channels, such as supermarkets and traditional liquor stores, account for substantial volumes of beer and wine. In Decision 401 it was noted that off-premise accounted for around 80% of wine sold (supermarkets 50% and traditional liquor 30%). For beer, supermarkets sell around 20-23% of all packaged beer sold. This proportion, however, could rise substantially if New Zealand follows overseas trends. In the UK, for example, it is understood that supermarkets account for around 70% of all packaged beer sold. For these reasons, off-premise distribution channels, and in particular supermarkets, are important outlets for volume sales. Concerns have been raised that the merged entity will be able to control these channels.

42. Lion Nathan is vertically integrated from production, to distribution, to retailing. This vertical integration ensures it has a strong degree of control over its brands. For example, as noted above it has a retail presence of around 35 stores through its Liquor King and Smugglers chains, and it has been suggested that while not excluding competing brands completely, it strongly favours Lion brands in these stores. However, there are other retail chains, not associated with the merged entity, such as Liquorland (around 90 owner operated stores), the Mill, Robbie Burns, Liquor Centre, and Super Liquor (over 100 owner operated stores), where competing liquor firms can sell their goods.

43. Allied Liquor, which owns 25 Liquorland stores, has advised that it stocks products according to consumer demand and supplier promotions. It further advised that it tries to keep a good "width and breadth" of products to differentiate itself from supermarkets. Similar comments were made by Super Liquor. It has been suggested that traditional liquor stores are not quite so "ruthless" as supermarkets towards ensuring every product is providing a margin. This means there are opportunities for smaller suppliers, and in particular local wineries, to get their product into traditional liquor stores. It is, therefore, unlikely Lion would have any significant control over traditional liquor stores as a distribution outlet.

44. Lion Nathan and Montana products have a strong presence in supermarkets. In Woolworths[7], for example, Lion beer accounts for around [ ]% of all beer sales, and Montana combined accounts for around [ ]% of all wine sales. Similarly, in Progressive Enterprises'[8] supermarkets, the figures are [ ]% and [ ]%, respectively, while the figures for Foodstuffs'[9] supermarkets are [ ]% and [ ]%.[10]

45. A significant reason for Lion's and Montana's strong presence in supermarkets is the amount of promotional spending they do. Beer and wine suppliers will negotiate with supermarkets to do promotions and specials. This might include paying for prime space in the supermarket, such as in the middle of the floor and on aisle-ends. Enquiries during Decision 401 revealed that some promotions that include prime space and a discounted product can increase a product's sales ten-fold.

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[7] Woolworths comprises of the supermarket chains Woolworths, Big Fresh, and Pricecutter.

[8] Progressive Enterprises comprises of the supermarket chains Countdown, Foodtown, and 3 Guys.

[9] Foodstuffs comprises of the supermarket chains Pak'n'Save, New World, and 4 Square.

[10] Liquor laws do not allow supermarkets to sell liquor with alcohol content greater than 16%. This precludes the sale of spirits in supermarkets.

46. Woolworths and Progressive own their supermarkets, so specials and promotions are negotiated at head office on a quarterly basis. Foodstuffs supermarkets are franchised so promotional deals are negotiated at the regional level, while also allowing scope for the franchisees to negotiate their own promotions. Promotions are organised up to a year in advance depending on the preferences of the firm. In general, all space in a given supermarket is booked around three weeks in advance.

47. Competing companies have argued that Lion and Montana have a disproportionate presence on the shelf compared to other companies. Supermarkets, however, have advised the Commission that they will stock products relating to demand.[11] While this results in significant allocation of shelf space to Lion and Montana, it does not exclude other competitive brands, or significantly limit the opportunity to promote new brands.

48. In addition, the Commission has been further advised that in some instances the reverse may happen in terms of allocated shelf space; that is, supermarkets may devote more shelf space to smaller firms, to encourage their growth and ensure suppliers do not become too powerful. One example, is [ ] which has advised the Commission that it has given extra shelf space to [ ] to encourage its growth. By far the main determinant for shelf space, however, is demand. Nevertheless, supermarkets do have countervailing power and an interest to ensure effective competition is maintained.

<u>On-premise</u>

49. On-premise includes restaurants, bars, cafes, hotels, casinos, cinemas and so forth. Although volumes are not as high as off-premise, it is understood that on-premise presence is important because it creates brand awareness and in turn demand in off-premise locations.

50. [ ] has argued that:

> "…if Lion increases its Montana shareholding it will use its market power to ensure "on-premise" outlets stock Montana/Corbans product exclusively, or…predominantly, in a similar way…it uses its market power to ensure "on premise" outlets stock Lion beers."

51. The way Lion "ties up" on-premise outlets is by offering financial incentives to stock Lion beer either exclusively or predominantly. This is similar to methods used in the 'beer wars' in which DB and Lion purchased taverns and pubs to control distribution of their beer at the retail level. While Lion and DB no longer own hotels, paying for exclusive pouring rights serves the same purpose.

52. This is not necessarily a sign of dominance, as the same opportunities are available to other suppliers should they be prepared to make the same investment. DB Group, for example, has advised Commission staff that it also participates in "tying bars". In some circumstances, bars have played DB and Lion off against each other in order to secure the best deal. It is likely that bars and ultimately customers benefit from this competition because payments made to bars can help offset set-up costs or, for established bars, payments made could be reflected in lower prices.

53. Commission staff have been advised that very few tying arrangements are exclusive in that they allow for no other company's brands. Usually they will apply only to tap beer

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[11] [ ], for example, consider AC Neilson data, which indicates, among other things, which brands are growing in popularity.

or relate to a proportion of shelf space. The establishment owner still has the opportunity to stock popular beers such as Heineken or Crown Lager.

54. Similar issues were raised during the Decision 401 investigation. Montana currently provides incentives to exclusively or predominantly stock Montana wines. This includes the provision of aprons, wine knives, wine menus, and so forth. However, these kinds of offers are tendered by all suppliers of wine. Again, it is likely that these incentives are pro-competitive.

55. In terms of spirits, the merged entity will have distribution rights over a number of strong brand names. However, tie-ins are unlikely to be workable because NZWS does not have any particularly strong brands in bourbon or rum. The most popular type of bourbon is Jim Beam, while for rum it is Coruba (these are apparently the two largest spirit brands in New Zealand in terms of cases sold). These are both distributed by Maxxium.[12] The spirit market is unique, in that each type of spirit is very distinctive and arguably not a close substitute for another type. In some instances, it could even be argued that individual products form their own market, (for example, Cointreau and Bacardi). For this reason, bars stock a very wide range of spirits, and it is unlikely that any one distributor could cover a bar's needs.

<u>Conclusion on Access to Channels</u>

56. It is accepted that Lion and Montana have significant presence in on and off-premise outlets. However, it is the view of the Commission that competitors in each market retain the capacity to compete for shelf space to the extent necessary to constrain dominance. While promotional or other product support outlays play a role in product availability or shelf space in some distribution channels, this is not considered to be anti-competitive. Nor, given the range of available outlets, is it considered to raise barriers to entry so as to result in dominance.

Forced Bundling

57. An acquisition with similar characteristics was considered by the European Commission ("EC") in 1997. In this case the EC insisted that the merged firm give up the distribution of Bacardi in Greece, despite no aggregation occurring. Its reasoning was that the acquisition would leave a company with a strong portfolio of products across different product markets (whisky, gin, vodka etc), that could in itself lead to market dominance.[13] An extended portfolio could increase the scope for "bundling", make more potent the threat to refuse to deal, and increase the ability to secure promotional support for secondary brands.[14] These are all concerns identified by industry parties. These types of practices, among other things, could act as a barrier to entry and expansion as the merged entity could foreclose the market to new entrants or smaller suppliers trying to establish their brands.

58. Concerns have been raised by [ ] that the merged entity might engage in forced bundling following the acquisition. That is, the merged entity might threaten withdrawal of a strong brand unless the purchaser accepts a brand of lesser strength. However, given that the acquisition does not increase market share to any significant

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[12] Distributors act as agents for the various imported spirits. Typically, they have the distribution rights for 3-5 year periods, subject to meeting sales targets.

[13] This was referred to as "portfolio power". "Portfolio Power: A New Doctrine in Merger Control?", Lexecon, 1998.

[14] Ibid, p. 182.

extent in either the beer, wine, or spirit market individually, it must be shown that bundling could potentially take place across liquor categories. For example, Lion may threaten to withdraw some or all of Montana's wines if a buyer does not purchase its beer or spirits.

59. The criteria for successful forced bundling is that the firm has a high degree of market power in at least one of the markets. In this particular scenario, the merged entity is likely to have a degree of market power in all three liquor categories (beer, wine, and spirits)[15]:

- Montana is the largest supplier of wine with a overall market share of around [ ]%. It has some very strong wine brands including Lindauer, Church Road, and Montana.
- Lion is the largest supplier of beer in New Zealand with around [ ]% of the market. In terms of volume, its strongest brands are Lion Red (Auckland), Speights (Otago), and Canterbury Draught (Canterbury).
- NZWS is likely to be the largest suppliers of spirits in New Zealand. Its share of the spirits market (if it were so defined) is likely to be around [ ]%. It has particularly strong brands in Gin (Gordons, Beefeater), Scotch Whisky (Johnnie Walker, William Grant, Teachers), and Vodka (Smirnoff).

60. Both the Restaurant Association[16] and Hospitality Association[17], however, have made submissions to the Commission advising that forced bundling of products is unlikely to be feasible because there is sufficient competition in the wine, beer, and spirit market to provide satisfactory alternatives. That is, neither Association felt its members were in a situation where they would feel compelled to purchase Montana or Lions products, post acquisition.

61. In addition, any attempts by Lion to limit goods to on-premise outlets is likely to be constrained to a considerable degree by the ability of outlets to source Lion products from sources other than Lion Liquor itself. This includes supermarket distributors such as James Gilmour, Toops, Trents, and Rattrays that can supply on-premise outlets with a full range of grocery items. There are also other specialist alcohol distributors that supply on-premise such as Tasman and Allied. It is, therefore, unlikely that Lion will be able to force bundles of goods to on-premise outlets as a result of the acquisition.

62. Concerns have been raised by [ ] that forced bundling could occur in supermarkets and other off-premise locations. However, as noted above, the Commission is of the view that for forced bundling to occur, the merged entity must have high market power in at least one market. In Decision 401, the Commission was of the view that the wine market was competitive. In addition, it is likely that the beer market is also competitive, with Lion facing strong competition from DB, and to a lesser extent, Fosters.

63. In addition, the countervailing power of the supermarkets is likely to provide considerable constraint. It was noted in Decision 401 that the grocery channel is very concentrated and collectively the largest distribution channel for wine, accounting for in excess of 50% of wine sales. It is also a growing outlet for packaged beer sales. Foodstuffs, in particular,

[15] Market power does not equate to dominance. Dominance requires a "high degree of market control", which includes, *inter alia,* "high" market power.
[16] The Restaurant Association represents around 1350 restaurants throughout New Zealand.
[17] The Hospitality Association represents around 1600 on-premise outlets including cafes, bars, taverns, country hotels and so forth.

has considerable countervailing power. It has around [ ]% of the grocery market, implying it accounts for around [ ]% of all retail wine sales in New Zealand.

Conclusion on Forced Bundling

64. The Commission does not rule out the possibility that in some circumstances potential for forced bundling could be a barrier to entry and expansion. However, the Commission has considered the extent to which it applies in this case, and is of the view that the criterion are not met. The Commission considers that the merged entity will not have sufficient market power in any one market for leverage to occur.

CONCLUSION

65. For the reasons given earlier in this determination, the Commission considers that the merged entity will face sufficient constraints to prevent any dominance concerns. Accordingly, having regard to the various elements of section 3(9) of the Act, and all other relevant factors, the Commission concludes that it is satisfied that the proposal would not result, or would not be likely to result, in any person acquiring or strengthening a dominant position in any market.

DETERMINATION ON NOTICE OF CLEARANCE

66. Accordingly, pursuant to section 66(3)(a) of the Commerce Act 1986, the Commission determines to give clearance for the proposed acquisition by Lion Nathan Limited, through its wholly owned subsidiary Lion Nathan Enterprises Limited, of all shares of Montana Group (NZ) Ltd.

Dated this 8th day of December 2000

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John Belgrave
Chair