

Determination

H.J. Heinz Company (New Zealand) Limited and Cerebos Pacific Limited [2018] NZCC 2

The Commission: Dr Mark Berry
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Dr Jill Walker
Sarah Court

Summary of application: An application from H.J. Heinz Company (New Zealand) Limited to acquire Cerebos Pacific Limited's New Zealand food and instant coffee business.

Determination: Under section 66(3)(a) of the Commerce Act 1986, the Commerce Commission determines to give clearance to the proposed merger (subject to the divestment undertaking dated 7 March 2018 provided by H.J. Heinz Company (New Zealand) Limited under section 69A of the Commerce Act 1986).

Date of determination: 8 March 2018

Confidential material in this report has been removed. Its location in the document is denoted by [].

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The proposed transaction

Summary of the proposed transaction

1. On 28 November 2017 the Commerce Commission registered an application (the Application) under section 66(1) of the Commerce Act 1986 (the Act) from H.J. Heinz Company (New Zealand) Limited (Heinz) to acquire Cerebos Pacific Limited's (Cerebos) New Zealand food and instant coffee business, by acquiring 100% of the shares in Cerebos' subsidiary Cerebos Gregg's Limited (the Proposed Transaction).
2. Acknowledging that the Proposed Transaction would give rise to competition concerns, Heinz (the Applicant) has offered an undertaking to divest the Gregg's red, barbecue and steak sauce business as well as the F. Whitlock & Sons (Whitlock's) Worcestershire sauce business (the Divestment Undertaking) as part of its merger clearance application, see Attachment B.

Applicant's rationale for the merger

3. The Proposed Transaction is part of an international transaction by which Heinz's parent, the Kraft Heinz Foods Company, through local subsidiary companies, will acquire Cerebos' New Zealand, Australia and Singapore food and instant coffee business.
4. Heinz submitted that Suntory Beverage & Food Asia Pte Ltd, the owner of Cerebos, is selling the Cerebos food and instant coffee business to focus on Suntory's core business, the beverage category.¹ Further, Heinz submitted that the Proposed Transaction provides an opportunity for Heinz to expand its portfolio into complementary food categories.

Areas of overlap

5. In New Zealand, Heinz and Cerebos both supply a range of sauces. These sauces include red sauces (tomato sauce and ketchup), barbecue sauce, steak sauce, Worcestershire sauce, chilli sauce and Asian sauces. In addition, the parties manufacture and supply a range of condiments, mayonnaise, mustard, marinades, gravies, powdered beverages, desserts, and soy sauce. However, competition concerns arise only in respect of red, barbecue, steak, and Worcestershire sauces.

Our decision

6. The Commission gives clearance to the Proposed Transaction (subject to the Divestment Undertaking) as it is satisfied that the merger together with the Divestment Undertaking will not have, or would not be likely to have, the effect of substantially lessening competition in a market in New Zealand.

Our framework

7. Our approach to analysing the competition effects of the merger is based on the principles set out in our Mergers and Acquisitions Guidelines (our guidelines).²

¹ Application at [3.6].

² Commerce Commission, *Mergers and Acquisitions Guidelines* (July 2013).

The substantial lessening of competition test

8. As required by the Act, we assess mergers using the substantial lessening of competition test.
9. We determine whether a merger is likely to substantially lessen competition in a market by comparing the likely state of competition if the merger proceeds (the scenario with the merger, often referred to as the factual), with the likely state of competition if the merger does not proceed (the scenario without the merger, often referred to as the counterfactual).³
10. A lessening of competition is generally the same as an increase in market power. Market power is the ability to raise price above the price that would exist in a competitive market (the 'competitive price'),⁴ or reduce non-price factors such as quality or service below competitive levels.

When a lessening of competition is substantial

11. Only a lessening of competition that is substantial is prohibited. A lessening of competition will be substantial if it is real, of substance, or more than nominal.⁵ Some courts have used the word 'material' to describe a lessening of competition that is substantial.⁶
12. As set out in our guidelines, there is no bright line that separates a lessening of competition that is substantial from one which is not. What is substantial is a matter of judgement and depends on the facts of each case.⁷
13. A lessening of competition or an increase in market power may manifest itself in a number of ways, including higher prices or reduced services.⁸

When a substantial lessening of competition is likely

14. A substantial lessening of competition is 'likely' if there is a real and substantial risk, or a real chance, that it will occur. This requires that a substantial lessening of competition is more than a possibility, but does not mean that the effect needs to be more likely than not to occur.⁹

The clearance test

15. We must clear a merger if we are satisfied that the merger would not be likely to substantially lessen competition in any market.¹⁰ If we are not satisfied – including if we are left in doubt – we must decline to clear the merger.
16. In *Woolworths* the Court held that "the existence of a 'doubt' corresponds to a failure to exclude a real chance of a substantial lessening of competition".¹¹

³ *Commerce Commission v Woolworths Limited* (2008) 12 TCLR 194 (CA) at [63].

⁴ Or below competitive levels in a merger between buyers.

⁵ *Woolworths & Ors v Commerce Commission* (2008) 8 NZBLC 102,128 (HC) at [127].

⁶ *Ibid* at [129].

⁷ *Mergers and Acquisitions Guidelines* above n2 at [2.23].

⁸ *Mergers and Acquisitions Guidelines* above n2 at [2.21].

⁹ *Ibid* at [111].

¹⁰ Commerce Act 1986, section 66(3)(a).

17. The burden of proof lies with Heinz, as the Applicant, to satisfy us on the balance of probabilities that the proposed merger is not likely to have the effect of substantially lessening competition.¹² The decision to grant or refuse a clearance is necessarily to be made on the basis of all the evidence.¹³ We will sometimes have before us conflicting evidence from different market participants and must determine what weight to give the evidence of each party.¹⁴

Divestment undertakings

18. We may accept undertakings to dispose of assets or shares.¹⁵ If divestment undertakings are accepted by us, they are deemed to form part of the clearance.
19. As set out in our divestment guidelines,¹⁶ upon receiving a divestment undertaking, we will consider whether the proposed divestment is sufficient to remedy any substantial lessening of competition that would otherwise arise from the Proposed Transaction.

Parties

Heinz

20. Heinz is a subsidiary of the Kraft Heinz Foods Company, which is a subsidiary of global food and beverage company, The Kraft Heinz Company based in the United States. In New Zealand, the Wattie's brand was acquired by Heinz in 1992.¹⁷
21. Heinz supplies over 1,000 products in New Zealand, ranging from table sauces, soups, and soft drinks, to pet food, seafood, and meat products. It supplies into the retail, food service, and quick service restaurant (QSR) channels. Alongside Heinz and Wattie's, its brands include Golden Circle, Eta, Weight Watchers, and Champ. Heinz has six production factories in New Zealand: four in Hastings,¹⁸ one in Auckland,¹⁹ and one in Christchurch.²⁰ In some instances, it also uses third parties to co-pack certain products. Heinz manufactures all of its New Zealand (and Australian) sauce products from one of its factories in Hastings.

Cerebos

22. Cerebos is an Australasian food and beverage company which supplies around 440 products in New Zealand. It supplies into both retail and food service channels. Its product range consists of sauces, condiments, gravy, salt, herbs and spices, desserts, and beverages. Other than Cerebos, Gregg's, and Whitlock's, Cerebos' key New Zealand

¹¹ *Commerce Commission v Woolworths Ltd* (CA) above n3 at [98].

¹² *Commerce Commission v Southern Cross Medical Care Society* (2001) 10 TCLR 269 (CA) at [7] and *Commerce Commission v Woolworths Ltd* (CA) above n3 at [97].

¹³ *Commerce Commission v Woolworths Ltd* (CA) above n3 at [101].

¹⁴ *Brambles New Zealand Ltd v Commerce Commission* (2003) 10 TCLR 868 at [64].

¹⁵ Under section 69A(2) of the Commerce Act 1986, we are only able to accept structural undertakings. This means that we are unable to accept behavioural undertakings.

¹⁶ *Mergers and Acquisitions Guidelines* above n2 at Attachment F.

¹⁷ *H J Heinz Company and Wattie Foods Ltd* NZCC Decision No. 268 (30 September 1992).

¹⁸ The Hastings plants produce jams, dressings, soups, sauces, beans, spaghetti, chilled soup, canned fruit and vegetables, and frozen meals.

¹⁹ The Auckland plant produces pates, dips and meat sticks.

²⁰ The Christchurch plant produces frozen, dehydrated and freeze-dried vegetable products.

brands include Bisto, Robert Harris, Dilmah, Raro, Special Blend, and Asian Home Gourmet.

23. Relevant to the Proposed Transaction, Cerebos manufactures the sauce products it supplies in New Zealand at Cerebos' factory in Seven Hills, New South Wales. Gregg's 590g tomato sauce refill pouch is an exception, which is manufactured for Cerebos by [].²¹

Other sauce producers

Delmaine Fine Foods Limited

24. Delmaine Fine Foods Limited (Delmaine) was established in 1980, and now supplies products in approximately 35 food categories. Delmaine has two manufacturing plants in New Zealand. Over the past five to six years it has been manufacturing and supplying sauces in New Zealand under its own label (Delmaine), under licence, (Tuimato), and using the Boss label, which it owns. Delmaine estimates that its sauce business makes up approximately []% of its turnover. It currently supplies sauce products into the retail and food service channels, and has previously supplied products into the QSR channel.

Barker's

25. Barker's was established nearly 50 years ago in Geraldine, New Zealand. Its products include jams, chutneys, syrups, condiments, and sauces. Barker's currently supplies products in New Zealand into the retail and food service channels.

Groenz Limited

26. Groenz Limited (Groenz), a subsidiary of US food processor, Golden State Foods, makes sauces and condiments for supply to the food service and QSR sectors. It produces these products under its Kiwi Style and French Maid brands as well as under other businesses' brands. Groenz's manufacturing plant is located in Seaview, Wellington.

Cuisine Resources NZ Limited

27. Cuisine Resources NZ Limited (CRNZ) is a relatively small company that forms part of the Swiss-based Givaudan company.²² CRNZ makes food ingredients, including sauces and natural extracts. Its factory is located in Pukekohe. At present, sauces account for []% of CRNZ's current production, which are toll manufactured for [].²³

MON Natural Foods Pty Limited

28. MON Natural Foods Pty Limited (MON) is owned by the Green Group. MON's facility is based in Barooga, Australia, and it is a dedicated toll manufacturing business. MON's annual turnover is around AUD [], and it currently employs 57 personnel.
29. MON predominantly manufactures sauces and condiments, including tomato, barbecue, and Worcestershire sauces. These products are primarily manufactured under other

²¹ Application at [4.10].

²² Givaudan is an international flavour and fragrance business, which is active in the food, beverage, consumer goods and fragrance industries.

²³ Commerce Commission interview with CRNZ (26 January 2018).

businesses' brands, although MON also manufactures these products under private labels and under its own label (MON).²⁴

Pacific Food Industries Pty Limited

30. Pacific Food Industries Pty Limited (Pacific) was established in Australia in 1994. It currently employs 30 staff at its factory based in Yatala, Gold Coast. Pacific's factory comprises three sites (one for glass packaging, one for plastic manufacturing, and one warehouse facility). Pacific has expertise in producing wet products such as sauces and condiments. At present, Pacific manufactures private label sauces for []. It also supplies sauces through Ashon Ventures (NZ) Limited for distribution in New Zealand (eg, oyster sauce).

Supermarkets

Foodstuffs

31. Foodstuffs is a nationwide supermarket and food service chain. Foodstuffs comprises two regional cooperatives, Foodstuffs North Island Limited, covering the North Island, and Foodstuffs South Island Limited, covering the South Island. Across the two cooperatives, Foodstuffs supplies around 200 supermarkets under the PAK'nSAVE and New World banners, and 11 food service stores trading under the Gilmours and Trents brands. Foodstuffs stocks a range of products supplied by the merging parties, including sauces. In addition, Foodstuffs sells a range of sauces under private labels which it has manufactured largely by [].

Progressive Enterprises Limited

32. Progressive Enterprises Limited (Progressive) owns and operates over 184 Countdown supermarkets in New Zealand. Progressive is part of the Woolworths Group and is also the franchisor of the Super Value and Fresh Choice supermarkets, representing a further 62 stores which are also part of the Woolworths Group. Progressive stocks a range of products supplied by the merging parties, including sauces. Like Foodstuffs, Progressive also sells a range of sauces under private labels which are manufactured for it mainly by [].

Food service providers

33. Bidfood, Gilmours, and Trents account for approximately []% of the supply of products (including sauces) to food service customers such as restaurants.²⁵ As we describe below, some food service providers on-sell products made by the merging parties as well as selling their own private label products.

Bidfood Limited

34. Bidfood Limited (Bidfood) is a national wholesale food distributor. It supplies the New Zealand food service and hospitality industry with a range of food and non-food products (eg, cleaning materials, packaging, and disposable containers). This includes a range of sauce products supplied by the merging parties as well as under its own private label (Smart Choice). Bidfood has warehouses located nationwide.

²⁴ MON manufactures sauce under private label for [], and it previously manufactured for Coles.

²⁵ Application at [8.3].

Gilmours and Trents Wholesalers

35. In addition to its supermarket chains, Foodstuffs also supplies 11 food service stores operating under the Gilmours and Trents brands. These companies supply grocery and food service merchandise to the food service and hospitality industry as well as to large government departments such as the Department of Corrections. Gilmours and Trents sell a range of sauce products supplied by the merging parties as well as private label products.

QSRs

36. QSR customers are large fast food restaurants which are distinguished by their size, strict product specifications, and service level requirements. These include KFC, McDonalds, Burger King, and Subway. QSR customers are large volume purchasers of sauce that typically tender for the provision of their sauce requirements. In addition to Heinz, other major suppliers to QSR customers include Groenz and Kerry Ingredients.²⁶

Previous decisions

Decision 268

37. In Decision 268 – H J Heinz Company and Wattie Foods Limited, 30 September 1992 (application for authorisation), the Commission gave clearance to the acquisition by H J Heinz Company of all the share capital of Wattie Foods. The applicant submitted that there was a broader market for sauce. However, many of the parties contacted by the Commission at that time submitted that tomato sauce is a separate market. Supermarket operators, in particular, saw tomato sauce as a product that is a staple part of most households. For the purposes of its analysis, the Commission examined the impact of the acquisition on the tomato sauce market, without necessarily concluding that the most appropriate product market was that narrow.

Decision 367

38. In Decision 367 – Heinz-Wattie Limited and Griffin Foods Limited (Eta Foods Division), 7 July 1998, the Commission gave clearance to the acquisition by Heinz-Wattie Limited of the salad dressing business of Eta Foods (a division of Griffins Foods Limited). This particular acquisition was part of a broader acquisition of Griffin's food businesses that also included a contract for the sole distribution in New Zealand of HP and Lea & Perrins sauces. Although clearance was not sought for the acquisition of the sauce distribution contract, we nevertheless considered the impact on competition of the acquisition in this market.
39. In line with Decision 268, the Commission concluded that the relevant markets in that instance included the markets for the manufacture and distribution of tomato-based and other sauces in New Zealand. In the Decision, the Commission did not define separate markets for sauces other than tomato-based sauces.

UK Competition Commission decision – HJ Heinz and HP Foods

40. In its report on the acquisition by HJ Heinz Company Ltd of the HP Food Companies dated 24 March 2006, the UK Competition Commission identified separate markets for retail customers for each of ketchup (red), brown sauce, and barbecue sauce. The UK

²⁶ Kerry Ingredients is a leading global supplier of food ingredients based in Ireland.

Competition Commission also concluded it was appropriate to distinguish separate markets for the supply of the relevant sauce products to the retail and food service sectors.

Market definition

41. Market definition is a tool that helps identify and assess the close competitive constraints the merged entity would face. Determining the relevant market requires us to judge whether, for example, two products are sufficiently close substitutes as a matter of fact and commercial common sense to fall within the same market.
42. We define markets in the way that best isolates the key competition issues that arise from a merger.²⁷ In many cases this may not require us to precisely define the boundaries of a market. What matters is that we consider all relevant competitive constraints, and the extent of those constraints. For that reason, we also consider products and services which fall outside the market but which still impose some degree of competitive constraint on the merged entity.

Applicant's view of the relevant markets

43. The Applicant submitted that the relevant markets for assessing the Proposed Transaction are national markets for the wholesale supply of:²⁸
 - 43.1 red sauces (primarily tomato sauce and ketchup);
 - 43.2 barbecue sauce;
 - 43.3 steak sauce;
 - 43.4 Worcestershire sauce;
 - 43.5 Asian sauces;
 - 43.6 condiments; and
 - 43.7 chilli sauce;

to retail and food service industry customers respectively.
44. The Applicant did not provide comment on the dessert, powdered beverage, gravies and soy sauce categories. The Applicant submitted that the Proposed Transaction would result in nil or insignificant competitive overlap in these categories.²⁹

Our view of the relevant markets

45. For the reasons set out below, we consider the relevant markets for assessing the Proposed Transaction are separate national markets for the manufacture/importation and wholesale supply of:
 - 45.1 red sauces (primarily tomato sauce and ketchup);

²⁷ *Mergers and Acquisitions Guidelines* above n2 at [3.10-3.12].

²⁸ Application at [6.1] – [6.13].

²⁹ Application at [6.2].

- 45.2 barbecue sauce;
- 45.3 steak sauce; and
- 45.4 Worcestershire sauce

to supermarkets, the food service industry, and QSRs respectively.

46. We do not propose to further consider markets relevant to the supply of Asian sauces, condiments, and chilli sauces as we do not consider that the Proposed Transaction raises concerns in relation to the supply of these products.

Product dimension

47. The Commission has previously considered acquisitions concerning the supply of tomato-based sauces. In *Heinz-Wattie/Eta*,³⁰ the Commission considered the impact of the acquisition on the national market for the manufacture and distribution of tomato-based sauces (among other markets).³¹ The Commission considered it appropriate to distinguish tomato-based sauces from other “English” variety sauces in that decision.³²
48. More recently, the UK Competition Commission in *HJ Heinz/HP Foods*³³ considered it appropriate to define separate markets for the supply of ketchup (red), brown sauce, and barbecue sauce to the retail industry.³⁴
49. Consistent with these decisions, we consider it is appropriate to define separate product markets in relation to the supply of red, barbecue, steak, and Worcestershire sauces. Evidence from retailers and food service industry participants confirm that such sauces are considered separate products that are not generally substitutable for each other. For instance, Foodstuffs South Island segments its sauce under red, barbecue, steak, and Worcestershire categories based on end consumer purchasing decisions.³⁵

Geographic dimension

50. The merging parties distribute their respective products nationally.³⁶ We consider the geographic dimension of the relevant markets to be national as a result.

Functional dimension

51. The merging parties either manufacture domestically or import the various sauces they supply to the retail and food service industries. Heinz’s sauce products are

³⁰ Heinz-Wattie Limited and Griffins Foods Limited (*Eta Foods Division*) (Commerce Commission Decision 327, 7 July 1998).

³¹ *Ibid*, at [36].

³² *Ibid*, at [34].

³³ UK Competition Commission *HJ Heinz and HP Foods: A report on the completed acquisition of the HP Foods companies by HJ Heinz Company and HJ Heinz Company Ltd* (24 March 2006) [*HJ Heinz/HP Foods*].

³⁴ *Ibid*, at [4.49] – [4.50]. Note that while the Competition Commission considered that barbecue sauce was in a separate retail market from ketchup and brown sauce, it considered that the boundaries of this market were not well defined.

³⁵ Commerce Commission interview with Foodstuffs South Island (20 December 2017) at [2] and [5]. See also Commerce Commission interview with Progressive (9 February 2017), [].

³⁶ Application at [6.13].

manufactured in New Zealand while Cerebos' sauce products are manufactured in Australia and imported into New Zealand.³⁷ We therefore consider the appropriate functional dimension to be the manufacture/importation and wholesale supply of red, barbecue, steak, and Worcestershire sauces.

Customer dimension

52. We have distinguished between retail, food service, and QSR customers when defining the relevant markets for the purposes of assessing the Proposed Transaction.³⁸ We may distinguish markets by customer groups where suppliers have an ability to discriminate between certain groups because their competitive alternatives vary. This may arise where, for example, requirements for certain customers differ significantly from others.³⁹
53. The food service industry typically requires either very large (ranging from portions of three to 1,000 kg portions) or very small packaged goods (single-serve portion controlled units). This differs significantly from packaging typically supplied to the retail industry. We consider there would be a limited ability for food service customers to switch to sauce products packaged for retail customers or vice versa.
54. We also consider that a further distinction should be made between food service and QSR customers. While both food service and QSR customers require either very large or very small packaged sauce goods, QSR customers typically require bespoke production as there is an emphasis on supplying sauce under their own brands.⁴⁰ Volume and scale were emphasised as being important characteristics for those supplying QSR customers.⁴¹ Given the volume and scale required to service QSR customers, we consider that their competitive alternatives are likely to differ to that of food service customers.

With and without scenarios

55. To assess whether a merger is likely to substantially lessen competition in a market, we compare the likely state of competition if the merger proceeds (the scenario with the merger, often referred to as the factual), with the likely state of competition if the merger does not proceed (the scenario without the merger, often referred to as the counterfactual).⁴²

With the merger

56. With the Proposed Transaction, Heinz would acquire Cerebos' New Zealand food and instant coffee business. The Proposed Transaction is part of a larger transaction that includes Cerebos' businesses in Australia and Singapore, including its Seven Hills plant in Australia at which most of the Gregg's products sold in New Zealand are manufactured.

³⁷ Application at [3.2]. We note, however, the exception at [23].

³⁸ This is also consistent with the approach the UK Competition Commission took in *HJ Heinz/HP Foods* – see *HJ Heinz/HP Foods*, above n 33, at [4.5] – [4.9].

³⁹ *Mergers and Acquisitions Guidelines* above n 2 at [3.40].

⁴⁰ []

⁴¹ *Ibid*, at [6].

⁴² *Mergers and Acquisitions Guidelines* above n2 at [2.29].

57. The Proposed Transaction would result in an overlap between the two largest suppliers of red, barbecue, steak, and Worcestershire sauce products in New Zealand.

Without the merger

58. Cerebos submitted that the Proposed Transaction is the result of a competitive tender process where Heinz was the successful bidder. Absent the Proposed Transaction, Cerebos considers [].
⁴³ Therefore, [], Cerebos considers the appropriate without-the-merger scenario is the equivalent of the status quo.
59. Cerebos provided us with details of those parties which expressed interest in and/or bid for Cerebos' food and instant coffee business.⁴⁴ On the basis of that information, we agree that the likely state of competition without the merger is best reflected by the status quo.

How the merger could substantially lessen competition

60. We consider that the Proposed Transaction could substantially lessen competition due to unilateral effects. Unilateral effects refer to the ability of the merged entity itself to raise prices or reduce quality due to the merger removing a competitor that would otherwise have acted as a competitive constraint in the market.
61. We consider the Proposed Transaction is likely to substantially lessen competition in the national markets for the manufacture/importation and supply of red, barbecue, steak, and Worcestershire sauces to supermarkets by providing the merged entity with the ability and incentive to raise prices and/or lower service quality, for the following reasons:
- 61.1 the Proposed Transaction would remove the merged entity's closest competitor, resulting in one very large manufacturer and supplier of these sauces with the other competitors being significantly smaller;
 - 61.2 potential new entry into the markets for the manufacture and supply of these sauces is likely to be inhibited by high barriers to expansion and entry (particularly the need for strong branding); and
 - 61.3 the likelihood that supermarkets will pass on any price increases rather than exercise any countervailing buyer power that they may have.

Competition analysis

62. We have considered whether, post-merger, there would be sufficient constraint imposed on the merged entity by other suppliers of red, barbecue, steak, and Worcestershire sauces to supermarkets, the food service industry, and QSRs.

⁴³ Application at [7.2].

⁴⁴ For completeness, those parties (other than Heinz) which expressed an interest and/or submitted a non-binding indicative bid were [].

63. We have also assessed whether expansion by rivals or potential entry into these markets would be likely to be sufficient in extent and in timeliness to constrain the merged entity and prevent any substantial lessening of competition. Further, we have considered whether customers of the merging parties would have any countervailing power which they could exercise in order to thwart a substantial lessening of competition.
64. We are of the view that:
- 64.1 because of the limited overlap and the presence of other strong competitors in the markets for the manufacture/importation and wholesale supply of the relevant sauces to food service customers, the Proposed Transaction is unlikely to result in a substantial lessening of competition in these markets;
 - 64.2 as the Proposed Transaction is unlikely to result in any material change in the markets for the manufacture/importation and wholesale supply of the relevant sauces to QSRs, the acquisition is unlikely to result in a substantial lessening of competition in these markets; and
 - 64.3 as the merged entity would not face sufficient constraint from existing competitors, expansion, potential entry, or the countervailing power of buyers in the markets for the manufacture/importation and wholesale supply of the relevant sauces to supermarkets, the Proposed Transaction is likely to result in a substantial lessening of competition in these markets.

Extent of existing competition between the merging parties

Competition in the food service customer market

65. We considered the extent of existing competition between the merging parties for the supply of the relevant products to food service customers such as Bidfood, Gilmours and Trents.
66. Heinz is one of the major suppliers to the food service customer market⁴⁵ with red, barbecue, and Worcestershire sauces included in its product offering in these markets. Heinz considers that bulk products make up a high proportion of total sauce products in this market with small quantities of retail-oriented products also sold.
67. Cerebos submitted that its market share for the supply of sauces to the food service customer market (except for Asian sauces) is very small (likely to be around []%).⁴⁶ [].⁴⁷ Therefore, Cerebos suggested that the Proposed Transaction would not result in material aggregation in the food service customer market, especially taking into account the proposed divestments.
68. [], one of the major customers in the food service market,⁴⁸ also considered that Cerebos does not seem to be very active in this market as a supplier of sauce products

⁴⁵ For example, Application at [8.40].

⁴⁶ Application at [8.38].

⁴⁷ Commerce Commission interview with Cerebos (20 December 2017).

⁴⁸ The other major customers being [].

with [] accounting for the major overlap.⁴⁹ [] advised us that of its suppliers, the merging parties are “quite significant” and feature prominently in the supply of red, barbecue and Worcestershire sauces.⁵⁰ However, [] also noted the presence of a number of other players (including Groenz and MasterFoods). In addition, [] has sauces toll manufactured on its behalf by firms independent of the merging parties.⁵¹

69. Based on market enquiries, we consider that the combined entity would continue to be constrained by other suppliers of sauce products to food service customers, particularly Groenz (under its Kiwi Style and French Maid brands as well as its private label),⁵² and other suppliers.⁵³

70. On the basis that:

70.1 the overlap resulting from the Proposed Transaction is likely to be small; and

70.2 a number of existing competitors will remain in the market following the Proposed Transaction,

we consider that the Proposed Transaction is unlikely to result in a substantial lessening of competition in the manufacture/importation and wholesale supply of the relevant sauces to food service customers.

Competition effects in the QSR market

71. On the basis of market enquiries, we have identified three major participants in the supply of sauces to QSRs: Heinz, Kerry Ingredients, and Groenz.⁵⁴ Cerebos does not currently sell sauces to QSRs⁵⁵ and has

[]⁵⁶

[]. Therefore, we do not consider that the Proposed Transaction is likely to result in any material change in respect of the relevant sauces supplied to QSRs and that competition will continue to be provided by the other major suppliers (eg, Kerry Ingredients and Groenz).

⁴⁹ []

⁵⁰ []

⁵¹ []

⁵² []

⁵³ These include MasterFoods, Delmaine and the firms that toll manufacture on behalf of [].

⁵⁴ []

⁵⁵ Email from Cerebos (6 January 2018).

⁵⁶ []

72. Therefore, we conclude that the acquisition is unlikely to result in a substantial lessening of competition in the manufacture/importation and wholesale supply of the relevant sauces to QSRs.

Competition between the merging parties in the supermarket market

73. We have considered market shares as an initial indicator of the competition between the suppliers of each of red, barbecue, steak, and Worcestershire sauces to supermarkets in New Zealand.
74. Heinz submitted that absent the Divestment Undertaking, the Proposed Transaction would result in the aggregation of the number one and number two suppliers of red, barbecue, steak, and Worcestershire sauces resulting in the combined market shares ranging from approximately []% for barbecue sauce, to []% in steak sauce.⁵⁷ However, it added that the proposed divestment of the Gregg's brand of tomato sauce, barbecue sauce and steak sauce and the Whitlock's brand of Worcestershire sauce would remove almost all of the aggregation that would otherwise occur in the red, barbecue, steak, and Worcestershire sauce markets and therefore remedying any substantial lessening of competition.⁵⁸
75. The evidence from the two major supermarket chains (Foodstuffs and Progressive), confirmed that the merging parties generally rank as the two leading suppliers of these products.⁵⁹ For example, [] advised that Heinz is the market leader in the supply of red sauces with Cerebos the second largest supplier in this category. The next largest supplier to [] supermarkets is Delmaine, but it is well behind the merging parties in each of the affected markets. [] confirmed these views.⁶⁰

Private labels

76. In considering the aggregation of market share resulting from this acquisition, we have also taken into account that, apart from supplying their own branded product, the merging parties toll manufacture most of the private label sauces for the two supermarket chains. For the purpose of estimating market shares, we aggregate the market shares of the toll manufacturer with its own branded product. This is because the toll manufacturer is able to set the wholesale price of the product it supplies to its customer.
77. []

]

⁵⁷ Application at [8.7]. These market share estimates are based on the revenue that the combined entity would earn from the sale of its own label sauce products.

⁵⁸ Ibid at [8.8].

⁵⁹ Commerce Commission interviews with Foodstuffs South Island (20 December 2017), Foodstuffs North Island (20 December 2017) and Progressive (9 February 2018).

⁶⁰ []

Estimated market shares

78. Attachment A sets out tables showing the estimated supermarket market shares by revenue for the 12 months ending 25 June 2017 for the red, barbecue, steak, and Worcestershire sauce markets, both pre- and post-divestment.⁶¹
79. As shown in these tables, for red sauces, Heinz would increase its market share to around []% by value and []% by volume, for barbecue sauce, to around []% by value and []% by volume, for steak sauce to almost []% by value and volume, and for Worcestershire sauce to around []% by value and []% by volume.
80. The next largest share would be held by Delmaine, but its market shares would remain small (at around []% by value for each of Worcestershire and barbecue sauces, and around []% by value for red sauce).
81. In summary, the Proposed Transaction would combine the market shares of the two closest competitors in the affected markets with the combined entity's estimated market shares ranging by value from around []% for barbecue sauce to nearly []% for steak sauce. The remaining suppliers, of which Delmaine would be the largest, would account for only very small shares.

Expansion and potential entry

82. In assessing whether the Proposed Transaction would be likely to have the effect of substantially lessening competition, we also assess whether, if prices increase and/or quality decreases, existing competitors would expand their sales, and/or new competitors would enter and effectively compete with the merged entity.
83. The Applicant submitted that barriers to entry and expansion in respect of sauces are relatively low. It set out the requirements as:
- 83.1 product development;
 - 83.2 sourcing ingredients;
 - 83.3 testing products;
 - 83.4 branding and packaging;
 - 83.5 arranging manufacture or importation; and
 - 83.6 arranging supply to supermarkets.⁶²
84. While most of these requirements can be readily met, it appears that some requirements such as branding represent a major barrier to entry.
85. The Applicant submitted that brand strength can be leveraged from other products and/or activities. It gave the example of New Zealand chef Simon Gault introducing his

⁶¹ These market share estimates aggregate the shares of the merging parties' own branded sauces with those of the private labels they toll manufacture.

⁶² Application at [8.56].

eponymous tomato ketchup sauce in 2017.⁶³ The Applicant advised that during a four week promotion to 5 November 2017 by New World, the sauce rose from []% market share to []% despite being at a significantly higher price point than the average tomato sauce price and with distribution at that time limited. However, we note that the market share increase occurred while on promotion and that []% is still a relatively small market share.

86. Delmaine, a well-known New Zealand food brand, supplies several sauces to New Zealand supermarkets. In the last five to six years it began manufacturing and supplying Tuimato sauce under licence, using one of New Zealand's iconic beer brands, Tui.⁶⁴ To date, Tuimato sauce has only achieved a supermarket share of around []% by volume. Delmaine's own brand has achieved only []% by volume.
87. [] advised that brand is paramount and that "Wattie's is an incredibly powerful brand, with New Zealanders brought up on Wattie's tomato sauce and baked beans".⁶⁵ Further, [] noted Delmaine's attempts to grow market share over a long period of time. It added that consumers tend to look for specific brands, and that it considers establishing a brand is "incredibly hard".⁶⁶ [] view was very similar, noting that it is difficult to compete with the Wattie's brand which had been strong historically and had always been "loved by" New Zealanders.⁶⁷
88. In our view, the Delmaine example of seeking to leverage an already established brand demonstrates that brand and brand recognition are both significant barriers to entry and expansion into the supply of the relevant sauces to supermarkets.
89. Further, we consider that to successfully launch a new brand would require firms making a large investment in sunk costs for advertising and promotion, with no guarantee of a successful outcome.
90. We conclude that expansion by existing competitors and/or potential entry by a new competitor in response to the merged entity exercising market power is unlikely to constrain the merged entity in the relevant sauce markets.

Countervailing power

91. A merged entity's ability to increase prices profitably may be constrained by the ability of certain customers to exert substantial influence on negotiations.⁶⁸ Countervailing power is more than a customer's ability to switch from buying products from the merged entity to buying products from a competitor. Countervailing power exists when a customer possesses a special ability to substantially influence the price the merged entity charges (eg, an ability to switch to self-supply or sponsor new entry).⁶⁹

⁶³ Application at [8.52].

⁶⁴ Commerce Commission interview with Delmaine (1 February 2018).

⁶⁵ []

⁶⁶ []

⁶⁷ []

⁶⁸ *Mergers and Acquisitions Guidelines* above n2 at [3.113].

⁶⁹ For examples of the types of characteristics that may give rise to countervailing power see *Mergers and Acquisitions Guidelines* above n2 at [3.115].

92. Heinz submitted that its major customers in retail markets are the two supermarket retailers, Foodstuffs and Progressive. Further, Heinz argued that the Commission has previously accepted that supermarkets have strong bargaining power vis-a-vis their suppliers with an ability to control factors such as shelf space, promotional activity, and private label products.⁷⁰ However, this does not necessarily mean that supermarkets would have bargaining power post-merger.
93. We put this to []. [] considered that, if faced by a price increase in respect of tomato, barbecue, steak, and/or Worcestershire sauce, there is “not a great deal” that it could do.⁷¹ [] would not punish Heinz in another category where it faces more competition such as canned fruit, for example, [] advised that it would have to pass any price increase on to consumers.
94. [] said each category was independent and that it would be unusual to punish a supplier in one category for its conduct in a separate category.⁷² However, it would also “need to be mindful we are not impacting on consumers”. We also note that such conduct would likely result in supermarkets disadvantaging themselves as they would be offering their customers a less attractive range of products in other categories.
95. In the absence of any other strong brands, [] would look to promote its own private label as a first step. However, it said that this would be challenging given [].
96. [] confirmed these views, advising that there was very little that it could do to counteract a price increase if the merging parties were under common ownership.⁷³
97. In conclusion, we do not consider that supermarkets would be likely to have the incentive to take the actions described by the Applicant in response to the merged entity increasing prices. Rather, as the supermarkets told us, we think it more likely that they would simply pass any price increases through to consumers.

Conclusion on unilateral effects

98. On the basis of:
- 98.1 the loss of competition between the merging parties;
 - 98.2 the lack of sufficient competitive constraint from existing competitors,
 - 98.3 high barriers to entry and expansion; and
 - 98.4 the lack of countervailing power from purchasers,

⁷⁰ Application at [8.57].

⁷¹ [].

⁷² [].

⁷³ [].

we conclude the Proposed Transaction would be likely to result in a substantial lessening of competition in the markets for the manufacture/importation of the relevant sauces to supermarkets.

The Divestment Undertaking

99. In order to remedy the substantial lessening of competition that are likely to arise in the relevant sauce markets, Heinz has provided the Commission with the Divestment Undertaking under section 69A of the Act.
100. Heinz proposes to divest the:
- 100.1 recipes for the relevant Gregg's products supplied in New Zealand;
 - 100.2 right to use the Gregg's brand insofar as it relates to tomato sauce, barbecue sauce, and steak sauce in New Zealand;
 - 100.3 recipes for Whitlock's Worcestershire sauce products supplied in New Zealand;
 - 100.4 right to use the Whitlock's brand insofar as it relates to Worcestershire sauce in New Zealand;
 - 100.5 assignment of all existing co-packing contracts in relation to the Divestment Products (as defined in the Licensing Agreements); and
 - 100.6 assignment of customer contracts in relation to the Divestment Products that are capable of assignment (if any).
101. These rights are contained in two licensing agreements - one for each of the Gregg's and Whitlock's intellectual property (IP) – known as the "Trade Mark and Intellectual Property Licence" (Licensing Agreements). Heinz does not intend to divest any manufacturing assets. On this basis, our analysis has focused on the:
- 101.1 terms and conditions of the Licensing Agreements; and
 - 101.2 terms, conditions, and sufficiency of the Divestment Undertaking as a whole.

Our approach to considering the Divestment Undertaking

102. In considering whether the Divestment Undertaking will be sufficient to restore competition to the relevant markets, we have had regard to the guidance contained in our own guidelines⁷⁴ as well as international best practice as set out in the International Competition Network Merger Remedies Guide 2016.⁷⁵ In addition, we have had regard to the practices of other jurisdictions.^{76 77 78}
103. Where we consider that a merger is likely to substantially lessen competition in the relevant market(s), we consider whether the proposed divestment undertaking will

⁷⁴ *Mergers and Acquisitions Guidelines* above n2 at Attachment F.

⁷⁵ <http://www.internationalcompetitionnetwork.org/uploads/library/doc1082.pdf>.

⁷⁶ EC Remedies notice, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF>.

⁷⁷ Richard Feinstein, *Negotiating Merger Remedies: Statement of the Bureau of Competition of the Federal Trade Commission* (January 2012).

⁷⁸ *The FTC's Merger Remedies 2006-2012, A Report of the Bureaus of Competition and Economics*, January 2017.

remedy the likely substantial lessening(s) of competition. For a divestment undertaking to remedy competition concerns, we must be satisfied that the divestment will result in sufficient additional competitive constraint on the merged firm so that a substantial lessening of competition is no longer likely.

104. In making this assessment, we consider all the relevant risks associated with divestment proposals. These risks arise because a divestment undertaking's impact will be felt in the future. Therefore, there will always be some uncertainty about an undertaking's likely impact on the relevant market. It follows that there will also be some uncertainty whether a divestment will actually remedy the competition concerns raised by the merger.
105. In order to assess these divestment risks, we compare the situations with and without the divestment undertaking. We assess whether the divestment would, of itself, or in combination with other market conditions, likely remedy the competition concerns that have been identified.
106. We assess three kinds of risks associated with divestment undertakings.
- 106.1 **Asset risk** – the risk that the competitive effectiveness of a divestment package will deteriorate prior to completion of the divestment.
- 106.2 **Composition risk** – the risk that the scope of a divestment undertaking may be too constrained, or not appropriately configured, to attract a suitable purchaser.
- 106.3 **Purchaser risk** – the risk that there may not be a purchaser acceptable to the Commission available and/or the risk that the applicant has an incentive to sell to a weak competitor.

Asset risk

107. The Divestment Undertaking provides that the divestment is to occur within [] of the completion of the Proposed Transaction (the Divestment Period). This is in line with the Commission's typical timeframe for divestment.
108. In respect of the hold-separate provisions of the undertaking, Heinz proposes to appoint an independent Divestment Manager (to be approved by the Commission) who will:
- 108.1 oversee the day-to-day management of the business to be divested;
- 108.2 appropriately ring-fence Cerebos staff that are remaining with the business to be divested for the Divestment Period;
- 108.3 ensure that there is no transfer of commercially sensitive information between Heinz and the business to be divested, and vice versa; and
- 108.4 report monthly to the Commission on the progress of the business to be divested and the progress of the divestment.
109. We are satisfied that the provisions of the Divestment Undertaking adequately address any asset risk posed by the proposed divestment.

Composition risk

110. In most jurisdictions there is a strong preference for the outright divestment of intellectual property rather than the licensing of such assets. This is because, with a licence, there is an increased risk that the licence will be a vehicle that facilitates interference with the divested business by the licensor, potentially resulting in anticompetitive behaviour.
111. In this instance, because Heinz wishes to retain certain Gregg's and Whitlock's branded products, and these products are in markets where competition issues are unlikely to arise, total divestment of the intellectual property in the brands is not necessary for the reasons explained in paragraphs 113-120. As such, Heinz is proposing to license the relevant intellectual property relating to the relevant sauces.
112. In our assessment of the composition risks we have specifically considered the sufficiency of:
- 112.1 the range of sauces being divested; and
- 112.2 the terms and conditions of the draft licence.

Range of sauces

113. Heinz proposes to divest the range of Gregg's tomato, barbecue, and steak sauces together with the Whitlock's brand of Worcestershire sauce. The Gregg's range encompasses a number of SKUs whereas there are only three SKUs of Whitlock's sauce included.
114. We have considered whether Heinz should also divest two further products that it intends to retain, specifically, Whitlock's Tomato Chutney Sauce and Whitlock's Smoky Barbecue Sauce. We have considered whether:
- 114.1 the divestment of these products is required to restore competition in the relevant markets; and
- 114.2 a third party owner would require more than one product of the Whitlock's brand in order to make the sales and marketing of the product viable.
115. We asked Heinz to explain why Whitlock's red and brown sauces are not part of the Divestment Undertaking. Heinz responded that in its view, the addition of Whitlock's red and brown sauce to Heinz's current red and brown sauce portfolio does not give rise to any competition concerns. In respect of red sauces Heinz stated the following.⁷⁹
- 115.1 The Whitlock's brand accounts for just []% of the red sauces market by revenue and []% by volume, so the level of aggregation is minor. While Heinz would have a post-merger market share of []% by revenue and []% by volume, this represents only a slight increase over Heinz's current market share.
- 115.2 Further Heinz said it will continue to be constrained by other suppliers including Delmaine ([]% by revenue and []% by volume) and the purchaser of the

⁷⁹ Email from Heinz to the Commerce Commission (7 February 2018).

Gregg's brand (Gregg's currently has a market share of []% by revenue and []% by volume).

115.3 Heinz also pointed out that there is product differentiation, as Whitlock's two red sauce products are tomato chutney sauces while Heinz's are tomato sauce and ketchup (more mainstream).

116. Heinz made similar comments in respect of Whitlock's barbecue sauce.⁸⁰

116.1 In the barbecue sauce market, Heinz said that the Gregg's brand is currently the number one brand by a significant margin, with a market share of []% by revenue and []% by volume. The purchaser of the Gregg's brand would continue to pose a significant competitive constraint on Heinz post-merger, as would a number of smaller suppliers, including Delmaine ([]% by revenue and []% by volume), MasterFoods ([]% by revenue and []% by volume), Rufus Teague ([]% by revenue and []% by volume) and Barker's of Geraldine ([]% by revenue and []% by volume).

116.2 Further, Heinz said that the sole Whitlock's barbecue sauce product (Smoky Barbecue Sauce) accounts for []% of the barbecue sauce market by revenue and []% by volume. Even with the addition of Whitlock's Smoky Barbecue sauce, Heinz would remain the number two supplier, with a market share of []% by revenue and []% by volume.

116.3 [

].

117. Industry participants agreed with Heinz's views and also advised us that the Whitlock's Tomato Chutney Sauce and Whitlock's Smoky Barbecue sauces do not closely compete with the merging parties' tomato and barbecue sauce products.⁸¹[] referred to these products as "spiced up products" that do not really compete with ketchup. [] reiterated this view, noting that Whitlock's tomato chutney sauce is "quite a unique SKU" and a "unique flavour profile."⁸²

118. In respect of Whitlock's Worcestershire sauce,
[

].

119. []⁸³

⁸⁰ Ibid.

⁸¹ See for example, []⁸¹.

⁸² []⁸².

⁸³ Email from []⁸³.

120. For the reasons expressed by Heinz and confirmed by industry participants, we consider that the divestment of the further two Whitlock's sauces is not necessary to restore competition in the markets for the manufacture/importation and wholesale supply of the relevant sauce products to supermarkets.

Food service and QSR markets

121. In assessing the composition risk, we have also considered whether the Divestment Undertaking should extend to the supply of the relevant sauces to each of the food service and QSR markets.
122. As concluded above, the Proposed Transaction is unlikely to result in a substantial lessening of competition for the supply of the relevant sauces to the food service market. However, as part of the Divestment Undertaking, Heinz has offered to license the supply of the relevant sauces to the food service market to ensure that there is the necessary scale for a licensee to be competitive. In our view, this proposed divestment combined with the divestment of the relevant sauces for supply to supermarket customers, is likely to be sufficient to satisfy the scale aspect of the composition risk. [].
123. In regard to QSRs, we recognise that Heinz could start selling the divested brands into the QSR market. However, for the reasons provided above, we consider that the Proposed Transaction would be unlikely to result in a substantial lessening of competition in the QSR market. In addition, we consider that there is unlikely to be any adverse impact on competition in respect of the relevant sauces in either the supermarket or food service markets. In particular, we consider that the scale aspect of the composition risk is addressed adequately (see paragraph 122), and there is likely to be limited incentive for Heinz to damage the brand.

Licensing Agreements

124. As noted above, the divestment package does not include any manufacturing assets. Instead it is licensing the IP rights to the relevant recipes, brands, trade marks, etc.
125. In our consideration of the terms of the licence, we have been alert to the potential for the merged entity to interfere with or adversely affect the divested business.
126. Our assessment of the terms of the Licensing Agreements is set out below.
- 126.1 []
- 126.2 []
- 126.3 []

126.4 As such, we consider the termination clauses are unlikely to affect the adequacy of the remedy.

126.5 [

].

126.6 [

].

126.7 [

].

126.8 [

].

126.9 [

].

127. In our view, there are no mechanisms contained in the licence that would allow the merged entity to interfere with or adversely affect the divested assets/business.
128. In addition, during negotiations with Heinz over the Licensing Agreements, Heinz inserted a clause which allows any potential licensee to amend (with the Commission's approval) those terms and conditions that they consider unworkable.
129. Although there will always be some risk with divestments – and in particular with intellectual property divestments – we are satisfied that it is unlikely that the terms of the Licensing Agreements would enable the merged entity to act in an anticompetitive manner with respect to the divested business.
130. As noted above, the Divestment Undertaking does not include any manufacturing assets. Typically, it is desirable for a divestment to include a full suite of assets such that the divested business can replicate the premerger business as closely as possible. A viable alternative to the manufacturing assets may be a purchaser who either has its own sauce manufacturing plant, or is able to secure toll manufacturing services from a third party.

- 131. We consider that the terms of the licence do not present any significant degree of composition risk.
- 132. Of course, any subsequent manufacturing would need to be as efficient as the pre-merger business in order to compete effectively with the merged entity. We discuss this requirement in the purchaser risk section below.

Purchaser risk

133. Typically, we consider the main purchaser risks to be that:

133.1 a purchaser acceptable to us may not be available; and/or

133.2 the Applicant has an incentive to sell to a weak competitor for a low price rather than to a strong competitor.

134. In some cases there may be little or no interest from potential purchasers. This might indicate that the assets are unattractive to potential purchasers which may cast doubt on the effectiveness of the undertaking.

135. A buyer acceptable to us needs to have certain attributes that enable it to be an effective competitor in the relevant market. Examples of attributes that may make a buyer acceptable are set out below:

135.1 It is independent of the merged entity

135.2 It possesses or has access to the necessary expertise, experience and resources to be an effective long term competitor in the market

135.3 The acquisition of the divested shares or assets by the proposed buyer does not raise competition concerns.

136. We spoke with a party interested in the divestment package,
[]⁸⁴
[].

137. []⁸⁵

138. []⁸⁶

139. []⁸⁷

⁸⁴ []
⁸⁵ Ibid.
⁸⁶ Ibid.
⁸⁷ Ibid.

140. []⁸⁸
[]
].

141. []⁸⁹
[]

142. As with any divestment proposal where there is no upfront purchaser, we consider that the Divestment Undertaking offered by Heinz carries some level of purchaser risk. However, the Commission must approve the acquirer of the divestment business within the [] divestment period.

143. To this extent, the level of purchaser risk is not sufficient to outweigh our conclusion that the Divestment Undertaking is likely to remedy any competition concerns in the national markets for the manufacture/importation and wholesale supply of each of red, barbecue, steak, and Worcestershire sauces to supermarkets.

Conclusion on the Divestment Undertaking

144. We consider that the Divestment Undertaking does not present a significant level of asset or composition risk. In our view there are sufficient safeguards in place to ensure that the assets will not deteriorate prior to divestment and that the makeup of the divestiture business is such that the purchaser will be able to offer meaningful competition to the merged entity.

145. Further, we consider that the Divestment Undertaking presents a low level of purchaser risk. While there is no upfront buyer, we have identified a potential purchaser or toll manufacturer of the divested products that is likely to be suitably independent and experienced in order to restore competition to the relevant markets. In addition, in the event that this party does not acquire the divested assets, we reserve the right to approve any other acquirer.

Overall conclusion

146. We are satisfied that the Proposed Transaction with the Divestment Undertaking, will not have, or would not be likely to have, the effect of substantially lessening competition in any of the relevant markets.

⁸⁸ Ibid

⁸⁹ []

Determination on notice of clearance

147. Pursuant to section 66(3)(a) of the Commerce Act 1986, the Commerce Commission determines to give clearance to H.J. Heinz Company (New Zealand) Limited to acquire Cerebos Pacific Limited's New Zealand food and instant coffee business, by acquiring 100% of the shares in Cerebos' subsidiary Cerebos Gregg's Limited subject to the Divestment Undertaking dated 7 March 2018 provided by Heinz under section 69A of the Commerce Act 1986.

Dated this 8th day of March 2018

Dr Mark Berry
Chairman

Attachment A: Estimated market shares

Table 1: Estimated market shares for red sauces in the supermarket customer market

Supplier	Estimated revenue (\$000) – pre merger	Estimated market shares (% by revenue) – pre merger	Estimated volume (tonnes) – pre merger	Estimated market shares (% by volume) – pre merger	Estimated market shares (% by revenue) – post divestment	Estimated market shares (% by volume) – post divestment
Heinz (<i>Wattie's, Heinz, Oak</i> [])	[]†	[]	[]†	[]	[]†	[]†
Cerebos (<i>Gregg's</i>)	[]	[]	[]	[]	-	-
Cerebos (<i>F. Whitlock & Sons</i>)	[]	[]	[]	[]	[]	[]
Combined entity	[]	[]	[]	[]	[]	[]
Purchaser of the <i>Gregg's</i> brand	-	-	-	-	[]	[]
Delmaine (<i>Tuimato & Delmaine</i>)	[]	[]	[]	[]	[]	[]
MasterFoods (<i>MasterFoods</i>)	[]	[]	[]	[]	[]	[]
Foodstuffs private labels	[]*	[]	[]*	[]	[]*	[]
Progressive private labels	[]**	[]	[]**	[]	[]**	[]
Other manufacturers (including but not limited to <i>Barker's of Geraldine & All Gold</i>)	[]	[]	[]	[]	[]	[]
Total	[]	100.0	[]	100.0	100.0	100.0

Source: Application and information from the merging parties.

†: Our estimate of Heinz's supply with the addition of private label production

*: Our estimate of Foodstuffs' private label []

** : Our estimate of Progressive's private label []

Table 2: Estimated market shares for barbecue sauces in the supermarket customer market

Supplier	Estimated revenue (\$000) – pre merger	Estimated market shares (% by revenue) – pre merger	Estimated volume (tonnes) – pre merger	Estimated market shares (% by volume) – pre merger	Estimated market shares (% by revenue) – post divestment	Estimated market shares (% by volume) – post divestment
Heinz (<i>Wattie's & Heinz</i>)	[]	[]	[]	[]	[]*	[]*
Cerebos (<i>Gregg's []</i>)	[]†	[]	[]	[]	-	-
Cerebos (<i>F. Whitlock & Sons</i>)	[]	[]	[]	[]	[]	[]
Combined entity	[]	[]	[]	[]	[]	[]
Purchaser of the <i>Gregg's</i> brand*	-	-	-	-	[]	[]
Delmaine (<i>Tuimato, Delmaine & Boss</i>)	[]	[]	[]	[]	[]	[]
MasterFoods (<i>MasterFoods</i>)	[]	[]	[]	[]	[]	[]
Other manufacturers (including but not limited to <i>Barker's, Rufus Teague & Jack Daniel's</i>)	[]	[]	[]	[]	[]	[]
Progressive private labels	[]	[]	[]	[]	[]	[]
Total	[]	100.0	[]	100.0	100.0	100.0

Source: Application and information from the merging parties.

†: Our estimate of Cerebos' supply []

*: Our estimate of Heinz's supply []

Table 3: Estimated market shares for steak sauce in the supermarket customer market

Supplier	Estimated revenue (\$000) – pre merger	Estimated market shares (% by revenue) – pre merger	Estimated volume (tonnes) – pre merger	Estimated market shares (% by volume) – pre merger	Estimated market shares (% by revenue) – post divestment	Estimated market shares (% by volume) – post divestment
Heinz <i>(HP, Wattie's)</i>	[]	[]	[]	[]	[]	[]
Cerebos <i>(Gregg's)</i>	[]	[]	[]	[]	-	-
Combined entity	[]	[]	[]	[]	[]	[]
Purchaser of the <i>Gregg's</i> brand	-	-	-	-	[]	[]
A1	[]	[]	[]		[]	[]
Total	[]	100	[]		100	100

Source: Application

Table 4: Estimated market shares for Worcestershire sauce in the supermarket customer market

Supplier	Estimated revenue (\$000) – pre merger	Estimated market shares (% by revenue) – pre merger	Estimated volume (tonnes) – pre merger	Estimated market shares (% by volume) – pre merger	Estimated market shares (% by revenue) – post divestment	Estimated market shares (% by volume) – post divestment
Heinz <i>(Lea & Perrins)</i>	[]	[]	[]	[]	[]	[]
Cerebos <i>(F. Whitlock & Sons)</i>	[]	[]	[]	[]	-	-
Combined entity	[]	[]	[]	[]	[]	[]
Purchaser of the <i>F. Whitlock & Sons</i> brand	-	-	-	-	[]	[]
Delmaine <i>(Boss)</i>	[]	[]	[]	[]	[]	[]
Foodstuffs private labels	[]	[]	[]	[]	[]	[]
Progressive private labels	[]	[]	[]	[]	[]	[]
Other manufacturers <i>(including but not limited Cannonhill Gourmet)</i>	[]	[]	[]	[]	[]	[]
Total	[]	100.0	[]	100.0	100.0	100.0

Source: Application

Attachment B - Divestment undertaking

H.J. HEINZ COMPANY (NEW ZEALAND) LIMITED DIVESTMENT UNDERTAKING

DEED dated 7 March 2018

GIVEN BY H.J. Heinz Company (New Zealand) Limited (HNZ)

IN FAVOUR OF New Zealand Commerce Commission (NZCC)

1. Divestment undertaking

1.1 HNZ undertakes to the NZCC that, if the Proposed Transaction completes, HNZ will carry out the Divestment within the Divestment Period (**Undertaking**).

1.2 HNZ acknowledges that the Undertaking:

- (a) forms part of any clearance given by the NZCC for the Proposed Transaction under section 66(3)(a) of the Commerce Act 1986; and
- (b) imposes legal obligations on HNZ under the Commerce Act 1986.

2. Commencement and term

2.1 The Undertaking comes into effect when it is signed by HNZ and accepted by the NZCC under section 69A of the Commerce Act 1986.

2.2 Other than clause 8, which imposes contingent obligations on HNZ, the Undertaking expires on completion of the Divestment.

3. Definitions

In this Undertaking:

- (a) **Approved Purchaser** means a third party that is approved by the NZCC pursuant to clauses 6.1 to 6.3 below;
- (b) **Cerebos** means Cerebos Pacific Limited;
- (c) **CGL** means Cerebos Gregg's Limited;
- (d) **Completion Date** means the date on which HNZ completes the Proposed Transaction;
- (e) **Divestment** means entry into a final binding agreement for the unreserved divestment as a going concern of the Divestment Business to an Approved Purchaser;
- (f) **Divestment Business** means:
 - (i) the recipes for the Gregg's Divestment Products; and
 - (ii) the right to use the Gregg's brand insofar as it relates to the Gregg's Divestment Licensed Goods,

on the terms of a Trade Mark and Intellectual Property Licence in the form set out in Schedule 3 with any amendments requested by the Licensee to be approved by the NZCC;
 - (iii) the recipes for the F. Whitlock & Sons Divestment Products; and

- (iv) the right to use the F. Whitlock & Sons brand insofar as it relates to the F. Whitlock & Sons Licensed Goods,

on the terms of a Trade Mark and Intellectual Property Licence in the form set out in Schedule 4 with any amendments requested by the Licensee to be approved by the NZCC;
- (v) the assignment of all existing co-packing contracts in relation to the Divestment Products; and
- (vi) the assignment of customer contracts in relation to the Divestment Products that are capable of assignment (if any);
- (g) **Divestment Manager** means an independent third party to be agreed with the NZCC;
- (h) **Divestment Period** means [REDACTED] from the Completion Date;
- (i) **Divestment Products** means the F. Whitlock & Sons Divestment Products and the Gregg's Divestment Products;
- (j) **F. Whitlock & Sons Divestment Products** means F. Whitlock & Sons Worcestershire sauce products supplied in New Zealand, as set out in Schedule 2;
- (k) **F. Whitlock & Sons Licensed Goods** means the F. Whitlock & Sons Divestment Products and any other Worcestershire sauce products (in any packaging sizes and formulations) for sale in retail and food service channels;
- (l) **Gregg's Divestment Products** means Gregg's tomato sauce, barbecue sauce and steak sauce products supplied in New Zealand, as set out in Schedule 1;
- (m) **Gregg's Licensed Goods** means the Gregg's Divestment Products and any other tomato sauce, steak sauce and barbecue sauce products (in any packaging sizes and formulations) for sale in retail and food service channels;
- (n) **Proposed Transaction** means the proposed acquisition by HNZ of Cerebos' New Zealand food and instant coffee business, as described in HNZ's notice seeking clearance dated 24 November 2017.

4. **Divestment process**

HNZ will undertake a competitive sales process for the sale of the Divestment Business and will [REDACTED]

5. **Conduct during the Divestment Period**

Preservation obligations

5.1 During the Divestment Period, HNZ will use all reasonable endeavours to:

- (a) preserve the reputation and goodwill of the Divestment Business;
- (b) preserve the economic viability, marketability and competitiveness of the Divestment Business; and
- (c) maintain the Divestment Business's provision of goods and services in a manner consistent with the provision of goods and services as at the date of this Undertaking.

5.2 HNZ will not:

- (a) carry out any act upon its own authority that might have a significant adverse impact on the value, management or competitiveness of the Divestment Business or that might alter the nature and scope of activity, or the industrial or commercial strategy, of the Divestment Business; or
- (b) sell or transfer the Divestment Business, or any assets or substantial part of the Divestment Business, to any person other than an Approved Purchaser.

Hold-separate obligations

5.3 HNZ will appoint a Divestment Manager who will, from the Completion Date until the sale of the Divestment Business to an Approved Purchaser, conduct the Divestment Business:

- (a) as a fully operational, competitive going concern;
- (b) separate from the rest of HNZ's business,

in such a way that preserves the economic viability, marketability, competitiveness and goodwill of the Divestment Business.

5.4 The Divestment Manager will report directly to HNZ's board of directors.

5.5 HNZ will not be involved in the management or operation of the Divestment Business.

5.6 All employees involved with the Divestment Business will report to the Divestment Manager in relation to their Divestment Business activities.

5.7 At the Completion Date CGL and HNZ will operate separate trade pricing and accounting systems which are password protected. HNZ will ensure that this separation and password protection will continue during the Divestment Period.

5.8 No HNZ employee will have access rights to the Divestment Business's systems during the Divestment Period with the exception of HNZ IT staff for normal operational purposes, who will be required to sign a confidentiality undertaking before access rights are granted.

5.9 While HNZ will extract data from the CGL system into its data warehouse for reporting purposes, it will ensure that the data in relation to the Divestment Products is in aggregated format.

5.10 No HNZ employee will have access to emails of employees involved in the Divestment Business.

Ring-fencing obligations

5.11 The Divestment Manager will ensure that systems are in place (and will monitor the effectiveness of those systems during the Divestment Period) to prevent commercially sensitive information regarding the Divestment Business being provided to HNZ other than in accordance with clause 5.13, and for the purposes of HNZ:

- (a) selling the Divestment Business to an Approved Purchaser (but subject to clause 5.14);
- (b) reporting to the NZCC as required by clauses 7.1 and 7.2; and
- (c) complying with its legal and regulatory obligations (including obligations relating to taxation, accounting, financial reporting or stock exchange disclosure requirements).

5.12 HNZ will procure that all members of its staff (including independent contractors) and those of its affiliates who might receive any commercially sensitive information in relation to the Divestment

Business sign a confidentiality undertaking pursuant to which they undertake not to access or use such information except for the purposes set out in clause 5.11 and/or 5.14.

- 5.13 Commercially sensitive information regarding the Divestment Business which is provided to HNZ for the purposes set out in clause 5.11 will be disclosed only to those officers, employees, contractors, agents and advisers of HNZ who need to know the information in order to carry out those purposes, and who have signed a confidentiality undertaking.

Role of the Divestment Manager in the sale process

- 5.14 The Divestment Manager will oversee the team within the Divestment Business involved in the sale process and will be responsible for protecting the confidential information of the Divestment Business during the sale process, including:
- (a) execution of confidentiality agreements with potential interested parties;
 - (b) consideration of commercially sensitive information and where relevant during due diligence, either redacting or withholding the information from potential interested parties;
 - (c) provision of due diligence information, questions and answers and requests for further information
 - (d) limiting access to the data room only to interested parties and their representatives who, in the reasonable opinion of HNZ, have a realistic prospect of becoming the Approved Purchaser in due course;
 - (e) limiting access to the data room to nominated members of HNZ's in-house legal team as approved by the General Counsel of HNZ and HNZ's advisers; and
 - (f) subject to clause 5.12, providing all information that is requested by HNZ for the purpose of facilitating the sale process.

Non-solicitation obligations

- 5.15 HNZ undertakes that, subject to legal limitations, it will not solicit any staff of the Divestment Business during the Divestment Period.

All reasonable endeavours

- 5.16 HNZ will use all reasonable endeavours to assist the Approved Purchaser to procure any consents required to the assignment of the contracts referred to in clauses 3(f)(v) and 3(f)(vi) of the Undertaking.

6. Purchaser approval

- 6.1 HNZ will notify the NZCC at least 20 business days before the end of the Divestment Period of the identity of the proposed purchaser.
- 6.2 HNZ must demonstrate to the NZCC that the Divestment will be carried out in a manner consistent with the Undertaking and that the proposed purchaser:
- (a) is not associated with, or an interconnected body corporate of, HNZ;
 - (b) has the financial resources, expertise and incentive to operate the Divestment Business as a viable competitor; and
 - (c) is not likely to create competition concerns that would result in a contravention of section 47(1) of the Commerce Act 1986.

6.3 HNZ will ensure that relevant final binding agreements effecting the Divestment are conditional on obtaining the NZCC's approval of the proposed purchaser based on the criteria set out in clauses 6.1 and 6.2.

7. Monitoring compliance with the Undertaking

7.1 At the NZCC's request, HNZ will give the NZCC any information and documents reasonably required:

- (a) about the Divestment and HNZ's progress towards carrying out the Divestment; and
- (b) demonstrating that HNZ's conduct during the Divestment Period complies with this Undertaking.

7.2 Without limiting clause 7.1, HNZ will provide to the NZCC:

- (a) the terms of engagement between HNZ and the Divestment Manager at least five business days prior to the commencement of the Divestment Period;
- (b) a copy of all transaction documents relating to the Divestment within five business days prior to their execution;
- (c) a request for any amendment to the terms of a Trademark and Intellectual Property Licence requested by the Licensee within 10 business days prior to execution of the transaction documents; and
- (d) notification of the completion of the Divestment within five business days of its completion.

7.3 Nothing in this Undertaking requires HNZ to provide legally privileged information or documents.

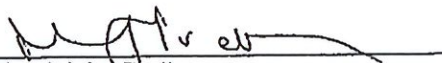
7.4 HNZ will procure that the Divestment Manager provide monthly reports to the Commission detailing the performance of the Divestment Business so the Commission can assess whether the Divestment Business is being held in a manner consistent with this Undertaking.

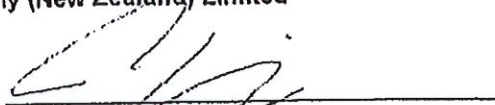
8. Contingent obligations

8.1 If following the Divestment, a Trade Mark and Intellectual Property Licence giving effect to the transfer of assets set out in clause 3(f) terminates, HNZ will follow the processes set out in clauses 4, 5 and 6 of this Undertaking in relation to the assets to which the Licence relates.


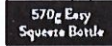
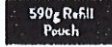

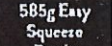
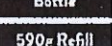

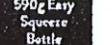

8.2 In this event, Divestment Period means [REDACTED] from the date of termination of the preceding licence.






Executed as a deed on behalf of H.J. Heinz Company (New Zealand) Limited

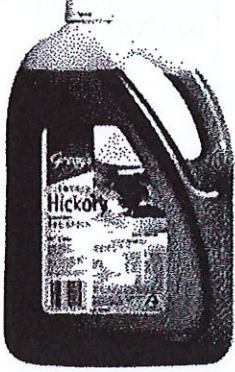



Michael John Pretty

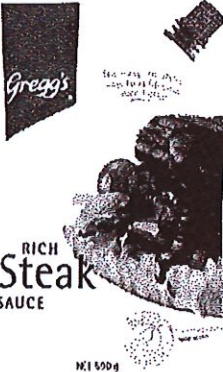


Steven Daniel Briggs

Schedule 1 Gregg's Divestment Products




Product Code	Gregg's sauce SKHs – as at October 2017	Image
210200	GREGGS TOM SCE SQ 8X570G	   <p>Gregg's Rich Red Tomato Sauce Pass the sauce and pour on the flavour. Gregg's Tomato Sauce is a Kiwi classic that is loved by the whole family.</p> <p>Gregg's Rich Red Tomato sauce has no added colours or preservatives and is rich in lycopene. It's perfect as an ingredient in pasta dishes, meatballs, meatloaf and savoury patties.</p> <p>Available in: 570g Easy Squeeze Bottle, 590g Refill Pouch</p>
210201	GREGGS SMKD HKY SCE SQ 8X585G	   <p>Gregg's Smoked Hickory BBQ Sauce Where there's smoke, there's flavour. Gregg's Smoked Hickory BBQ Sauce brings out the best in steak, chops and spare ribs.</p> <p>Gregg's Smoked Hickory BBQ Sauce is sensational with sausages and hamburgers. It also tastes great with wedges, sour cream and bacon and is a must at any BBQ!</p> <p>Available in: 585g Easy Squeeze Bottle, 590g Refill Pouch</p>
210203	GREGGS BBQ SCE SQ 8X590G	   <p>Gregg's Classic BBQ Sauce When there's a sizzle in the air, Gregg's Classic BBQ Sauce is perfect company for sausages, kebabs, steak, chicken and wedges.</p> <p>For something a bit different why not use as an ingredient in marinades, burger patties and casseroles or drizzle over pizza for a barbecue topping.</p> <p>Available in: 590g Easy Squeeze Bottle, 590g Refill Pouch</p>

Product Code	Gregg's sauce SKHs – as at October 2017	Image
210204	GREGGS STEAK SCE SQ 8X590G	 <p data-bbox="951 748 1310 801">Gregg's Steak Sauce Rich 500g Made in Australia from local and Imported Ingredients</p>
210208	GREGGS LSG RRED TOM SCE 540GX6	  <p data-bbox="951 1167 1054 1227">540g Easy Squeeze Bottle</p> <p data-bbox="1102 987 1382 1039">Gregg's 60% Less Sugar* Rich Red Tomato Sauce</p> <p data-bbox="1102 1048 1398 1122">Kiwi's can now enjoy the great taste of Gregg's Rich Red Tomato Sauce with 60% less sugar* & 40% less sodium*.</p> <p data-bbox="1102 1144 1406 1256">Sweetened naturally with Natvia™, it's still a full flavoured sauce, just the thing for squeezing onto a hot barbeque sausage, squirting into a bacon butty or dipping on the side.</p> <p data-bbox="1102 1279 1406 1352">With no added colours or preservatives; it's a better choice for you and your family all round.</p>
210209	GREGGS LSG CLAS BBQ SCE 540GX6	  <p data-bbox="951 1666 1054 1727">540g Easy Squeeze Bottle</p> <p data-bbox="1102 1487 1406 1538">Gregg's 60% Less Sugar* Classic BBQ Sauce</p> <p data-bbox="1102 1547 1398 1644">Nothing beats a sizzling steak and Classic BBQ Sauce, unless that sauce has 60% less sugar* & 40% less sodium*!</p> <p data-bbox="1102 1666 1414 1785">Sweetened naturally with Natvia™, this Gregg's sauce still delivers a great tasting Classic BBQ flavour, perfect for combining with any mighty, meaty meal that you and your family share</p> <p data-bbox="1102 1807 1398 1881">It's also a great addition to marinades, meatballs or burger patties; see our recipes section for inspiration!</p>

Product Code	Gregg's sauce SKHs – as at October 2017	Image
210270	GREGGS SMKD HKY SCE 3X4.6KG (Foodservice)	
Sauces (Pouches)		
1802	GREGGS SMKD HKY SCE PCH 6X590G	 <p data-bbox="933 1198 1348 1243">Gregg's Bbq Sauce Smoked Hickory pouch refill 590g Made in New Zealand</p>
1800	GREGGS TOM SCE POUCH 6x590G	 <p data-bbox="1077 1388 1316 1422">Gregg's Rich Red Tomato Sauce</p> <p data-bbox="1077 1422 1364 1478">Pass the sauce and pour on the flavour. Gregg's Tomato Sauce is a Kiwi classic that is loved by the whole family.</p> <p data-bbox="1077 1489 1364 1579">Gregg's Rich Red Tomato sauce has no added colours or preservatives and is rich in lycopene. Its perfect as an ingredient in pasta dishes, meatballs, meatloaf and toasty parties.</p> <p data-bbox="933 1556 1029 1601">570g Easy Squeeze Bottle</p> <p data-bbox="933 1601 1029 1646">590g Refill Pouch</p> <p data-bbox="1077 1579 1364 1624">Available in: 570g Easy Squeeze Bottle, 590g Refill Pouch</p>

Product Code	Gregg's sauce SKHs – as at October 2017	Image
1801	GREGGS STEAK SCE POUCH 6X590G	 <p data-bbox="922 779 1257 831">Gregg's Steak Sauce pouch refill 590g Made in New Zealand</p>
1803	GREGGS BBQ SCE POUCH 6X590G	 <p data-bbox="1086 1014 1310 1037">Gregg's Classic BBQ Sauce</p> <p data-bbox="1086 1043 1353 1126">When there's a sizzle in the air, Gregg's Classic BBQ Sauce is perfect company for sausages, kebabs, steak, chicken and wedges.</p> <p data-bbox="1086 1144 1361 1227">For something a bit different why not use as an ingredient in marinades, burger patties and casseroles or drizzle over pizza for a barbeque topping.</p> <p data-bbox="962 1171 1042 1227">590g Easy Squeeze Bottle</p> <p data-bbox="962 1238 1042 1283">590g Refill Pouch</p> <p data-bbox="1086 1245 1361 1283">Available in: 590g Easy Squeeze Bottle, 590g Refill Pouch</p>

Schedule 2 F. Whitlock & Sons Divestment Products

Product Code	F Whitlock & Sons Worcester sauce SKU's – as at October 2017	Image
210232	WHLKS WORCESTER SCE 8X400ML	
210281	WHLKS WORCESTER SCE 4.4KGX3 SP (foodservice)	
210290	WHLKS WORCESTER SCE 12X250ML	

Trade Mark and Intellectual Property Licence

Cerebos Gregg's Limited
CGL

[Name]
Licensee