Public Version
ISSN NO. 0114-2720
J5655

COMMERCE COMMISSION

Decision No. 487

Determination pursuant to the Commerce Act 1986 in the matter of an Application for clearance of a business acquisition involving:

BURNS PHILP & COMPANY LIMITED

and

GOODMAN FIELDER LIMITED

The Commission:	P R Rebstock D R Bates QC P J M Taylor
Summary of Application:	An Application by Burns Philp & Co Ltd, for clearance to acquire up to 100% of the ordinary issued share capital of Goodman Fielder Ltd along with Goodman Fielder Ltd's existing options and any ordinary shares that may be issued pursuant to those options.
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:	21 February 2003

CONFIDENTIAL MATERIAL IN THIS REPORT IS CONTAINED IN SQUARE BRACKETS

CONTENTS

THE PROPOSAL

1. On 18 December 2002, Burns Philp & Company Limited (Burns Philp) gave notice, pursuant to s 66(1) of the Commerce Act 1986 (the Act), seeking clearance for the proposed acquisition by itself, or an interconnected body corporate, of up to 100% of the ordinary issued share capital of Goodman Fielder Limited (Goodman Fielder) together with Goodman Fielder's existing options and any ordinary shares that may be issued pursuant to those options.
2. On 21 February 2003, Burns Philp, varied its Application for clearance by including a divestment undertaking. The divestment undertaking is attached as Appendix One.
3. Section 69A of the Act states:

> Commission may accept undertakings –
>
> (1) In giving a clearance or granting an authorisation under section 66 or section 67 of this Act, the Commission may accept a written undertaking given by or on behalf of the person who gave notice under section 66(1) or section 67(1) of this Act as the case may be, to dispose of assets or shares specified in the undertaking.
>
> (2) The Commission shall not accept an undertaking in relation to the giving of a clearance or the granting of an authorisation under section 66 or section 67 of the Act, other than an undertaking given under subsection (1) of this section.
>
> (3) An undertaking given to the Commission under subsection (1) of this section is deemed to form part of the clearance given or the authorisation granted in relation to the acquisition to which the undertaking relates.

4. The Commission is satisfied that the Undertaking has been given by or on behalf of the Applicant in this case, and that it relates to the disposal of assets or shares. Accordingly the Commission is able to accept the Undertaking in accordance with section 69A(1). The Undertaking forms part of the Application considered below.

THE PROCEDURES

5. Section 66(3) of the Act requires the Commerce Commission (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. Extensions of time were agreed to by the Commission and the Applicant. Accordingly, a decision on the Application was required by 21 February 2003.
6. In the Application accompanying the notice, Burns Philp sought confidentiality for certain marked information. It requested that the Commission withhold that information under s 9(2)(b) of the Official Information Act 1982 for the earlier of a period of two years from the date of the Application or until Burns Philp advises the Commission that it may disclose the information. The Commission agrees to this course of action subject to any decisions of the Ombudsman on the matter.
7. The Commission's determination is based on the analytical approach set out in the Commission's *Practice Note 4*.[1]

[1] Commerce Commission, *Practice Note 4: The Commission's Approach to Adjudicating on Business Acquisitions Under the Changed Threshold in section 47 – A Test of Substantially Lessening Competition*, May 2001.

THE PARTIES

Rank Group Ltd

8. Rank Group Ltd (Rank Group) is 100% owned by a private investor, Mr G Hart, and is based in Auckland. It has two operating subsidiaries - Burns Philp and New Zealand Dairy Foods Ltd (NZDF).

9. Rank Group owns a controlling interest in Burns Philp by way of ordinary shares, options to purchase shares and preference shares which are convertible to ordinary shares. If Rank Group were to exercise all its options to purchase and convert all its preference shares to ordinary shares (by August 2003), it has the potential to own 57.58% of Burns Philp.

10. Rank Group, through subsidiary companies, owns 100% of the shares of NZDF.

Burns Philp Ltd

11. Burns Philp is an Australian-based public company, listed on the New Zealand and Australian stock exchanges. All significant shareholdings of Burns Philp, other than that of Rank Group, belong to institutional investors.

12. Burns Philp owns 100% of New Zealand Food Industries (NZFI), its only operating subsidiary in New Zealand. The principal activities of NZFI are:

    - the supply of fresh cream, fresh stabilised cream, fresh compressed and dry yeast to commercial bakeries and dry yeast for home baking. NZFI manufactures and supplies all fresh yeast used by the baking industry in New Zealand and supplies a lesser proportion of imported dry yeast. Overall NZFI supplies 91% of the bakers yeast consumed in New Zealand; and

    - the supply of bakery ingredients such as bread improvers, pastry-cook mixes, and cake mixes.

13. Burns Philp also supplies yeast in many other countries, and herbs and spices and other food products principally throughout North America.[2]

14. Another relevant shareholding owned by Burns Philp is 19.8% of Goodman Fielder, mostly acquired through the stock exchange on 12 December 2002 and 6 February 2003.

New Zealand Dairy Foods Ltd.

15. NZDF manufactures and acquires, and supplies, a range of food products for export and for domestic consumption. NZDF supplies "Anchor", "Fernleaf" and other branded products, specifically milk, cream, cheese, yoghurt and other dairy products. It supplies 100% of the butter house brands of Progressive Enterprises Ltd (Progressive) and the three Foodstuffs companies. It acquires butter from Fonterra, under a long-term supply contract, and margarine from Bakels Edible Oils Ltd.

[2] Burns Philp does not supply herbs and spices in New Zealand and that part of its activities is neither relevant to, nor is considered further in, this Decision.

Goodman Fielder Ltd

16. Goodman Fielder is an Australian-based food company whose 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". Goodman Fielder owns bakeries throughout New Zealand and Australia;
- margarine, in which its largest brands are "Meadow Lea", "Sunrise", "Olivani" and "Gold N Canola". It also supplies house brand margarine to Foodstuffs-Auckland and Foodstuffs-South Island. It manufactures margarine in both New Zealand and Australia.
- cereals and snack foods, in which its largest brands are "Uncle Toby's" and "Bluebird"; and
- bakery ingredients for commercial and home baking including flour, pre-mixes for bread, pastry and confectionery products bread and cake mixes, baking powders, bakery fats. Two of its major brands are "Champion" and "Edmonds".

Other Relevant Parties

New Zealand Bakels Ltd

17. New Zealand Bakels Ltd (NZ Bakels) manufacture and distribute a wide range of bakery ingredients tailored for both commercial bakeries and for domestic baking. Its subsidiary, Bakels Edible Oils (NZ) Ltd, manufactures bakery fats and oils and margarines in Tauranga. Bakels Edible Oils currently supplies NZDF with margarine.

The Major Supermarket Operators

18. The operators of New Zealand's two major supermarket chains are:

- Progressive Enterprises Ltd (Progressive) which is owned by Foodland Associates Ltd (Foodland), an Australian public company. Its banners are Woolworths, Big Fresh, Price Chopper, Foodtown and 3 Guys; and
- Foodstuffs. There are three separate Foodstuffs companies; Auckland, Wellington and South Island. Each is a cooperative, owned by the individual owners of the member supermarkets. Foodstuff's banners are New World, Pak 'N Save and Four Square.

19. The two supermarket chains are the retailers of 95% of the butter, margarine and mixes of the two sold in New Zealand.

INTERCONNECTION

20. In determining the companies which comprise the proposed merged entity s 47(2) provides:

> "For the purposes of this section, a reference to a person includes two or more persons that are interconnected or associated."

21. Section 2(7) of the Act provides:

> "...any 2 bodies corporate are to be treated as interconnected if-

> One of them is a body corporate of which the other is a subsidiary (within the meaning of sections 158 and 158A of the Companies Act 1955 or section 5 and 6 of the Companies Act 1993, as the case may be); or
>
> Both of them are subsidiaries (within the meaning of those sections) of the same body corporate; or...."

22. The Companies Act 1993 provides that a company is a subsidiary of another company if that other company:
    - controls over half the composition of the company's board;
    - controls over half the votes exercisable at a meeting of the company;
    - holds more that half of the company's issued shares; or
    - is entitled to more than half of every dividend paid by the company.
23. Furthermore, ss 5 and 6 of the Companies Act 1993 provide that if company A is a subsidiary of company B, and company B is a subsidiary of company C, the company A is a subsidiary of company C.
24. Mr G Hart owns 100% of Rank Group. Rank Group owns 100% of NZDF. Rank Group, by August 2003, will own 57.58% of Burns Philp after exercising its options to purchase further shares in Burns Philp. Burns Philp owns 100% of NZFI. It is a condition of Burns Philp's offer to purchase Goodman Fielder's shares that shareholders owning at least 90% of the shares accept its offer.
25. Accordingly, the Commission is satisfied that those companies will, if the merger proceeds, become interconnected and it will consider Rank Group, Burns Philp, NZDF, NZFI and Goodman Fielder as the proposed merged entity (the merged entity).

MARKET DEFINITION

26. 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 have, or would be likely to have, the effect of substantially lessening competition in a market.
27. 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."

28. For the purpose of competition analysis, a relevant market is the smallest space within which a hypothetical, profit-maximising, sole supplier of a good or service, not constrained by the threat of entry, could impose at least a small yet significant and non-transitory increase in price, assuming all other terms of sale remain constant (the '*ssnip* test'). For the purpose of determining relevant markets, the Commission will generally consider a *ssnip* to involve a five percent increase in price for a period of one year.
29. Markets are usually 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.

30. 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 a *ssnip*, assuming that other terms of sale remain unchanged.

31. 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. The acquisition currently being considered involves a party operating at one functional level (Burns Philp which supplies yeast to bakeries) acquiring another party at a different functional level (Goodman Fielder which supplies bread and bakery products).

THE RELEVANT MARKETS

The Applicant's Submission

32. Burns Philp has proposed the following relevant markets:

- the market for the supply of bakery ingredients in New Zealand;
- the market for the supply of yeast which includes fresh and dry yeast in New Zealand; and
- the market for the supply of yellow spreads[3] in New Zealand.

Bakery Ingredients

33. The bakery ingredient product range comprises a diverse group of commercial and home baking ingredients. Typical products supplied market participants are batters, bread improvers, bread premixes, cake premixes, food colourings, custards, emulsifiers, fats, shortenings, fillings, icings, meringue and marshmallow mixes, pastry, pie mixes, puddings, sauces, seasonings, stabilisers, thickeners and toppings.

34. The major participants in this market are NZ Bakels Ltd, Goodman Fielder, Allied Foods and other smaller players. Because of the diverse nature of the market and the fact that all participants do not supply all products, market share information is

[3] Although the Applicant advances the expression "yellow spreads" this Decision utilises the term "consumer yellow spreads" to correspond with Commission precedent.

difficult to obtain. The Applicant advised that it estimated Goodman Fielder and NZ Bakels each had about 30% market share and NZFI had 8%. Allied Foods and others are market participants supplying specialist components of the market. NZ Bakels is not sure of its market share [ ].

35. The Commission does not accept the Applicant's estimation of its market share. NZ Bakels has informed the Commission that its annual sales of bakery ingredients are about $[ ] million. NZFI's annual sales of bakery ingredients are $[ ] million. The Commission concludes that, in fact, NZFI has a very small share of the bakery ingredients market, perhaps a maximum of [ ]%. It is possible, however, that this discrepancy has arisen because of the difficulty of defining the boundaries of this market.

36. Goodman Fielder stated to the Commission that:

> …there remain strong competitive effects from domestic producers and imports in most segments of this market, and Goodman Fielder does not anticipate that the acquisition will result in a substantial lessening of competition in bakery ingredients.

37. Burns Philp states in its Application that the market shares of the merged entity falls within the Commission's safe harbour guidelines. The Commission agrees and also notes the:

- diverse unconcentrated nature of this market;
- presence of three major and many minor market participants;
- very minor nature of the aggregation resulting from the proposed merger;
- presence of imports, particularly from Australia; and
- absence of concern expressed by market participants.

38. Therefore, the Commission considers that the proposed acquisition does not raise competition issues in regard to the sale or purchase of bakery ingredients and does not consider it a relevant market. It is not considered further in this Decision.

Yeast

39. Burns Philp accepts that, even though there would be no horizontal aggregation in either yeast or bread markets, the proposed acquisition raises a potential vertical integration issue in respect of Burns Philp's yeast manufacturing business and Goodman Fielder's bread baking business.

40. In assessing vertical acquisitions, the Commission would be concerned if the vertical links were to create a potential for a position of substantial market power in one market to be strengthened, or leveraged into another market. The Commission's *Practice Note 4* (p. 44) states that:

> in general, the vertical aspects of acquisitions leading to vertical integration are unlikely to result in a substantial lessening of competition in a market unless a situation of a substantial degree of market power exists at one of the functional levels affected by a vertical acquisition. Where such a situation is found to exist, the Commission will examine the acquisition to determine whether that position is likely to be strengthened or extended to other markets, and whether that will substantially lessen competition.

41. The *Practice Note* goes on to outline some of the competition concerns that may be raised by vertical acquisitions:

> Vertical integration may facilitate coordination effects. For example, the efforts of a group of manufacturers to collude may be undermined by the competition between the downstream retailers. This might be prevented if each retailer were to be acquired by a manufacturer.
>
> Vertical integration may foreclose entry into one or other of the vertical levels affected. For example, a commodity processor that vertically integrates with upstream suppliers of the commodity may be able to foreclose others from the processing market. Likewise, a manufacturer that gains control of a downstream distribution level of the market may be able to foreclose others from the manufacturing market.
>
> Vertical integration may increase entry barriers. Foreclosure as just described may raise barriers to entry, by requiring an entrant at one functional level of the market to enter simultaneously at the other, foreclosed, level.
>
> Vertical integration may raise access concerns. A vertically integrated firm which owns an essential facility to which others need access in order to compete at a downstream level, has the ability to discriminate in favour of its own affiliated activities in the downstream market. Those affiliated activities could also benefit from information gained about rivals through those rivals requiring access at the upstream level.

42. Burns Philp, through NZFI, appears to have a substantial degree of market power in New Zealand yeast markets. It manufactures and supplies 100% of the cream yeast, stabilised cream yeast and compressed yeast consumed by bakers in New Zealand. It supplies 91% of all yeast consumed in New Zealand. The Applicant accepts that it is most unlikely that an alternative supplier would build a new yeast plant in New Zealand, as the market is too small to sustain a second plant.

43. The only form of competition envisaged in respect of cream yeast is that from imports from Australia, where Burns Philp shares the market roughly equally with Bakels Lesaffre. Burns Philp considers that cream yeast prices in New Zealand are capped by potential import prices. It employs an import-costing model to estimate the delivered price of yeast imported from Australia, and then sets its price to below that level in order to deter imports.

44. The sources of the entry barrier that appear to discourage imports at current prices are the following:

- the relatively small New Zealand market, and the very few potential customers present;
- the proportionately high costs of shipping the low value/high bulk product;
- the uncertainty caused by fluctuations in the A$/NZ$ exchange rate;
- the significant investment costs in storage facilities in New Zealand, which would largely be sunk;
- the significant level of fixed costs in the importing operation, which would be spread over a potentially low level of demand; and
- the prospect of an incumbent response to entry, in the form of a sharp price cut.[4]

---

[4] The argument is that it is not necessarily pre-entry prices that matter to an entrant. If an entrant believes that 'high' pre-entry prices do not imply high post-entry prices (because the incumbent will respond quickly to entry by cutting its price), then even high prices need not induce entry.

45. As a result of the merger, Burns Philp would acquire Goodman Fielder, which is the largest bread baker in New Zealand and one of the three large consumers of cream yeast.

46. In the circumstances of this case, this prospective vertical integration raised competition concerns for the Commission for the following two reasons:

- competition in fresh cream yeast would have been lessened if the merger were to make importing more difficult. This might have happened for two reasons: a major buyer of yeast would no longer be available to an importer, as Goodman Fielder would be vertically integrated with Burns Philp; and the only potential importer—Bakels Lesaffre in Melbourne—would probably have lost market share in Australia for similar reasons, and this would have caused its unit costs to rise, making it less competitive as an exporter. These effects might cause the current 'cap' imposed by the threat of imports to be relaxed, allowing the incumbent to raise prices further without inducing imports. The Commission discounted the arguments by the Applicant that the above effects would not be significant, and that George Weston could use its buying power in Australia to constrain Burns Philp from raising prices in New Zealand. The large amount of market power already residing with NZFI could have been augmented sufficiently for there to have been a substantial lessening of competition. The Commission could not be satisfied that this would not happen; and
- competition in the packaged bread market might have been lessened as the merged entity would have been in a position to lever its market power in fresh cream yeast into that market. This might have been accomplished in various ways. For example, it could have supplied fresh cream yeast on terms that were relatively disadvantageous to competitors, or at a degraded quality (either in terms of the product or in the timeliness of deliveries) such that those competitors would have suffered a damaging inability to supply their product to customers. This would have enabled the merged entity unfairly to capture bread demand from its competitors. Alternatively, the merged entity could have used the mere threat of disruptions to the supply of an essential input as a means of enforcing an implicit cartel in bread, which would have reduced competition. By such means, competition in the packaged plant bread market could have been substantially lessened. The Commission could not be satisfied that this would not happen.

47. In the event, the Commission did not have to decide finally on the matter. Burns Philp undertook to divest itself of the New Zealand yeast business of NZFI[5] and this satisfied the Commission's concerns.

48. Therefore, the Commission considers that the proposed acquisition does not raise competition issues in regard to the supply of yeast in New Zealand and does not consider it a relevant market. It is not considered further in this Decision.

Consumer Yellow Spreads

Product Dimension

49. Burns Philp states that one group of products that would be affected by the proposed acquisition are butter, margarine and mixes of the two. That is because NZDF

---

[5] See Appendix One.

supplies butter and margarine and Goodman Fielder supplies margarine. Burns Philp submits that there are two potential market definitions that could apply, ie:

- individual markets for the supply of each of butter and margarine; or
- a wider market for consumer yellow spreads which would include the supply of butter, margarine and mixtures of the two.

However, Burns Philp adopts the latter definition in its Application.

50. Burns Philp notes that if the Commission were now to consider that butter and margarine are supplied in separate markets there would be only minimal aggregation in respect of the small amount of margarine supplied by NZDF, well within the Commission's safe harbour guidelines. However, as stated, Burns Philp accepts that there is a product market for the sale of yellow spreads.

51. In its Draft Determination on the proposed 1999 dairy cooperative merger[6] the Commission gave consideration to whether butter is in a product market of its own or is part of a wider consumer yellow spreads product market:

> A variety of butter types are manufactured and sold on the domestic market, including salted, unsalted and semi-soft. Butter is commonly used as a spread, but is also used for baking, cooking and garnishing. However, it appears to have an important substitute in the form of margarine, as suggested by the following observations. Firstly, econometric evidence from the United States indicates that there is a relatively high cross-price elasticity of demand between butter and margarine, indicating that the two are close substitutes in that country.

52. The Commission concluded, on the basis of the information available at the time, that butter was supplied as part of a wider market for consumer yellow spreads.

53. The Commission's investigation of this Application has revealed both opposing and supporting evidence for this argument, viz:

- in opposition, some supermarket operators reported that price reduction promotions of butter and margarine were offered contemporaneously because they did not believe sales of one were affected by the price of the other;
- in support, evidence from other supermarket operators suggested that margarine is a reasonably close substitute for butter[7] - an increase in the retail price of one would lead to an increase in the demand for the other;
- also in support, Fonterra considers it competes with margarine world-wide in respect of its butter sales.

54. Given this evidence, the Commission does not intend to vary the product market definition it adopted in the Dairy Cooperative merger case. If the Commission was to adopt the wider and more conservative market definition, and to decide (as it does – see below) that there would be no substantial lessening of competition likely as a result of the proposed acquisition, then neither would there be any competition issues if the alternative market definition was adopted.

---

[6] Commerce Commission "Newco" Draft Determination dated 27 August 1999 (which Application was subsequently withdrawn), beginning at paragraph 141.

[7] Technically the two are obviously close substitutes. There are substantial sales of butter/margarine mixes. When two products are so closely similar that they may be mixed together and utilised for essentially the same function as the original, it seems unlikely that any of the three would not be technical substitutes for each other.

55. The Commission also notes support for this view of the relevant market definition from the Australian Competition and Consumer Commission.[8]

Function and Geographic Dimensions of the Market

56. The Commission notes that:

- NZDF and Goodman Fielder each manufacture and distribute butter and/or margarine to (mostly) supermarkets throughout New Zealand; and
- margarine and a small amount of butter are imported and distributed via ports in each Island.

57. Therefore, the Commission concludes that the market for the manufacture and wholesale supply of consumer yellow spreads in New Zealand is the relevant market.

Conclusions on Market Definition

58. The Commission considers that the market relevant to the consideration of Burns Philp's application for clearance is that for the manufacture and wholesale supply of consumer yellow spreads in New Zealand (the consumer yellow spreads market). Consumer yellow spreads products are differentiated to a degree. However, the Commission considers that the products are not so differentiated as to cast doubt on there being well-defined markets for consumer yellow spreads.

59. The Commission does not consider that either the bakery ingredients market or yeast markets are relevant markets.

COMPETITION ASSESSMENT - BACKGROUND

Substantially Lessening Competition

60. Section 47 of the Act prohibits particular business acquisitions. It provides that:

    (a) "A person must not acquire assets of a business or shares if the acquisition would have, or would be likely to have, the effect of substantially lessening competition in a market."

61. Section 2(1A) provides that substantial means "real or of substance".[9] Substantial is taken as meaning something more than insubstantial or nominal. It is a question of degree. What is required is a real lessening of competition that is not minimal. The lessening needs to be of such size, character and importance as to make it worthy of consideration.

62. Section 3(2) provides that references to the lessening of competition include references to the hindering or preventing of competition.

63. While the Act defines the words "substantial" and "lessening" individually it is desirable to consider the phrase as a whole. For each relevant market, the Commission will assess:

- the probable nature and extent of competition that would exist in a significant section of the market, but for the acquisition (the counterfactual);

---

[8] In its Decision not to intervene in the proposed merger of Bonlac Foods Ltd and the New Zealand Dairy Board in 2000.

[9] "Practice Note 4: The Commission's Approach to Adjudicating on Business Acquisitions Under the Changed Threshold in Section 47 – A Test of Substantially Lessening Competition", section 2.

- the nature and extent of the contemplated lessening; and
- whether the contemplated lessening is substantial.

64. In interpreting the phrase "substantially lessening competition", the Commission will take into account the explanatory memorandum to the Commerce Amendment Bill (No 2). The memorandum notes that:

> "Two of the 3 key prohibitions are strengthened to bring New Zealand into line with Australian competition law, which will facilitate a more economic approach to defining anti-competitive behaviour."

and, in relation to s47:

> "This proposed new threshold is the same as the threshold for these types of acquisitions in section 50 of the Trade Practices Act 1974 (Australia)."

65. For the purposes of the analysis, the Commission takes the view that a lessening of competition and a strengthening of market power may be taken as being equivalent, since they are the two sides of the same coin. Hence, it uses the two terms interchangeably. Thus, in considering whether the acquisition would have, or would be likely to have, the effect of substantially lessening competition in a market, the Commission will take account of the scope for the exercise of market power, either unilaterally or through co-ordination between firms.

66. When the impact of enhanced market power is expected predominantly to be upon price, the anticipated price increase relative to what would otherwise have occurred in the market has to be both material, and able to be sustained for a period of at least two years, for the lessening, or likely lessening, of competition to be regarded as substantial. Similarly, when the impact of increased market power is felt in terms of the non-price dimensions of competition, these also have to be both material and able to be sustainable for at least two years for there to be a substantial lessening, or likely substantial lessening, of competition.

The Counterfactual

67. The Commission uses a forward-looking, counterfactual type of analysis in its assessment of business acquisitions, in which two future scenarios are postulated: that with the acquisition in question, and that in the absence of the acquisition (the counterfactual). The impact of the acquisition on competition can then be viewed as the difference between those two scenarios.

68. In the current case, on the information currently to hand, it appears that the most likely counterfactual will be a continuation of the status quo. While there has been press speculation about the potential for other parties to bid against Burns Philp, for the shares in Goodman Fielder, and about the possibility of Goodman Fielder selling some of its assets, nothing concrete has emerged which the Commission could consider to be evidence for the purpose of this Decision.

69. Therefore, in the present case, the counterfactual is considered to be Goodman Fielder remaining in existence as an entity, independent of Burns Philp, Rank Group or NZDF.

Potential Sources of Market Power

70. Two types of market situation conducive to the exercise of substantial unilateral market power are now considered. These involve making the distinction between undifferentiated and differentiated product markets.

71. In undifferentiated product markets, where buyers make their purchases largely on the basis of price, and the production capacities of firms are an important element in competition, a business acquisition may have the potential to substantially lessen competition when the combined entity has acquired a market share below that required for dominance. This is especially likely in circumstances where the rivals of the combined entity cannot easily expand production to offset its output contraction within a one year time frame.[10] The inability of rivals to expand may result either from their facing binding capacity constraints, or because additional capacity is significantly more expensive to operate.

72. In differentiated products markets, where the product offerings of different firms vary, and in which buyers make their purchase decisions on the basis of product characteristics as well as of price, the products of firms are by definition not perfect substitutes for each other. The substitutability between products will vary depending upon differences in their various characteristics, which may include their physical specifications, brand image, associated services and location of sale. In simple terms, differentiated products can be thought of as being arranged in a "chain of substitutes", where those in adjacent positions in the chain tend to be close substitutes, and those positioned further apart are less close substitutes.

73. The supply-side characteristics of differentiated products markets are important, as the potential market power of the combined entity may be offset by the actions of rivals. However, rivals may not be able to offer a competitive constraint where they are unable either to re-position their products closer to that of the combined entity to replace the lost localised competition, or to strengthen the promotion of existing products. A further possible constraint would be lost if it were not possible for new products to be added through new entry.

74. As stated, consumer yellow spreads products are differentiated to a degree. This implies the existence of some existing market power.

Conclusion on Competition Analysis Principles

75. The Act prohibits business acquisitions that would be likely to have the effect of substantially lessening competition in a market. The Commission makes this assessment against a counterfactual of what it considers would be likely to happen in the absence of the acquisition. In the present case the counterfactual is considered to be the status quo. A substantial lessening of competition is taken to be equivalent to a substantial increase in market power. A business acquisition can lead to an increase in market power by providing scope either for the combined entity to exercise such power unilaterally, or for the firms remaining in the market to co-ordinate their behaviour so as to exercise such power.

76. In broad terms, a substantial lessening of competition cannot arise from a business acquisition where there are sufficient competitive constraints upon the combined

---

[10] See, for example, Roger D Blair and Amanda K Esquibel, "The Roles of Areeda, Turner and Economic Theory in Measuring Monopoly Power" (1996) *Antitrust Bulletin*, 781, especially pp 791-95.

entity. The next part of the Decision considers and evaluates the constraints that might apply in the consumer yellow spreads market under the following headings:

- analysis of existing competition;
- potential competition from entry; and
- other competition factors.

ANALYSIS OF COMPETITION IN CONSUMER YELLOW SPREADS MARKET

Analysis of Existing Competition

Introduction

77. Given that the two largest suppliers of consumers yellow spreads are proposing to merge, there is the potential for competition in the consumer yellow spreads market to be substantially lessened by the exercise of either unilateral or coordinated market power.

Scope for Unilateral Market Power

78. An examination of concentration as measured by market shares in a market post-acquisition can provide a useful guide to the constraints that market participants may place upon each other, including the combined entity. Both structural and behavioural factors have to be considered. However, concentration is only one of a number of factors to be considered in the assessment of competition in a market. Those other factors are considered in later sections, as noted above.

79. In determining market shares, the Commission will take into account the existing participants, inter-firm relationships and the level of imports. This is followed by a specification of the Commission's 'safe harbours', an estimation of market shares, and an evaluation of existing competition in the market and product differentiation. Each of these aspects is now considered in turn.

<u>Existing Participants</u>

80. The existing competitors are:

- NZDF, which supplies Anchor and Fernleaf butters, Anchor margarines, Avezzo margarine and all of Progressive and Foodstuffs butter house brands (such as "Pams" and "No Frills"). Fonterra supplies NZDF's butter for both its Anchor brands and its house brands. Bakels Edible Oils currently supplies NZDF's house brand margarines but it is likely that post-merger Goodman Fielder would become NZDF's supplier in this respect;
- Goodman Fielder, which supplies Meadow Lea, Sunrise, Olivani, Gold 'N Canola, Choice, Slimarine and Logical branded margarine and house brand margarine to Foodstuffs-Auckland and Foodstuffs-South Island;
- Mainland butter and butter/margarine mixes;
- Unilever, which supplies Flora, Olivio and I Can't Believe its Not Butter margarine;

- Caines Foods Ltd, which supplies house brand margarine to Foodstuffs-Wellington;
- Peerless Foods Ltd, which supplies house brand margarine to Progressive; and
- other minor competitors.

Imports

81. Substantial quantities of consumer yellow spreads are imported into New Zealand by some of the existing competitors listed above:

- Unilever no longer manufactures margarine in New Zealand. It imports its entire market share of about [ ] tonnes per annum from its Australian manufacturing plants. Unilever is able to expand its imports into New Zealand. Unilever is able to supply its key Flora brand at a competitive price vis a vis Goodman Fielder's Meadow Lea, which is manufactured in New Zealand.
- Peerless Foods supplies about [ ] tonnes per annum of margarine to Progressive for its house brand margarine (from its Australian manufacturing plant). Until very recently Goodman Fielder supplied Progressive's house brand margarine but, [ ] Progressive has decided to change supplier;
- Caines Foods Ltd previously supplied all Foodstuff's house brand margarine from its Australian manufacturing plant. It now provides about [ ] tonnes of house brand margarine only to Foodstuffs-Wellington; and
- butter imports into New Zealand rose from 272 tonnes for the year ending October 2001 to about 400 tonnes for the year ending October 2002.

82. Total imports of consumer yellow spreads are about 7,500 tonnes per annum as shown in Table 1 below. These amount to about 25% of the total market size by weight. These imports compete directly with products made in New Zealand and their sales figures are included in the figures used to calculate market shares. There are no import tariffs.

Table 1: **Butter and Margarine Currently Imported into New Zealand**

Name	**Amount in tonnes per annum**
Unilever	[ ]
Progressive for its margarine house brands	[ ]
Foodstuffs-Wellington for its margarine house brands	[ ]
Butter (various minor players)	[ ][11]
Total	**7,444** (25% of the market size)

Market Shares

[11] Customs statistics show 1,200 tonnes of butter were imported for the year ended October 2002. However, inquiries of Fonterra revealed that [ ]. The figure of 400 tonnes quoted in the table has this amount netted off.

83. The consumer yellow spreads market is approximately $145 million in value and 30,000 tonnes in volume.

84. Goodman Fielder has provided the Commission with the volume and dollar sales of butter, margarine and mixes of the two, as shown in Table 2. The figures have been confirmed, apart from trivial variances, by Burns Philp in its Application for clearance, and the Commission accepts them for the purposes of this Decision. The market shares provided by both companies market shares were based on AC Nielsen data.

Table 2: Sales of Butter, Margarine and Mixes of the Two for the Year Ending 1 December 2002

Supplier	Sales ($)	Market share by value (%)	Sales (tonnes)	Market share by weight(%)
Goodman Fielder[a]	[ ]	[ ]	[ ]	[ ]
NZDF[b]	[ ]	[ ]	[ ]	[ ]
Unilever[c]	[ ]	[ ]	[ ]	[ ]
Progressive house brands[d]	[ ]	[ ]	[ ]	[ ]
Foodstuffs house brands[e]	[ ]	[ ]	[ ]	[ ]
Mainland[f]	[ ]	[ ]	[ ]	[ ]
15 Others	balance	[ ]	Balance	[ ]
Total	**144,666,811[g]**	**100**	**30,118**	**100**

Notes:

a Goodman Fielder manufactures margarine in Auckland and in Australia. It does not supply butter.
b NZDF supplies butter manufactured by Fonterra and margarine manufactured by Bakels Edible Oils (NZ) Ltd.
c Unilever does not supply butter. All margarine supplied by Unilever is manufactured in Australia and imported into New Zealand.
d Progressive's house brand butter is supplied by NZDF. Its house brand margarine is manufactured in Australia and supplied by Peerless Foods Pty Ltd of Victoria, Australia.
e Foodstuffs house brand butter is supplied by NZDF. Foodstuffs - Auckland and Foodstuffs - South Island's house brand margarine is supplied by Goodman Fielder. Foodstuffs - Wellington's house brand margarine is manufactured in Australia and supplied by Caines Foods Pty Ltd, a New South Wales based manufacturer.
f Mainland supplies butter which is manufactured by Fonterra.
g In January 2002, the ratio of sales of margarine to butter to mixes of the two was 55.6 : 38.1 : 6.3.

85. Market shares are shown in Table 2 above and are summarized in Table 3 below.

86. Burns Philp has argued that the supply of house brands should not be included in the market shares of the merged entity due to the countervailing market power of the two supermarket operators who, it is argued, will, and have, changed supplier "at a moment's notice" after obtaining a lower priced source of supply. The Commission considers that house brands should be included in the market shares of the merged entity because there is some doubt whether a manufacturer could be constrained by its own product, albeit with house brand packaging. The argument concerning countervailing power of the supermarkets is discussed later in this Decision.

Table 3: Summary of Market Shares in Consumer Yellow Spreads Market

Manufacturer	**Market share Value ($)**	**Market share Volume**
Goodman Fielder	[ ]%	[ ]%
NZDF	[ ]%	[ ]%
House brands supplied by merged entity	[ ]%	[ ]%
Sub-total for merged entity	**[ ]%**	**[ ]%**
Unilever (imports)	[ ]%	[ ]%
Mainland	[ ]%	[ ]%
Others - fringe participants, other house brands (mostly imports)	[ ]%	[ ]%
Total	100%	100%

Safe Harbours

87. The Commission's "safe harbours" can now be applied. Under these safe harbours, a business acquisition is considered unlikely to substantially lessen competition in a market where, after the proposed acquisition, either of the following situations exist:

- where the three-firm concentration ratio (with individual firms' market shares including any interconnected or associated persons) in the relevant market is below 70%, the combined entity (including any interconnected or associated persons) has less than in the order of a 40% share; or
- where the three-firm concentration ratio (with individual firms' market shares including any interconnected or associated persons) in the relevant market is above 70%, the market share of the combined entity is less than in the order of 20%.

88. The three firm concentration ratio is [ ]% in value and [ ]% in volume. With a market share of [ ]% in dollar value and [ ]% in volume, the merged entity is outside the safe harbours. This indicates the high concentration that would result from the proposed merger.

89. Market shares are insufficient in themselves to establish whether competition in a market would be lessened. It is the interplay between a number of competition

factors, of which seller concentration is only one, that has to be assessed in determining the impact of a business acquisition on competition.

State of Existing Competition

90. Participants in the consumer yellow spreads market compete with each other by means of:

- price;
- advertising campaigns;
- packaging innovation;
- product innovation; and
- in-store price promotions.

91. Strong price competition exists, particularly between the suppliers of house brand consumer yellow spread and the suppliers of proprietary branded products. Further price competition occurs between suppliers of proprietary branded consumer yellow spreads to obtain in-store product promotion time periods and shelf space from supermarket operators.

92. Advertising is used to create consumer yellow spreads brand awareness. Successful differentiation may create an element of market power because it helps to justify the higher price of a product (for example, the price premium olive oil based margarines and mixes). However, supermarket operators report very little brand loyalty for butter, with purchasing decisions usually made on price alone.

93. Packaging is a substantial means of differentiating consumer yellow spreads on supermarkets' shelves and competitors have been active in developing and launching new packaging. This is particularly so for some manufacturers of spreadible butters, and margarines in which the use of oval containers, replacing the previously standard round ones, has occurred.

94. Industry participants also compete via product innovation, as is evidenced by the introduction of olive and avocado oil-based spreads, which carry the perception of being more healthy products.

95. Consumer yellow spreads are one of a limited basket of headline products which supermarket operators use to attract shoppers to their supermarket. Further examples are other dairy products and bread. Supermarket operators are particularly price sensitive in respect of these products.

96. The Commission considers the consumer yellow spreads market to be presently disaggregated and competitive. There are major national and international competitors on the supply and demand sides of the market. The market is supplied by a mixture of local manufacturer and imports. Pre-merger, the three firm concentration ratio by value is [ ]% with the largest firm, Goodman Fielder supplying about [ ][12]% of the market (including house brands). However, as discussed post-merger these

[12] Goodman Fielders market share for its supply of proprietary brands is about [ ]% and for its supply of house brands to Foodstuffs is about [ ]%.

figures alter to [ ]% and [ ]% respectively, and the market becomes more concentrated.

97. Market participants stated that in respect of butter, Mainland (Fonterra) provided a major constraint to NZDF should it increase its prices. [

]

98. Bakels Edible Oils, a New Zealand based manufacturer, which currently supplies margarine to NZDF and, previously, to Progressive [ ]. The Commission has been informed that Bakels Edible Oils currently supplies [ ] tonnes per annum of margarine within New Zealand, [ ]. Should the merger proceed, it is likely that NZDF would [ ]. Bakels Edible Oils [

];

99. Unilever's sales of its main margarine brand, Flora, has [

]

100. Progressive has recently changed its supplier of house brand margarine from a local manufacturer to an Australian manufacturer. Foodstuffs Auckland and South Island changed their supplier of house brand margarine from an Australian manufacturer to a local manufacturer.

101. Classic Farm has recently entered the butter market selling butter manufactured by Westland Dairy and Fonterra and has obtained [ ]% market share in a short time.

Product Differentiation

102. Differentiation may be an attempt to insulate a product from competition. Consumer yellow spreads are differentiated in some respects. Burns Philp has proposed, and the Commission accepts, that butter and margarine are differentiated by product type and by brand. Margarine is soft and easily spread vis a vis chilled butter which requires to be softened by heat. That has led to the development of spreadible butters and butter-margarine mixes. Butter is differentiated by its potential use as a baking ingredient, that is by its taste. Olive oil and avocado spreads are differentiated on the basis of apparent healthiness. House brands are differentiated from proprietary brands. Olive and Avocado based margarines are 10 – 15% higher priced than are margarines manufactured from soya or other more traditional oil bases.

103. In the National Foods case[13] the Commission considered that differentiated product markets for yoghurt and dairy desert would allow producers to raise prices without losing market share and that the market participants would be able to exert a degree of market power with respect to their brands, even though they are competing with the similar brands of rival firms. This statement was qualified to the extent of constraint on post-merger price increases by, for example, countervailing power of the two

[13] Commerce Commission, *Decision 459: Business Acquisition involving National Foods and NZDF.*

supermarket purchasers, new entry and imports. The Commission considers these conclusions also apply to the consumer yellow spreads market.

Conclusion on Scope for Unilateral Market Power

104. The Commission concludes that the proposed acquisition would cause an increase in concentration in the consumer yellow spreads market. The number of major participants would be reduced by one, although two major competitors would remain (Mainland and Unilever).

105. The presence of product differentiation suggests that a degree of market power is likely to exist pre-merger, and that common ownership could further erode competition by the elimination of the constraint provided by competition between consumer yellow spreads supplied by each of NZDF and Goodman Fielder (whether in respect of either proprietary brands or house brands).

106. However, the Commission notes that one quarter of the market is supplied by imports from Australia. Importers such as Unilever, Peerless Foods and Caines Foods have the potential to expand should the merged entity raise margarine prices. Such expansion is likely to be extensive and timely.

107. In addition, the Commission notes the presence of Mainland [ ].

108. Finally Bakels Edible Oils is a potential large supplier of margarine, post merger.

109. The Commission consider that these last three factors are crucial in considering whether or not there is likely to be an increase of unilateral market power as a result of the merger leading to a potential substantial lessening of competition.

110. These conclusions were confirmed by an executive of Progressive who said:

> I will have no worries in that (consumer yellow spreads) market as long as Fonterra, Unilever, and Bakels (Edible Oils) remain in the market.

111. Therefore, the Commission considers that the scope for the exercise of unilateral market power will not, by itself, be enhanced by the proposed merger.

Scope for the Exercise of Coordinated Market Power

112. As discussed in the Commission's Practice Note 4,[14] the Commission applies certain tests for the potential for collusion post-merger. A high proportion of "yes" responses indicate a likelihood of collusion post-merger. This is considered in Table 4.

[14] *Ibid* n1

Table 4 Testing the Potential for Collusion in the Consumer Spread Market

Factors conducive to collusion	Presence of factors in the market
High seller concentration	Yes: post merger the three main players have [ ]% market share.
Undifferentiated product	On balance, no: margarine products are differentiated through oil base, brand, packaging and price, though butter is not. Also, some differentiation between butter, margarine, mixes product types.
New entry slow	No: new entry has occurred within about three months by Australian imported margarine.
Lack of fringe competitors	No: Bonland[15], Universal Foods, Dairymaid, Classic Farm are all fringe competitors.
Demand unresponsive to price change	No: supermarket operators report consumers respond to price signals, hence "specials".
Industry's poor competition record	No previous evidence of collusion
Presence of excess capacity	Yes, most of the manufacturers have excess capacity in New Zealand and Australia.
Presence of industry associations	No

113. The above analysis reduces concerns over possible collusion effects post-merger. Further factors supporting that view are:

- consumer yellow spreads is a headline product which supermarket operators are particularly keen to purchase at the lowest possible prices. [ ]. As a result of the tendering system for the supply of house brands, it will be easy for the supermarket operators, and they will be particularly keen, to detect collusion in that segment;
- [ ]; and
- the Australian parent of Progressive, Foodland, purchases its house brand margarines on an Australasian-wide supply basis. This has resulted in the entry of Peerless Foods into the New Zealand consumer yellow spreads market. [ ]

Conclusion on Coordinated Market Power

114. The Commission concludes that the factors promoting collusion, ie the reduction from four major participants to three, is militated by the factors mentioned above. The

[15] A joint venture between Mainland and Bonlac Foods Ltd, an Australian-based producer of dairy foods.

Commission, considers that the prospects of collusion would not be likely to be materially increased by the proposed acquisition. Given this conclusion, no analysis of the ability of potential colluders to discipline each other needs be carried out.

115. The Commission therefore concludes that the proposed acquisition will not lead to the potential for an increase in coordinated market power post-merger.

Summary of Conclusions on Increased Market Power

116. The Commission considers that:

- the scope for the exercise of unilateral market power will not be enhanced by the proposed merger; and
- the proposed acquisition will not lead to the potential for an increase in coordinated market power post-merger.

117. Given this conclusion it is not strictly necessary for the Commission to go on and consider whether there are any other factors which might offset any increase in market power. Nevertheless, for the sake of completeness, potential constraints on the merged entity are discussed below.

Constraints from Market Entry

Introduction

118. A business acquisition is unlikely to result in a substantial lessening of competition in a market if behaviour in that market continues to be subject to real constraints from the threat of market entry.

119. The Commission will consider the history of past market entry as an indicator of the likelihood of future entry. The Commission is also mindful that entry often occurs on a relatively small scale, at least initially, and as such may not pose much of a competitive constraint on incumbents within the relevant time frame.

Barriers to Entry

120. The Commission accepted in the National Foods case that establishing a new brand, and obtaining access to supermarket shelf space for that brand, would be one of the more significant barriers to entry (although Universal Foods has done just that in recent years on a minor scale). That would apply to Bakels Edible Oils if it wished to enter the proprietary branded market. However, this barrier is not insuperable as is shown by the introduction of the new olive and avocado oil-based margarine brands in recent years.

121. Other potential suppliers to the market must enter via the house brands of the supermarkets or face this brand-based barrier to entry. Peerless Food's recent entry to supply all Progressive's house brands, although occurring on the basis of supply of Foodland's Australasian-wide margarine house brand business, shows this route is possible for an entrant which is able to competitively price.

122. That said, the Commission notes the following are either recent or potential entrants:

- Universal Foods, which markets its Classic Farm butter brand in the lower North Island using butter sourced from Fonterra and Westland Coop Dairy and has obtained a reasonable market share in that region;
- Bonland, which already imports small quantities of butter into New Zealand;
- Peerless Foods, which has just begun supplying house brands to Progressive; and
- other Australian dairy food manufacturers.

Conclusion on Barriers to Entry

123. This evidence leads the Commission to conclude that barriers to entry are relatively high and, as a result, that there is only limited potential for entry. Accordingly, the merged entity is likely to face competition from new entrants, only on the margin.

Countervailing Power of Purchasers

Analysis

124. All persons spoken to during the Commission's investigation of the proposed merger affirmed the very high countervailing power of the two major supermarket chains in the consumer yellow spreads market. This arises from the factors listed:

- 95% of consumer yellow spreads are sold in the stores of the two major supermarket chains;
- unlike Yoghurt in the National Foods case, both chains sell house brand butter and margarine at prices considerably lower than the brands supplied by the merged entity and other suppliers. [ ]% of the sales of consumer yellows spread are sold under house brands. Supermarket executives regard house brands as a strong constraint on the pricing of other branded consumer yellow spreads;
- both chains regard consumer yellow spreads as headline products which the two chains use to compete against each other for customers. They are, therefore, particularly mindful of pricing in this market;
- typical of this countervailing power is Fonterra's information [ ]. Further, Progressive has confirmed that upon its acquiring the Woolworths chain of supermarkets, it announced at meetings with suppliers that it *expected* to purchase products at the lowest price that either of Progressive or Woolworths paid when they were separate entities;
- 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. As mentioned above, supermarket operators stated they promoted butter and margarine at the same time because of their belief that an increase in sales of one type of product due to the promotion did not affect sales of the other;

- recently Progressive has abruptly changed supplier for its house brand margarine at about three months notice, [ ]. Similarly, two of the Foodstuffs companies have moved house brand supply from an Australian manufacturer to Goodman Fielder; and
- supermarket operators purchase house brand consumer yellow spread products using a tender system to achieve the lowest possible purchase prices.

Conclusion on Countervailing Power of Purchasers

125. The Commission concludes that supermarkets will be able to exert a large degree of countervailing power against the ability of the merged entity to raise prices.

Conclusion on Substantial Lessening of Competition in Consumer Yellow Spreads Market

126. Therefore the Commission concludes:

- the merged entity will have a market share well outside the Commission's safe harbour guidelines;
- differentiation exists between product type and brand;
- these two factors will not, as a result of existing and potential imports and the likelihood of expansion of output by current New Zealand-based market participants, provide scope for increased unilateral market power;
- there will be no potential increase of co-ordinated market power as a result of the proposed acquisition;
- there will be only limited constraints on the merged entity from potential entry; and
- there will be strong constraints on the merged entity arising from the countervailing market power of the two supermarket chains.

127. Balancing these factors, the Commission concludes that the proposed acquisition will not have, nor will not be likely to have, the effect of substantially lessening of competition in the consumer yellow spreads market.

CONCLUSIONS

128. The Commission, therefore, concludes that the proposed acquisition would not have, nor would be likely to have, the effect of substantially lessening competition in a market.

DETERMINATION ON NOTICE OF CLEARANCE

Accordingly, pursuant to section 66(3)(b) of the Commerce Act 1986, the Commission determines to give clearance for the acquisition by Burns Philp Limited, or by an interconnected body corporate of Burns Philp, of up to 100% of the ordinary issued share capital of Goodman Fielder Limited together with Goodman Fielder's existing options and any ordinary shares that may be issued pursuant to those options.

Dated this 21st day of February 2003

P R Rebstock
Deputy Chair

APPENDIX ONE

This **Deed** is made on 21 February 2003

by (1) **Burns, Philp & Company Limited** a publicly listed company duly incorporated under the Corporations Act 2001 (Commonwealth of Australia) having its registered office at Sydney, NSW, Australia (**Burns Philp**) and

(2) **New Zealand Food Industries Limited** a company duly incorporated under the Companies Act 1993 having its registered office at Auckland, New Zealand (**NZFI**)

in favour of (3) **The Commerce Commission** a body corporate established by Section 8 of the Commerce Act 1986 (the **Commission**)

Introduction

A. On 18 December 2002 Burns Philp gave notice to the Commission pursuant to section 66(1) of the Commerce Act 1986 (**Act**) seeking clearance for the proposed acquisition by Burns Philp, or an interconnected body corporate of Burns Philp, of up to 100% of the ordinary issued share capital of Goodman Fielder Limited (**Goodman Fielder**) and, subject to the disclosure to Burns Philp of the terms of Goodman Fielder's existing options, to the proposed acquisition of those options and any ordinary issued shares that may be issued pursuant to those options (the **Clearance Application**).

B. On 21 February 2003, Burns Philp gave notice amending the Clearance Application by offering the Commission a divestment undertaking in the form of this Deed.

Covenants

1. Subject to the conditions described in paragraph 2 of this Deed, Burns Philp will sell or procure the sale of the whole of the New Zealand yeast business of Burns Philp operated in New Zealand through its wholly owned subsidiary NZFI as a going concern (including then existing sales contracts with customers) to a purchaser which is not an interconnected body corporate (as defined by section 2(7) of the Act) or an associated person (as defined by section 47(3) of the Act) of Burns Philp or Goodman Fielder (an **Unrelated Purchaser**) within [ ] of the date that Burns Philp declares its formal offer to all shareholders of Goodman Fielder dated 3 January 2003 (the **Offer**) to be unconditional in all respects (which includes Burns Philp attaining at least 90% acceptances of the ordinary shares and convertible options under the Offer, or any lesser level of acceptance approved by Burns Philp in respect of that Offer) (**Unconditionality)**.

2.

(a) The covenants contained in this Deed are subject to Burns Philp attaining Unconditionality in respect of the Offer.

(b) For the avoidance of doubt, paragraph 1 of this Deed does not require the sale of the New Zealand food ingredients business (other than yeast) of NZFI.

(c) It is expressly acknowledged that in selling the business as a going concern, Burns Philp or its subsidiary, NZFI, shall be entitled to sell the land at Ponsonby to an Unrelated Purchaser separately from the sale of the New Zealand yeast business so long as there is a lease back of that land to the purchaser of the yeast business on terms acceptable to that purchaser.

3. Burns Philp will advise the Commission of the sale on completion.

4. Burns Philp confirms that in entering into the agreement recorded in this Deed it intends to create binding and enforceable legal obligations in relation to the Commerce Commission.

5. This Deed is governed by New Zealand law and the parties accept the exclusive jurisdiction of the New Zealand courts and any court which may hear appeals from those courts.

6. This Deed may be executed in any number of counterparts each of which is to be deemed an original, but all of which together are to constitute one instrument. Burns Philp and NZFI may enter into this Deed by executing any counterpart. It is acknowledged that this Deed may be executed by an exchange of facsimile copies and executing of this Deed by that means is valid and sufficient execution

EXECUTED AS A DEED

THE COMMON SEAL OF BURNS, PHILP & COMPANY LIMITED was hereunto affixed in accordance with its constitution in the presence of:

Thomas Degnan
Director

Name of Director

Helen Golding
Secretary

Name of Secretary

EXECUTED by **NEW ZEALAND FOOD INDUSTRIES LIMITED** by:

R P Meagher Director	Keith Mellor Director
Name of Director	Name of Director