Public Version
ISSN NO. 0114-2720
J6536

COMMERCE COMMISSION

Decision No. 529

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

COLGATE-PALMOLIVE COMPANY, COLGATE-PALMOLVIE PTY LIMITED, AND COLGATE-PALMOLIVE LIMITED

and

CAMPBELL BROTHERS LIMITED, AND CAMPBELL BROTHERS

The Commission: Peter JM Taylor
Denese Bates QC

Summary of Application: The acquisition by Colgate-Palmolive Limited of various laundry related brands and associated items from Campbell Brothers Limited.

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

Date of Determination: 20 July 2004

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EXECUTIVE SUMMARY

The Proposal

1. A notice pursuant to s 66(1) of the Commerce Act 1986 (the Act) was registered on 4 June 2004. The notice sought clearance for the acquisition by Colgate-Palmolive Company, Colgate-Palmolive Pty Limited, and Colgate-Palmolive Limited (together, Colgate) of various brands and associated items owned by Campbell Brothers Limited and Campbell Brothers' wholly owned subsidiary, Bushland Products Pty Limited (together, Campbell Brothers).
2. The various brands and associated items are as follows:
   - the "Fluffy" brand of fabric softener, and tumbler dryer pads;
   - the "Hurricane" and "Castle" brands of laundry detergent and dishwashing detergent; and
   - the "Love 'n' Care" brand of laundry detergent.[1]

Market Definition

3. The Commission concludes that the relevant markets for this acquisition are as follows:
   - The market for the manufacture and wholesale supply of laundry detergent in New Zealand (the laundry detergent market);
   - The market for the manufacture and wholesale supply of dishwashing detergent (excluding automatic) in New Zealand (the dishwashing detergent market); and
   - The market for the manufacture and wholesale supply of fabric softener in New Zealand (the fabric softener market).

Counterfactual

4. The Commission is of the view that the appropriate counterfactual is [ ]

Competition Analysis

Existing Competition

Laundry Detergent Market

5. The Commission considers that existing competition in the laundry detergent market would be likely to constrain the combined entity due to:

[1] Under the agreement, Colgate Palmolive Company (based in the United States) will acquire the trade markets, copyright, brands, trade dress, and brand goodwill associated with each of the brands; and Colgate Palmolive Pty Limed (registered in Australia) will buy the business information, bottle moulds, copyright works, know how, records, business goodwill, plant and equipment, customer lists, and printer plates associated with the brands.
Colgate Palmolive Limited (registered in New Zealand) will acquire the existing stock of the relevant brands. CPA and Campbell Brothers will also enter into manufacturing arrangements regarding the manufacture of the products which the brands will be applied.

- the vigorous nature of the competition as evidenced by the high promotional spend of participants and regular relaunching of laundry products;
- the price sensitivity of the laundry detergent market and the tendency of consumers to switch according to price; and
- the presence of Unilever as a large global player, and its possession of three of the major brands, albeit that brand loyalty is a lesser constraint than price sensitivity.

Dishwashing Detergent Market

6. The Commission considers that existing competition in the dishwashing detergent market would be likely to constrain the combined entity post acquisition due to:
   - the vigorous nature of the competition as evidenced by the high promotional spend of participants;
   - the price sensitivity of the dishwashing detergent market and the tendency of consumers to switch according to price;
   - the effectiveness of house branded product as a competitor;
   - the presence of large trans-national companies like Pental, PZ Cussons and Reckitt Benckiser; and
   - the high degree of supply-side substitutability.

Fabric Softener Market

7. The Commission concludes that the combination of existing competition, potential competition and countervailing power would be likely to constrain the combined entity in the fabric softener market due to the following factors:
   - the low level competition provided by Pams and Unilever, and the [ ];
   - moderate barriers to entry;
   - the identification of [ ] as potential entrants; and
   - the countervailing power of supermarkets, including their ability to sponsor price fighters and expand their existing house brands.

Overall Conclusion

8. Therefore, the Commission is of the view that the proposed acquisition is unlikely to give rise to a substantial lessening of competition in the laundry detergent, dishwashing detergent and fabric softener markets.
9. Accordingly, pursuant to section 66(3)(a) of the Commerce Act 1986, the Commission determines to give clearance of the proposed acquisition by Colgate-Palmolive Company, Colgate-Palmolive Pty Limited, and Colgate-Palmolive Limited of various brands and associated items owned by Campbell Brothers Limited and Campbell Brothers' wholly owned subsidiary, Bushland Products Pty Limited.

THE PROPOSAL

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2. The various brands and associated items are as follows:
   - the "Fluffy" brand of fabric softener, and tumbler dryer pads;
   - the "Hurricane" and "Castle" brands of laundry detergent and dishwashing liquid; and
   - the "Love 'n' Care" brand of laundry detergent.[2]

PROCEDURE

3. Section 66(3) of the Act requires the Commission either to clear or to decline to clear a notice given under s 66(1) within 10 working days, unless the Commission and the person who gave notice agree to a longer period. An extension of time was agreed between the Commission and the Applicant. Accordingly, a decision on the Application was required by 23 July 2003.
4. The Applicant sought confidentiality for specific aspects of the Application. A confidentiality order was made in respect of the information for up to 20 working days from the Commission's determination notice. When that order expires, the provisions of the Official Information Act 1982 will apply.
5. The Commission's approach to analysing this proposed acquisition is based on principles set out in the *Commission Merger and Acquisition Guidelines.*

STATUTORY FRAMEWORK

6. Under s 66 of the Act, the Commission may grant clearances for acquisitions where it is satisfied that the proposed acquisition would not have, or would not be likely to have, the effect of substantially lessening competition in a market. The standard of proof that the Commission must apply in making its determination is the civil standard of the balance of probabilities.

7. The Commission considers that it is necessary to identify a real lessening of competition that is not minimal.[3] Competition must be lessened in a considerable and

[2] Under the agreement, CPC (based in the United States) will acquire the trade markets, copyright, brands, trade dress, and brand goodwill associated with each of the brands; and CPA (registered in Australia) will buy the business information, bottle moulds, copyright works, know how, records, business goodwill, plant and equipment, customer lists, and printer plates associated with the brands; and
CPNZ (registered in New Zealand) will acquire the existing stock of the relevant brands. CPA and Campbell Brothers will also enter into manufacturing arrangements regarding the manufacture of the products which the brands will be applied.

sustainable way. For the purposes of its analysis, the Commission is of the view that a lessening of competition and creation, enhancement or facilitation of the exercise of market power may be taken as being equivalent.

8. When the impact of market power is expected to be predominantly upon price, for the lessening, or likely lessening, of competition to be regarded as substantial, 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.

9. Similarly, when the impact of market power is felt in terms of the non-price dimensions of competition such as reduced service, quality or innovation, for there to be a substantial lessening, or likely substantial lessening, of competition, these also have to be both material and sustainable for at least two years.

ANALYTICAL FRAMEWORK

10. The Commission applies a consistent analytical framework to all its clearance decisions. The first step the Commission takes is to determine the relevant market or markets. As acquisitions considered under s 66 are prospective, the Commission uses a forward-looking type of analysis to assess whether a lessening of competition is likely in the defined market(**s**). Hence, an important subsequent step is to establish the appropriate hypothetical future with and without scenarios, defined as the situations expected:

    - with the acquisition in question (the factual); and
    - in the absence of the acquisition (the counterfactual).

11. The impact of the acquisition on competition is then viewed as the prospective difference in the extent of competition in the market between those two scenarios. The Commission analyses the extent of competition in each relevant market for both the factual and the counterfactual scenarios, in terms of:

    - existing competition;
    - potential competition; and
    - other competition factors, such as the countervailing market power of buyers or suppliers.

THE PARTIES

Colgate-Palmolive Company

12. Colgate-Palmolive Company (CPC) is a United States based company with subsidiaries operating in North America, Latin America, Europe, Asia, Australasia and Africa. Colgate's worldwide sales are approximately ten billion United States dollars. Colgate-Palmolive Pty Limited is CPC's main subsidiary company in

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[3] See Fisher & Paykel Limited v Commerce Commission (1996) 2 NZLR 731, 758 and also Port Nelson Limited v Commerce Commission (1996) 3 NZLR 554.

Australia. Colgate-Palmolive Limited (CPL) is CPC's only subsidiary in New Zealand.

13. Colgate is a major global consumer products company. Colgate has five core business areas:
    - oral care;
    - personal care;
    - household surface care;
    - fabric care; and
    - pet nutrition.
14. In New Zealand, Colgate manufactures and distributes household cleaning products, personal care products, and skin care products under a number of brands, including:
    - Ajax;
    - Cold power;
    - Colgate;
    - Cuddly;
    - Palmolive;
    - Sard;
    - Soft as Soap; and
    - Softwash.

Campbell Brothers Limited

15. Campbell Brothers Limited (Campbell Brothers) is an Australian based company, registered in Australia under the Corporations Act 2001. [ ]. Campbell Brothers has a diverse shareholding, with no one shareholder owning more than 11% of the issued capital. The majority of shareholders are based in Australia.
16. Campbell Brothers is the parent company of the Campbell Brothers Group. Campbell Brothers has 3 business units, namely:
    - laboratory services;
    - consumer products; and
    - industrial products.
17. Campbell Consumer Products a division of Campbell Brothers Limited is the largest Australian owned manufacturer of household laundry products. The Consumer Products business unit manufactures and distributes a number of brands, including the Fluffy and More Soft brand of fabric softener, Hurricane and Castle, which are brands of laundry detergent and dishwashing detergent, Love 'n' Care, a laundry detergent and Happy Nappy, a stain remover. The Consumer Products business unit also provides home services such as carpet cleaning and pest control.

18. Campbell Consumer Products is one of Australia's major "private label" manufacturers. "Private label" or house brands are grocery items usually produced by way of contract manufacture for supermarkets. Campbell Brothers produces and sells private label products to various entities in both Australia and New Zealand. These products are produced in compliance with private label specifications, including branding, packaging, and formulation.

OTHER RELEVANT PARTIES

Unilever plc & Unilever NV

19. Unilever has two parent companies – Unilever NV and Unilever plc – which, despite being separate legal entities, operate as a single business with the same board of directors. Unilever is a leading multi-national company that manufactures and supplies fast moving consumer goods in foods, household and personal care products. Unilever operates in approximately 135 countries.

20. Unilever operates its New Zealand and Australian arms as a single operation under Unilever Australasia (a division of Unilever New Zealand Limited). Unilever has one manufacturing plant in Petone which produces predominately laundry powder for both New Zealand and Australia. Unilever's fabric softener sold in New Zealand is manufactured in Australia.

21. Products relevant to this application that Unilever supplies the New Zealand market include:

    - laundry detergent - Persil, Surf, Drive
    - fabric softener – Comfort

PZ Cussons (Holdings) Pty Ltd

22. PZ Cussons (Holdings) Pty Ltd (PZ Cussons) currently manufactures and distributes over 30 brands across its global network of companies in Europe, Africa, Asia, Australia, and New Zealand. PZ Cussons (New Zealand) Pty Ltd is the New Zealand subsidiary of PZ Cussons Australia Pty Ltd. All dishwashing liquid and laundry powder is manufactured in Australia and imported to New Zealand.

23. Products relevant to this application that PZ Cussons supplies to the New Zealand market include:

    - laundry detergent – Reflect
    - dishwashing detergent – Morning Fresh

Reckitt Benckiser plc

24. Reckitt Benckiser plc (Reckitt Benkiser) is a multi-national company that sells its products in over 180 countries. Reckitt's product range is extensive and includes surface care, home care, health and personal care, fabric care, dishwashing and food. Reckitt Benkiser (NZ) Ltd is the New Zealand subsidiary of Reckitt Benckiser. All dishwashing liquid is manufactured in Australia and imported to New Zealand.

25. Reckitt Benkiser supplies a number of products to the New Zealand market including:

- stain removers - Napisan, Frend
- automatic dishwashing powder – Finish
- dishwashing liquid – Down to Earth

Pental Products Pty Ltd

26. Pental Products Pty Ltd (Pental) is a wholly-owned subsidiary of Symex Holdings Limited, an Australian-based listed company. It is Australia's largest soap manufacturer with its major production facility in Victoria, Australia. It is also a contract manufacturer. It supplies the Australian and New Zealand markets only.

27. In November 2003, Pental acquired the following Unilever brands, which it continues to supply to the New Zealand market:
    - Sunlight (soap and dishwashing liquid)
    - Lux Flakes (laundry detergent)
    - Softly (wool wash)

EcoStore Limited

28. EcoStore Limited (EcoStore) is a New Zealand based company was established in 1993. EcoStore offers a variety of products that it markets as environmentally friendly, including cleaners, personal care and garden pest control. It targets the premium end of market. Originally, EcoStore was a mail order company only, but it later branched out into supplying retail outlets, like health food stores, and opened its own retail outlet in Auckland. In 2002, EcoStore launched its range into supermarkets and is continuing to expand its supermarket customer base. [ ].

29. The Ecostore range includes:
    - laundry powder and detergent;
    - dishwashing detergent; and
    - wool wash.

Quantum Pacific Limited

30. Quantum Pacific Limited (Quantum Pacific) is a New Zealand based company established in 1999. In New Zealand, Quantum Pacific manufactures and supplies the "Active" brand of automatic dishwashing powder, and the "Next Generation" brand of laundry products. In an effort to differentiate itself from other laundry products, Quantum Pacific markets its range as environmentally friendly and in concentrate form only. The products are targeted toward the high end of the laundry product category and retail for around 20% above premium brands.

31. The "Next Generation" range includes:
    - dishwashing liquid;
    - fabric conditioner;
    - laundry concentrate powder;

- laundry soaker;
- in wash stain remover; and
- all purpose cleaner.

Beauty Engineered For Ever Limited

32. Beauty Engineered For Ever Limited (BEE) is a New Zealand company that produces a variety of laundry products and markets them as environmentally friendly in order to differentiate them from conventional laundry product items. The products are at a higher price point and are aimed toward the premium end of the market. BEE products were launched in supermarkets in October 2003. [ ].

33. The BEE range includes:
    - laundry liquid/ fabric softener;
    - dishwashing liquid;
    - clothes whitener; and
    - surface cleaner.

Procter & Gamble Company

34. Procter & Gamble Company (P&G) is a large multinational manufacturer and distributor of consumer goods and is listed on the New York Stock Exchange. Internationally, P&G's portfolio consists of around 300 product brands in 50 product categories supplied to almost 160 countries. P&G has an annual turnover in excess of US$40 billion and invests approximately US$1.6 billion each year in research and development.

35. P&G produces products in five main categories: baby, feminine and family care; fabric and home care; beauty care; heath care; and food and beverage. P&G spends in excess of US$5 billion on advertising, two thirds of which is done outside of the United States.

36. Currently, P&G supplies the New Zealand market with a variety of hair care and feminine hygiene products. It has the United States number one fabric softener, Bounce, but does not currently market that product in Australia or New Zealand.

Progressive Enterprises Limited

37. Progressive Enterprises Limited (Progressive) is owned by Foodland Associated Limited, a public company incorporated in Australia. Foodlands conducts wholesale and retail supermarket operations in Western Australia and New Zealand.

38. Progressive includes the Foodtown, Countdown, Woolworths, and Three Guys banner groups. Through its wholesale distribution operation, Progressive supplies the FreshChoice and SuperValue chains.

Foodstuffs

39. Foodstuffs is comprised of three separate co-operative companies based in Auckland, Wellington, and the South Island. Each Foodstuffs company is a co-operative, owned by the individual owners of the supermarkets within the chain.

40. Each of the co-operatives run independently, and there is no overlapping ownership of directorship. The three Foodstuffs companies share ownership of Foodstuffs (New Zealand) Limited. Foodstuffs (New Zealand) has ownership of the brands New World, Pak n' Save, and 4 Square and leases them to the three Foodstuffs companies.

INDUSTRY BACKGROUND

Supermarkets

41. Currently there are two supermarket chains in New Zealand: Progressive and Foodstuffs. While in some cases there could be potential for a cosy duopoly to engage in co-ordinated market behavior, such as tacit collusion, the Commission notes the two supermarket chains compete vigorously between themselves for the New Zealand consumer's grocery dollar. In Decision 448, regarding the acquisition by Progressive Enterprises and Woolworths (NZ) Ltd, the Commission noted that New Zealand supermarkets generally had "systematic, thorough and quite sophisticated procedures for the monitoring and analysis of rival supermarkets' prices."

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

43. Supermarkets have sponsored new entry in the in the past and [ ]

44. In terms of supply of goods to the supermarket, the Applicant submitted and the Commission agrees that generally:

> supermarkets choose which products they will stock and the shelf space and positioning of the products (which affects sales of the relevant products). Within each supermarket's promotional programme, the individual supermarket chooses which product ranges it will promote and the pricing and promotional regimes for the relevant products.

45. There is a particular process that suppliers must go through to get their products on to supermarket shelves. The process varies slightly according to whether a supplier is dealing with the Progressive or Foodstuffs supermarket chain. There are also some variations across the three separate co-operative companies of Foodstuffs.

Progressive

46. A supplier must deal directly with Progressive's head office. Head office decides:

- whether or not to accept the product;
- how much self space is dedicated to the product; and
- its position on the shelf.

47. Shelf position is decided centrally in relation to planograms. Suppliers can submit their own planograms to be considered by the supermarket's own team. Once finally completed, the planograms are implemented nationally.

48. While Progressive does not charge for shelf use, commitment to a promotional programme is generally key to getting a product accepted by Progressive in the first instance. Promotion can be both inside and outside the supermarket, also known as below and above the line spend.

49. Above the line spend is valued by supermarkets for promoting the product to consumers outside the supermarket and getting them into the store to purchase the products.

50. In terms of below the line promotion, the supplier and Progressive will devise an annual promotional programme for implementation within the supermarket. Below the line spend comes in a variety of forms and costs. It includes purchasing end displays, wing stacks, on shelf ticket promotions, and a price reduction of the product, an additional expense to the supplier. Below the line spend is valued by supermarkets for two main reasons. Firstly, promotion of a product generates sales and, secondly, it provides an important source of income for the supermarkets.

51. Table 1 outlines Progressive's charges for below the line spend. Note however, that prices for such promotion fluctuate throughout the year. End displays may also be put out to tender at special times of the year.

Table 1: Progressive price range for below the line promotion

End display	[ ], this increases at special times of year like Xmas and Easter.
Side stack	[ ]
On shelf promotion	[ ]

Foodstuffs

52. The Foodstuffs companies are cooperatives whose members are the owner/operators of each store. The head office of each Foodstuffs company sets the recommended prices for its members as well as organising regional specials. Each store is obliged to comply with prices for regional specials, while for other products it can either implement the recommended price or apply a lower price.

53. Owner/operators also have the flexibility to organise their own specials and introduce their own lines of products at their discretion. This flexibility has given rise to

situations where two supermarkets that are both within the Foodstuffs cooperative appear to compete with each other.

54. If there is agreement to stock a product, then its positioning on the shelf is defined according to planograms. These are devised centrally, according to guidelines. Foodstuffs' planogram guidelines has been reproduced in Appendix 1. Generally, stock placement according to planograms is a suggestion only.

55. Broadly there are two stages in terms of promoting the product. First, a supplier negotiates a promotional programme with the banner's head office which covers nationwide advertising campaigns and the like. Second, a supplier then negotiates with the individual store in terms of end displays etc. It is usually left to the individual supermarket owner as to how the product is promoted in store. For example, the supermarket owner can decide to give the product one, two or three facings depending on how they view the product fitting within their business and clientele. Therefore, a supplier's sales representative visits each supermarket and pulls together a promotional programme at store level in terms of negotiating space, pricing and then promoting accordingly.

House brands

56. House brands or private labels are grocery items usually produced by way of contract manufacture for supermarkets. A supermarket supplies these products to its own chain of stores.

57. Both supermarket chains generate their own house brands. Each has a premium and generic brand. Progressive produces Signature Range (premium) and Basic (generic). Foodstuffs produce Pams (premium) and Budget (generic).

Table 2: Contract Manufacturers for Premium House Brands

Premium	**Laundry Detergent**	**Dishwashing Liquid**	**Fabric Softener**
Foodstuffs– Pams	Yeoman Limited;[4] Primary Distributors NZ; Clark Brothers	Yeoman Limited; Murdoch Manufacturing[5]	Yeoman Limited; Murdoch Manufacturing; Dowco Holdings
Progressive – Signature Range	Campbell Brothers[6]	Dermacare Limited	Campbell Brothers

Table 3: Contract Manufacturers for Generic House Brands

Generic	**Laundry Detergent**	**Dishwashing Liquid**	**Fabric Softener**
Foodstuffs– Budget	Yeoman Limited; Primary Distributors	Yeoman Limited; Murdoch	Yeoman Limited Ltd

[4] Foodstuffs owns a 50% share in Yeoman Limited.
[5] Murdoch Manufacturing is a solely own subsidiary of Foodstuffs South Island.
[6] Campbell Brothers has a contract manufacturing agreement with Progressive to take effect shortly.

	NZ	Manufacturing	
Progressive - Basic	PZ Cussons	Dermacare Limited	Dermacare Limited

58. Both Foodstuffs and Progressive have a similar philosophy behind their house brands, and operate a two tier programme. The first tier relates to the premium brand, which is offered as an alternative to a national market leader by either matching or out performing it in terms of quality, and then selling it [ ]. The second tier relates to the generic brand, which is focused on providing "value for money", and aims to attract market share by offering generally the lowest price in a category.

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

60. Currently, Pams is New Zealand's single largest grocery brand by turnover. The Pams range operated by Foodstuffs includes more than 650 different lines and covers every major grocery product category. Although, Progressive's premium brand, Signature Range, is not as large as Pams, it covers a wide variety of categories, and is expected to expand to most departments and categories in Progressive stores over the next few years.

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

Proprietary Brands

62. In the fast moving consumer goods (FMCG) industry market brand is recognised as an important part of a firm's marketing strategy. Brand is the proprietary visual, emotional, rational and cultural image associated with a company or product. Brand identity includes brand names and logos. Brand also reinforces product differentiation in terms of such factors as high quality or sophistication. Successful differentiation may create an element of market power because it helps justify the higher price of a product.

63. Brands are created and promoted by firms to develop customer loyalty to a particular product. Brands are developed usually through the media, but alignment with other companies, manufacturers or brands can also reinforce a brand's value. For example, [ ]

Laundry, Dishwashing and Fabric Softener Products

Laundry Detergent

64. Laundry detergent is used to clean a variety of fabrics, and comes in both powder and liquid form. In New Zealand, the supply and sale of liquid form is marginal and powder by far dominates the laundry detergent category.

65. Powder laundry detergent contains a number of ingredients including surfactants, builders, antiredeposition agents, and corrosion inhibitor, enzymes and fragrance. Powder detergents are produced by spray drying, agglomeration, dry mixing or combinations of these methods.

66. Laundry detergent marketed as environmentally friendly usually contains only plant based ingredients which biodegrade rapidly and completely. Below is a sample of laundry detergent prices.

Table 4: Sample Price Range for Laundry Detergent

Brand	Price Range
Persil 1kg	$ 5.49 – 5.70
Drive 1kg	$ 5.70 – 5.80
Cold Power 1kg	$ 3.79 – 4.31
Surf 1 kg	$ 3.29 – 3.97
Reflect 1 kg	$ 3.49 – 4.10
Hurricane 1kg	$ 2.89 – 3.53
Fab 1kg	$ 3.49 - 4.99
EcoStore 1kg	$ 7.99
Budget 1kg	$ 3.80
Basic 1.5kg	$ 2.69

Dishwashing Detergent

67. Dishwashing liquid is specifically developed to facilitate the cleaning of crockery, china, cooking utensils, cutlery and glassware. Dishwashing liquid used for hand dishwashing is formulated from a number of individual surface active agents, water, and optimally a stabilizing agent. Most commercial products also contain dyes, fragrance, a preservative and a sequestering agent. As with laundry detergent, dishwashing liquid marketed as environmentally friendly usually contain only plant based ingredients which biodegrade rapidly and completely.

68. Liquid dishwashing detergent is made by blending a variety of individual components in water, using simple mixing.

69. Below is a sample of dishwashing detergent prices.

Table 5: Sample Price Range for Dishwashing Detergent

Brand	Price Range
Palmolive (750mls)	$2.73 – 2.86
Down to Earth (1lt)	$3.14 – 3.52

Sunlight (900mls)	$2.87 - 3.53
Morning Fresh (450mls concentrate)	$1.99
Hurricane (900mls)	$2.19 – 2.25
Next Generation (900mls)	$3.99
EcoStore (500mls)	$3.45
BEE (500mls)	$3.99
Basics (2lt)	$2.89
Pams (900mls)	$1.84 – 1.94
Budget (1lt)	$1.69 – 1.79

Fabric Softener

70. Fabric softener makes washable fabrics feel softer. It also makes fabrics feel smooth, decreases static cling, reduces drying time, reduces wrinkling and makes ironing easier. Market participants the Commission consulted indicated that in New Zealand the primary reason consumers buy fabric softener is for the fragrance the product adds to their clothes.

71. Fabric softeners are designed for addition to the rinse (a liquid) or drying cycle (a sheet). In New Zealand, fabric softener typically comes in the form of a rinse-added fabric softener, and is used in the final rinse of the washer cycle to avoid adverse interaction with detergent ingredients. Fabric softener is made by blending a variety of individual components in water, using simple mixing.

72. Below is a sample of fabric softener prices.

Table 6: Sample Price Range of Fabric Softener

Brand	**Price Range**
Comfort (900mls)	$3.69 – 4.13
Cuddly (1lt)	$2.97 - 3.11
Basic (1lt)	$2.49
Fluffy (1lt)	$ 3.28 – 4.61
Pam's (2lt)	$ 4.83 - 5.12
Budget (2lt)	$3.20 - 3.50
BEE (500mls)	$3.99
Next Generation (900mls)	$3.90

MARKET DEFINITION

73. The Act defines a market as:

> ". . . a market in New Zealand for goods or services as well as other goods or services that, as a matter of fact and commercial common sense, are substitutable for them."[7]

74. For competition purposes, a market is defined to include all those suppliers, and all those buyers, between whom there is close competition, and to exclude all other suppliers and buyers. The focus is upon those suppliers who produce, or could easily switch to produce, those goods or services. Within that broad approach, the competitive impact of the acquisition under consideration, bearing in mind the need for a commonsense, pragmatic approach to market definition. [8]

75. For the purpose of competition analysis, the internationally accepted approach is to assume the 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, would be able to impose at least a small yet significant and non-transitory increase in price, assuming all other terms of sale remain constant (the SSNIP test). The smallest space in which such market power may be exercised is defined in terms of the five dimensions of a market discussed below. The Commission generally considers a SSNIP to involve a five to ten percent increase in price that is sustained for a period of one year.

Product Market

76. Initially, markets are defined for each product supplied by two or more of the parties to an acquisition. For each initial market so defined, the Commission considers whether the imposition of a SSNIP would be likely to be profitable for the hypothetical monopolist. If it were, then all of the relevant substitutes must be incorporated in the market.

77. The greater the extent to which one good or service is substitutable for another, on either the demand-side or supply-side, the greater the likelihood that they are bought and supplied in the same market. The degree of demand-side substitutability is influenced by the extent of product differentiation.

78. Close substitute products on the demand-side are those between which at least a significant proportion of buyers would switch when given an incentive to do so by a small change in their relative prices.

79. Close substitute products on the supply-side are those between which suppliers can easily shift production, using largely unchanged production facilities and little or no additional investment in sunk costs, when they are given a profit incentive to do so by a small change in their relative prices.

80. The applicant submits there are three relevant product markets in this proposed acquisition:

    - the laundry detergent market;

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[7] s3(1) of the Commerce Act 1986

[8] Australian Trade Practices Tribunal, *Re Queensland Co-operative Milling Association*, above note 10; *Telecom Coporation of NZ Ltd v Commerce Commission & Ors* (1991) 3 NZBLC 102,340 (reversed on other grounds).

- the dishwashing liquid market (excluding automatic dishwashing liquid); and
- the laundry additives market.

Laundry Detergent

81. Laundry detergent includes products for cleaning fabrics by hand or machine. There are slight variants in laundry detergents. In particular, they come in both powder and liquid forms, and two different strengths of standard and concentrate. However, given that consumers can readily substitute one form or strength for another based on individual preference or price, the Commission concludes that those differences do not justify placing them in different product markets.
82. Laundry detergent has been designed for the specific purpose of cleaning fabrics, and therefore there is considered to be almost no demand-side substitutability with other products, such as with dishwashing detergent and fabric softener.
83. The Commission also considered whether blocks of laundry soap, such as Sard, Sunlight and Preservene, formed part of the laundry detergent market. The Commission concluded that while laundry soap may be used to wash clothes, particularly hand washing, it is not generally used for machine washing of clothes. It is also put to a variety of other uses by consumers, such as stain removal and general household cleaning. Therefore, the Commission considers that laundry soap is not a close substitute for laundry detergent. For the purposes of this application laundry soap is considered to form a discrete market, and will not be considered further as there is no aggregation in that market.
84. There is considered to be some supply-side substitutability in terms of laundry detergent. But overall it is very limited because it relates only to liquid laundry detergent, and as the amount of liquid laundry detergent sold in New Zealand is marginal, any supply-side substitutability with other products such as dishwashing detergent is likely to act as minimal constraint only.
85. The Commission concludes that given almost no substitutability with other items, and limited supply-side substitutability, laundry detergent forms a discrete market.

Dishwashing Liquid

86. Dishwashing liquid products come in different strengths, as well in a variety of scents. Given that dishwashing liquid is designed for the specific purpose of washing kitchen items, the Commission considers there is very limited demand-side substitutability between dishwashing liquid and other products, such as fabric softener or liquid laundry detergent.
87. As automatic dishwashing liquid and powder relates to automated dishwashing and is not generally suitable for hand washing dishes because of its caustic nature, the Commission is of the view that it is not a close substitute for dishwashing liquid.
88. The equipment required to produce liquid laundry detergent, liquid dishwashing detergent and liquid fabric softener is the same. The only inconvenience is that the machines must be cleaned down between runs. For example, Colgate manufactures both dishwashing detergent and fabric softener with the same equipment at its premises in Petone. Market participants indicate that dishwashing liquid, laundry

detergent and liquid fabric softener formulae are accessible and not generally subject to patent rights. Raw materials are easily available.

89. Existing manufacturers of fabric softener and liquid laundry detergent have already built up strong distribution networks and have sunk costs in existing production and importing arrangements. However, although pre-existing infrastructure may assist in developing an additional product, this may be limited by the barrier presented in terms of access to supermarkets, which is discussed in later sections of this report.

90. The Commission therefore considers there is very high supply-side substitution between liquid laundry detergent, dishwashing liquid and liquid fabric softener.

91. However, even though there is high supply-side substitution, the Commission will in this case adopt a conservative approach by giving greater weight to the lack of demand-side substitutability and considers that dishwashing liquid forms a discrete market. The Commission adopts this narrow definition because if no competition issues arise in the narrower market, the Commission would be unlikely to find problems in a broader market. Supply-side substitutability will be considered further in terms of existing competition.

Fabric Softener

92. The applicant submitted:

> that the laundry additives market comprises fabric softeners, fine fabric/wool wash, pre-wash soakers (including stain removers and soakers), liquid bleaches, laundry soap, ironing aids/starch and nappy cleaners/sanitizers.
>
> It is [ ] strongly held view that these products are in fact substitutable to the extent that they can all be seen as being part of the same market. It outlined the following reasons:
>
> in most cases they are highly substitutable on the supply side. That is, common equipment is used to make and pack them and production can be readily switched between different laundry additives;
>
> the products are all discretionary products used to complement or supplement regular laundry detergent. Consumers will switch between these products if conditions, such as the price of the product, change;
>
> in many cases the products themselves are able to be used for the same purpose. For example:
>
> - wool wash is directly substitutable for the combination of laundry detergent and fabric softener as it is a laundry detergent with a fabric softener included; and;
> - many of the products that we have grouped into the laundry additives market perform the function of adding fragrance to the consumer's wash. Fragrance is a very important selling point in relation to many of these products, and consumers typically buy the products on the basis of their function of adding fragrance to the wash.

93. Based on its investigations, the Commission is of the view that there is a lack of demand-side substitutability between these different product items. Firstly, there is no demand-side substitutability between liquid bleaches, pre-wash soakers, ironing aids/starch and nappy cleaners/sanitisers, on the one hand, and fabric softeners on the other. Secondly, although the Commission accepts there may be some limited

demand-side substitutability at the margins between fabric softener and fine fabric/wool wash, manufacturers and other industry players advised the Commission it is largely due to customer confusion about the products' proper use, and is not significant enough to warrant including the two items in the same market.

94. Also, the above items are complements rather than substitutes and, therefore, in accordance with economic principles, ought to be treated as distinct product markets. For example, a pair of dirty sports shorts may go through a variety of stages such as:

- pre-treatment with a stain soaker;
- washing with laundry detergent; and
- softening with fabric softener.

95. The Commission agrees with the applicant's claim regarding supply-side substitutability to a certain extent, but as stated above, will take a conservative approach and give more weight to the lack of demand-side substitutability present with the product items in this application.

96. The Commission notes that of all the items listed by the applicant in the laundry additives market, fabric softener is the only one to be acquired by Colgate in New Zealand, and so there is no aggregation in relation to the other items. [ ]

97. Given the lack of demand-side substitutability and complementarity of the items, the Commission considers that fabric softener forms a discrete product market.

Conclusion on Product Markets

98. The Commission concludes that for the purposes of assessing the competition implications of the proposed acquisition, the appropriate product markets are the markets for:

- laundry detergent;
- dishwashing detergent; and
- fabric softener.

Functional Markets

99. The production, distribution and sale of a product typically occur through a series of functional levels, conventionally arranged vertically in descending order. Generally, the Commission identifies separate relevant markets at each functional level affected by an acquisition, and assesses the impact of the acquisition on each.

100. All suppliers of laundry detergent, dishwashing liquid and fabric softener in New Zealand act as wholesalers to retailers or supermarkets. Supermarkets in turn retail these items to end-users. No supplier of these products currently sells directly to end-users so there is a clear demarcation between the wholesale and retail functional level.

101. The Commission recognises that wholesale supply across these product categories is presently achieved in two ways. Suppliers either manufacture the products themselves, (either in-house or through contract manufacturing arrangements), or import the finished product from overseas in order to on-sell to resellers.

102. The Commission concludes that, for the purposes of the present application, the relevant functional level for the purposes of this clearance is the manufacture and wholesale supply of laundry detergent, dishwashing detergent and fabric softener.

Geographic Markets

103. The Commission defines the geographic dimension of a market to include all of the relevant, spatially dispersed sources of supply to which buyers would turn should the prices of local sources of supply be raised.

104. The applicant submitted that manufacturers tend to establish and implement manufacturing, distribution, and marketing strategies including national advertising campaigns.

105. The Commission found that on the whole manufacturers adopted nationwide strategies, and tailored their marketing to a national audience. Colgate, Campbell Brothers, Unilever, PZ Cussons and other industry participants supply and distribute their products nationally. There is a standard price throughout New Zealand which further supports the existence of a national market. All parties interviewed were of the view that the market is national in geographic scope.

106. In terms of distribution, laundry detergent, dishwashing liquid and fabric softener are predominately transported directly to customers. For instance, suppliers can transport their products directly to Progressive's three distribution centres. Foodstuffs is slightly different in that suppliers transport into both distribution centres and directly into Foodstuffs stores.

107. The Commission considers that for the purposes of this investigation, the relevant geographic market for the manufacture and wholesale supply of laundry detergent, dishwashing liquid and fabric softener is national.

Conclusion on Market Definition

108. The Commission concludes that, for the purposes of analysis of this application, the relevant markets are:

- The market for the manufacture and wholesale supply of laundry detergent in New Zealand (the laundry detergent market);
- The market for the manufacture and wholesale supply of dishwashing detergent (excluding automatic) in New Zealand (the dishwashing detergent market); and
- The market for the manufacture and wholesale supply of fabric softener in New Zealand (the fabric softener market).

COUNTERFACTUAL AND FACTUAL

109. In reaching a conclusion about whether an acquisition is likely to lead to a substantial lessening of competition, the Commission makes a "with" and "without" comparison rather than a "before" and "after" comparison. The comparison is between two hypothetical future situations, one with the acquisition (the factual)

and one without (the counterfactual).[9] The difference in competition between these two scenarios is then able to be attributed to the impact of the acquisition.

Factual

110. As a result of the acquisition Colgate would acquire 100% ownership of Campbell Brothers' various brands and associated items comprising:

- the "Fluffy" brand of fabric softener, and tumbler dryer pads;
- the "Hurricane" and "Castle" brands of laundry detergent and dishwashing detergent; and
- the "Love 'n' Care" brand of laundry detergent.

111. The laundry detergent market will go from six players to five. The dishwashing detergent market will go from seven players to six. The fabric softener market will go from five players to four. [ ].

Counterfactual

112. Campbell Brothers advised the Commission that if the proposed acquisition by Colgate does not progress [ ]. Therefore, as the same number of players would be present in the market, the Commission considers the appropriate counterfactual to be the status quo.

COMPETITION ANALYSIS

Existing Competition

113. Existing competition occurs between those businesses in the market that already supply the product, and those that could readily do so by adjusting their product-mix (near competitors). Supply-side substitution by near competitors arises either from redeployment of existing capacity, or from expansion involving minimal investment, in both cases involving a delay of no more than one year.

114. An examination of concentration in a market can provide a useful indication of the competitive constraints that market participants may place upon each other, providing there is not significant product differentiation. Moreover, the increase in seller concentration an acquisition is an indicator of the extent to which competition in the market may be lessened.

115. The Commission identifies market shares for all significant participants in the relevant market. Market shares can be measured in terms of revenues, volumes of goods sold, production capacities or inputs (such as labour or capital) used.

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[9] Commerce Commission, *Decision 410: Ruapehu Alpine Lifts Ltd/Turoa Ski Resorts Ltd (in receivership), 14 November 2000*, paragraph 240, p 44.

116. An aggregation that would result in a low concentration level is unlikely to be associated with a substantial lessening of competition in a market. On this basis, indicative safe harbours may be specified.

117. 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%.

118. The Commission recognises that concentration is only one of a number of factors to be considered in the assessment of competition in a market. In order to understand the impact of the acquisition on competition, and having identified the level of concentration in a market, the Commission considers the behaviour of the businesses in the market. Specifically, the Commission seeks to understand the dynamics of the competition that would exist between the remaining firms in the market, compared to what would exist in the absence of the merger.

Laundry Detergent Market

119. The total volume of laundry detergent sold through retail outlets for the year to May 2004 was approximately 28, 974,000 with a value of almost $100 million per annum. Market share information has been provided by the applicant and verified by the Commission with other industry participants.

120. Because of the varying price range across the different brands, the Commission considers the appropriate measure to determine market share is the volume of laundry detergent sold on an annual basis. Estimated market shares are shown in Table 7.

Table 7: Estimated Market Shares of the Laundry Detergents Market by Volume for the Year to May 2004

Supplier	Brands	Volume (litres – 000s)	Market Share (%)
Colgate	Dynamo, Cold Power, Fab	11,966	41
Campbell Brothers	Hurricane, Castle	1,246	4
Combined Entity			*45*
Unilever	Persil, Drive, Surf	12,256	42
House brand	Pams, Budget, Basics	1,536	5
PZ Cussons and	Reflect, Next	1,970	7

others	Generation, EcoStore		
Total		28,974,000	100

121. Table 7 indicates the merged entity would have a market share of 45% and the three firm concentration would be 94%. This is outside the Commission's safe harbour guidelines. The degree of aggregation that occurs at 4.3% is relatively modest.

Analysis of Existing Competition in the Laundry Detergent Market

122. The Applicant submitted that if Campbell Brothers withdrew from the laundry detergent market, Colgate would continue to face vigorous and effective competition from Unilever and PZ Cussons. Colgate also submitted that the laundry detergent market does not exhibit a high degree of brand loyalty, and that demand is highly elastic, with significant swings in demand associated with price promotions. Colgate claimed that up to 80% of the sales in this market occur when the relevant product is sold at discount while being promoted.

123. Industry participants spoken to by the Commission also emphasised the highly competitive nature of the laundry detergent market and the countervailing power of the supermarkets. As stated in the industry background, supermarkets compete with each other on a variety of levels from stocking a wide product range to developing house brands.

124. Supermarkets would also be competitors for the combined entity through house brands. Supermarkets have the ability to expand their existing house brands or expand into the market with new ones. Foodstuffs are presently already in this market. [

]

125. The underlying strategy of house brands discussed in the industry background makes them particularly effective competitors.

126. Industry participants informed the Commission that there is vigorous competition for attaining and retaining supermarket shelf space, and that getting product on to supermarket shelves and keeping it there was highly dependent upon providing support for the product with substantial advertising spend. For instance, [ ].

127. The vigorous nature of the competition in the laundry detergent market is supported by the fact that industry players invest heavily in promotion, in terms of both above and below spend the line spend as outlined in Table 8.

Table 8: Approximate Promotional Spend for Laundry Detergent by the Major Suppliers

Entity	Below the line	Above the line
Colgate	[ ]	[ ]
Campbell Brothers	[ ]	[ ]
Unilever	[ ]	[ ]
PZ Cussons	[ ]	[ ]

128. Market participants also told the Commission that product relaunches were important to gaining and maintaining market share especially in relation to maintaining sales to customers. A relaunch can involve some or all of reformulation, repackaging, new fragrance or new pack size. For instance, in December 2002, Cussons relaunched its Reflect brand by improving formulation, changing packaging, offering a concentrate strength and different package size. [ ] Unilever has also recently relaunched its brand Surf.

129. Unilever is Colgate's largest competitor in this market, and post acquisition would hold the second largest market share of 42.3%. Unilever is also a particularly effective competitor given it is a large successful international company with the capabilities and capital to support its product.

130. The brands included in Unilever's laundry category portfolio include Persil, Surf and Drive. Industry participants have variously described those brands as New Zealand's strongest. Unilever is regarded by market participants as the laundry category "champion", given these top performing brands.

131. The question of whether brand or price was the key determinant upon which consumers based their purchases was put to industry players. While both brand and price play a part in the consumer's decision to buy, the majority of industry participants confirmed that the laundry detergent market is strongly price sensitive.

132. For instance, [ ]. An independent research report commissioned by Colgate confirmed that the "New Zealand laundry detergent consumer market is generally quite cost conscious, and tended to view detergent as a commodity item. This is reflected in a market of very few premium brands." The report also noted that the laundry detergent market involves one of aggressive pricing thereby supporting the claim of a price sensitive market.

133. Given this price sensitivity, and the correspondingly strong tendency of consumers to switch according to price, it is considered if the combined entity attempted to exercise market power by increasing prices by 5-10% it would likely lose significant market share such as to make such a price rise unprofitable, especially given the viable alternatives provided by competitors such as Unilever and house brands.

<u>Conclusion on Existing Competition in the Laundry Detergent Market</u>

134. The Commission considers that existing competition would be likely to constrain the combined entity in the laundry detergent market post acquisition due to:

- the vigorous nature of the competition as evidenced by high promotional spend of participants and regular relaunching of laundry products;
- the price sensitivity of the laundry detergent market and the tendency of consumers to switch according to price; and

- the presence of Unilever as a large global player, with three major brands

135. The Commission therefore concludes that the proposed acquisition is unlikely to result in a substantial lessening of competition in the laundry detergent market due to the strength of the existing competition. Consequently, the Commission does not regard it necessary to consider potential competition.

Dishwashing Detergent Market

136. The total volume of dishwashing detergent sold through retail outlets in the year to May 2004 was 8,204,000 litres with a value of nearly $22.5 million per annum. Market share information has been provided by the applicant and verified by the Commission with other industry participants.

137. Because of the varying price range across the different brands, the Commission considers the appropriate measure to determine market share is the volume of dishwashing detergent sold on an annual basis. Estimated market shares are shown in Table 9.

Table 9: Estimated Market shares by Volume for Dishwashing Detergent in the Year to May 2004[10]

Supplier	Brands	Volume (litres – 000s)	Market Share (%)
Colgate	Palmolive	2,412	29
Campbell Brothers	Hurricane	115	1
Combined Entity			30
House brand	Pams, Budget, Signature Range, Basic	2,026	25
PZ Cussons	Morning Fresh	681	8
Reckitt-Benckiser	Down to Earth	509	6
Pental	Sunlight	1,518	19
Other	Next Generation, EcoStore, BEE	943	12
Total		8,204,000	100

138. Table 9 indicates the combined entity would have a market share of 30% and the three firm concentration would be 74%. This is outside the Commission's safe harbour guidelines. The degree of aggregation that occurs at 1.4% is again relatively modest.

[10] The market share information is currently based on the applicants view. It is bring verified with other market players. But note that market enquirers indicate these shares as they stand are reasonably accurate.

Analysis of Existing Competition in the Dishwashing Liquid Market

139. The applicant submitted the degree of aggregation that would occur in the dishwashing detergent market as a result of Colgate acquiring the "Hurricane" brand for dishwashing liquid is "miniscule". The Commission concurs with this and considers that given this modest degree of aggregation, Campbell Brothers' withdrawal, via the acquisition by Colgate, would be likely to have a limited effect on the dishwashing detergent market liquid. However, for completeness, the Commission has gone on to consider existing competition.

140. As with laundry detergent, suppliers of dishwashing liquid need to invest in a significant amount of promotional spend to get on to supermarket shelves and stay there. Table 10 outlines the amount the major suppliers spend annually on promotion on dishwashing liquid in terms of both above and below the line spend.

Table 10: Approximate Promotional Spend for Dishwashing Detergent by the Major Suppliers

Supplier	Below the Line	Above the Line
Colgate	[ ]	[ ]
Campbell Brothers	[ ]	[ ]
Pental	[ ]	[ ]
PZ Cussons	[ ]	[ ]
Reckitt Benckiser	[ ]	[ ]

141. Market participants confirm that the dishwashing liquid market is similar to laundry in terms of price sensitivity, and therefore under similar constraints in that the consumer generally will switch according to price. This price sensitivity is supported by the fact that house branded product, which generally competes on price, is Colgate's biggest competitor, as outlined in Table 9.

142. House brands' lower price point makes them a particularly effective competitor in a price sensitive market. House brands are able to offer a lower price due to not having to put the same effort into promoting the product in terms of above and below the line spend. Supermarkets could also react quickly to a 5-10% price increase by the combined entity by way of expanding existing house brands, creating new ones, or supporting and encouraging entry of price fighters.

143. Pental, with the Sunlight brand, holds a significant market share of 18.5%. The other competitors PZ Cussons and Reckitt Benckiser are also large well established multi-national companies and so have the capabilities and capital to absorb costs and effectively support their products.

144. As noted in the market definition section, there is a high degree of supply-side substitution in the dishwashing detergent market. This implies that there is also likely to be a large number of suppliers to other markets such as fabric softener who could easily switch to supply this market if the combined entity were to raise prices post acquisition. The Commission has not specifically identified these near competitors due to the strong existing competitors already in the market but notes their likely existence as a further constraint.

<u>Conclusion on Existing Competition in the Dishwashing Liquid Market</u>

145. The Commission considers that existing competition would be likely to constrain the combined entity in the market for dishwashing liquid post acquisition due to:

- the vigorous nature of the competition as evidenced by the high promotional spend of participants;
- the price sensitivity of the dishwashing detergent market and the tendency of consumers to switch according to price;
- the effectiveness of house branded product as a competitor;
- the presence of large trans-national companies like Pental, PZ Cussons and Reckitt Benckiser, and their strong market presence; and
- the likely existence of near competitors due to the high degree of supply-side substitutability.

146. The Commission therefore concludes that the proposed acquisition is unlikely to result in a substantial lessening of competition in the dishwashing detergent market due to the presence of existing competition.

Fabric Softener Market

147. The total volume of fabric softener sold through retail outlets for the year to May 2004 was approximately 2,272,000 litres with value if almost nearly $7 million per annum. Market share information has been provided by the applicant and verified by the Commission with other industry participants.

148. Because of the varying price range across the different brands, the Commission considers the appropriate measure to determine markets share is the volume of fabric softener sold on an annual basis. Estimated shares are shown in Table 11.

Table 11: Estimated Market Shares of Fabric Softener by Volume Sold in the May 2003 – May 2004 Year

Supplier	**Brands**	**Volume (litres – 000s)**	**Market Share (%)**
Colgate	Cuddly	849	37
Campbell Brothers	Fluffy	893	39
Combined Entity			76
Unilever	Comfort	223	10
House brand (Foodstuffs)	Pams	303	13
Other	Next Generation, EcoStore, BEE	4	0
Total		2,272	100

149. Table 11 indicates that post-acquisition, the combined entity would have a market share of 76% and the three firm concentration would be 99%. This is outside the Commission's safe harbour guidelines.

<u>Analysis of Existing Competition in the Fabric Softener Market</u>

150. Post-acquisition, house brand fabric softener would be Colgate's most significant individual competitor. Premium house brands are particularly effective competitors given their lower price point without sacrificing quality. Foodstuffs currently has a house branded fabric softener under the Pams label. [ ], as a house branded product, Pams could expand, given a 5-10% price increased by the combined entity, to meet any consumer need more easily than its competitors, given that it does not have the same outlay in terms of high promotional spend. Therefore, it can offer consumers a viable alternative if the combined entity was to raise its price and decrease quality.

151. Unilever is another significant competitor although it only has 9.8% share of this market. The reason for this low market share is that for the past three years, Unilever has adopted a strategy of [ ].

152. Consequently, [ ]. However, Unilever continue to manufacture and sell Huggie in Australia.

153. Further, Unilever's other fabric softener, [ ] Table 9 indicates the loss of market share of Comfort over the past three years.

Table 12: Market Shares by Volume for Comfort for the Years to May 2002, 2003 and 2004

Year to May 2004	9.8%
Year to May 2003	12.8%
Year to May 2002	16.4%

154. Unilever has indicated to the trade that it is planning to exit the New Zealand fabric softener market and [ ]

155. In response to this concern, the applicant submitted that although in the past three financial years Unilever has decreased its support for its two fabric softeners, Unilever has extensive experience in New Zealand markets and could quickly re-enter the market and become a significant competitor. Market participants largely confirm this view, and have said that if Unilever sells Comfort or continues to manufacture it, with proper promotional support Comfort could raise its market

share further. However, [

]

156. Therefore, while Unilever presently still provides some constraint with a market share of 9.8% by volume, it appears to be limited and likely to decrease in the future.

157. There is a real likelihood that the Huggie brand could be sold then revived by another company. Unilever has [

]

158. An example of a successful revival is Campbell Brother's fabric softener Fluffy. It [

] Table 13 outlines the amount the major suppliers spend annually on promotion of fabric softener in terms of both above and below the line spend.

Table 13: Approximate Promotional Spend for Fabric Softener by the Major Suppliers

Supplier	Below the line	Above the line
Colgate	[ ]	[ ]
Campbell Brothers	[ ]	[ ]
Unilever	[ ]	[ ]

159. Expansion of other existing competitors is also a possibility, the applicant names Quantum Pacific in particular. [

]

160. There is also supply-side substitutability with fabric softener for the same reasons as with dishwashing detergent above i.e. the same equipment is required, formulae and raw materials are accessible, and distribution systems established. A number of near competitors have been identified by the Commission.

161. [ ]

162. The applicant named PZ Cussons, currently a manufacturer of dishwashing liquid, as a near competitor that could swiftly redeploy capacity. The Commission spoke with PZ Cussons which said that [ ].

163. The applicant also submitted that fabric softener is a discretionary item, used to complement or supplement regular laundry detergent, and so consumers are sensitive to changes in price. It stated that if the price were to increase, the most common response from consumers would be to switch to another brand or cease purchasing that product altogether. Industry participants confirmed the view that fabric softener is a discretionary item and that the market is price-sensitive. Foodstuffs gave an anecdotal example of Comfort losing sales because it moved its price too high, resulting in consumers not purchasing it. While the Commission does not consider this to be a key constraint, it is likely to form part of the combined entity's considerations in terms of pricing strategy.

<u>Conclusion on Existing Competition in the Fabric Softener Market</u>

164. There is a relatively low level of existing competition provided by Pams and Unilever. However, there is a strong [ ] expanding into the market. The Commission therefore considers there is some degree of constraint provided by existing competition on the combined entity.

165. Given the high market share the combined entity would have in this market post acquisition, the Commission considers it necessary to consider potential competition and countervailing power in order to establish whether a substantial lessening of competition is likely or not in this market.

Potential Competition in the Fabric Softener Market

166. An acquisition is unlikely to result in a substantial lessening of competition in a market if the businesses in that market continue to be subject to real constraints from the threat of market entry.

167. The Commission's focus is on whether businesses would be able to enter the market and thereafter expand should they be given an inducement to do so, and the extent of any barriers they might encounter should they try. Where barriers to entry in a market are clearly low, it may be unnecessary for the Commission to identify specific businesses that might enter. In other markets, where barriers are higher, the Commission may seek to identify possible new entrants as a way of testing the assessed entry barriers.

Barriers to Entry

168. The likely effectiveness of the threat of new entry in preventing a substantial lessening of competition in a market following an acquisition is determined by the nature and effect of the aggregate barriers to entry into that market. The Commission is of the view that a barrier to entry is best defined as anything that amounts to a cost or disadvantage that a business has to face to enter a market that an established incumbent does not face.

169. The applicant submitted that the barriers to entry are low in relation to all the markets it defined in its application.

170. The Commission considers the following requirements are necessary to enter the fabric softener market:

- establishing a manufacturing operation from scratch or entering a contract for manufacture;
- access to materials;
- R & D capabilities;
- access to supermarkets; and
- size of the New Zealand market.

<u>Establishing a manufacturing operation from scratch or entering a contract for manufacture</u>

171. The applicant submitted, and based on its investigations the Commission accepts the following in relation to establishing a manufacturing operation:

- the cost of acquiring and installing a liquid products manufacturing machine is approximately $171,000;
- such machines are readily available in New Zealand; and
- one machine can produce 200,000 1 litre bottles per year (4,000 bottles per week, 100 bottles per hour, and 1.67 bottles per minute).

172. The Commission concludes the cost of establishing a manufacturing operation from scratch is relatively small in terms of the size of that market at near $7 million per annum.

173. An option for a new entrant which avoids the need for up-front investment in plant is to contract manufacture. Contract manufacturers are available in both New Zealand and Australia, and any importation costs are regarded as minimal by those who are importing the product currently from Australia. Contract manufacturers can range from those firms whose operations are solely dedicated to contract manufacturing, for example, Yeoman Limited, and others who already manufacture their own fabric softener but are willing to contract manufacture, such as [ ].

174. Table 14 outlines a number of different companies capable of contract manufacturing fabric softener, dishwashing detergent and liquid laundry detergent

in Australia and New Zealand. Companies that solely carry out contract manufacturing are listed from Ecotech below.

Table 14: Companies currently contract manufacturing fabric softener, dishwashing and liquid laundry detergent

Manufacturer	Australia	New Zealand
Campbell Brothers	*	
PZ Cussons	*	
Reckitt Benckiser	*	
Pental	*	*
Yeoman Limited		*
Ecotech Laboratories		*
Dermacare Limited		*
Shieling Laboratories Limited		*
Jaychem Industries		*
PSM Healthcare Limited		*
New Zealand Cosmetics		*
Clark Products		*
Tumblars Products Limited		*
C & R Packers		*
Trend Laboratories	*	
Arrowpak	*	
Steric	*	
Jalco	*	
Pax	*	

175. The Commission concludes that new entrants would have access to contract manufacturing on competitive terms, and that in any case the need to invest in plant would not be a barrier given its availability and relatively minimal cost.

Access to Materials

176. Market participants consider it is easy to obtain raw materials. The Commission is satisfied that access to raw materials does not present a barrier to entry, given the production of fabric softener involves only water and chemicals that are readily available at a reasonable price.

R&D Capabilities

177. Market participants consider that fabric softener formulae are readily available and not generally patented. Moreover, given that fabric softener is regarded as a mature market there is little room to develop formulae significantly. Therefore, the Commission considers that the R&D capabilities required are not significant.

<u>Access to Supermarkets</u>

178. Gaining access to supermarket shelves presents the most significant barrier for potential entrants because of two factors.

179. Firstly, industry participants advised the Commission that promotional spend to get products on to the supermarket shelves and keeping them there is the biggest barrier a new entrant would face. As discussed, supermarkets usually want assurances from new entrants that they will support the product through substantial promotional spend both inside and outside the supermarket.

180. As noted in the industry background, the cost of below the line spend is relatively high. For instance, [ ] Supermarkets also usually want assurances that a supplier will support the product with above the line spend, like television commercials.

181. The second factor in terms of getting products on to supermarket shelves is sufficient stock turn. Supermarkets generally want the supplier to demonstrate a certain product turn before agreeing to stock a supplier's product. For instance, [ ].

182. The barrier presented by promotional spend is not insuperable as is shown by the introduction of BEE, Next Generation and EcoStore. [ ] Progressive advised the Commission that it decided to stock BEE, Next Generation and EcoStore because of a gap in the market for eco products and their higher dollar value. Therefore, the Commission considers that it is possible for a new entrant to get on to supermarket shelves without necessarily having to commit to a large promotional spend. However, they may need to offer some other differentiating factor to gain access to shelf space.

183. Market participants who wish to launch an entire range or if they are expanding an existing range, gain some leverage with supermarkets, in terms of having a greater variety of products that will potentially attract below the line spend. Companies which are expanding an existing range are also attractive from a supermarkets point of view because they have an enhanced ability to invest in brand development by cross subsidising, in terms of being able to absorb the costs of spending more on promotion than they may be making in revenue on a new product.

184. [ ] told the Commission that it considers continuity of supply as important. More specifically, it considers the ability of a firm to react to stock needs and whether the firm warehouses the products itself, or whether Progressive would have to go to the inconvenience of having to bring the stock into its distribution centres itself.

185. [ ] also said that it considers the product's point of difference in its assessment of whether to take a new entrant on board. [ ] Although fabric softener is regarded by market participants as a mature market, the Commission considers it is still capable of some innovation. For example, a new entrant can differentiate on fragrance, ease of ironing, anti-static ability, anti-bacterial function and quality improvement.

186. Both [ ] cited longstanding relationships with supermarket representatives as an important factor to get their products on the shelf. [ ].

187. Access to supermarket shelf space is quite a high barrier for new entrants given that supermarkets generally expect significant promotional spend, as well as adequate stock turn. Other factors such as ability to react to stock needs, product point of difference, pre-existing relationships with supermarkets and the supermarkets ability to sponsor a price fighter go some way in terms of countering that high barrier. Therefore, overall, the Commission considers access to supermarket shelves to be a moderate barrier.

<u>Size of New Zealand Market</u>

188. In terms of the size of the New Zealand market, most industry participants said that double entry was necessary for non-Australian new entrants, and that before a global player would consider entering New Zealand, it would generally want to enter Australia as well. The Commission accepts that double entry is a commercial reality and, to that extent, the small size of the New Zealand may pose a barrier to entry.

189. Market participants indicated that while the fabric softener market is comparatively small compared against other items in the laundry category, it is capable of growth given the right promotion. They also said that unlike most other items in the laundry category range, profit margins are relatively high in fabric softener, making it an attractive prospect for a new entrant. However, the Commission still considers it is likely an international player would need to enter both the New Zealand and Australian markets if not already present in Australia.

Conclusion on Barriers to Entry

190. Although the barrier presented by access to supermarket shelves is considered high, the Commission is of the view that barriers to entry overall are moderate because of the low barriers in terms of establishing a manufacturing operation, gaining a contract for manufacture, access to materials and R&D spend.

The "LET" Test

191. In order for market entry to be a sufficient constraint, entry of new participants in response to a price increase or other manifestation of market power must be Likely, sufficient in Extent and Timely (the LET test).

192. The mere possibility of entry is, in the Commission's view, an insufficient constraint on the exercise of market power, and would not alleviate concerns about a substantial lessening of competition. In order to be a constraint on market participants, entry must be likely in commercial terms. An economically rational business would be unlikely to enter a market unless it has a reasonable prospect of achieving a satisfactory return on its investment, including allowance for any risks involved.

193. If it is to constrain market participants, the threat of entry must be at a level and spread of sales that is likely to cause market participants to react in a significant manner.

194. If it is to alleviate concerns about a substantial lessening of competition, entry must be feasible within a reasonably short timeframe, considered to be two years, from the point at which market power is first exercised.

<u>Likelihood of Entry</u>

195. During its investigations, the Commission has been able to identify several likely new entrants.

196. Industry participants have indicated that [

]

197. Entry into the fabric softener market for a firm with existing presence and reputation in the laundry category globally like [

]

198. [

]

199. Even if the Commission had not identified these potential entrants, it considers that a hypothetical entrant would be likely to enter the market given the ease of developing a fabric softener product, as long as they have secured access to supermarkets. There are a number of players in similar markets who have this access through other products and can therefore be considered to be likely hypothetical entrants.

<u>Extent of Entry</u>

200. Despite some concerns regarding the extent to which a de novo entrant could penetrate the market, the Commission believes that entry by a competitor with an existing infrastructure in a similar market, [

]

201. The underlying strategy of [

]

202. The Commission considers that likely entry into the market by would likely be sufficient in extent to constrain the combined should it attempt to raise prices or reduce quality post acquisition.

<u>Timeliness of Entry</u>

203. The Commission believes, in terms of an existing overseas manufacturer supplying the New Zealand market, new entry could be achieved reasonably quickly. Logistical arrangements would be required with the various retail outlets, though these would not be so onerous as to suggest that entry could not be achieved within a few months, especially for a company that already had infrastructure in place to serve other markets.

204. Further, the Commission understands that [
].

205. The Commission is of the opinion that entry could be achieved within two years.

Conclusion on Potential Competition in the Fabric Softener Market

206. The Commission concludes that the barriers to entry are moderate given the challenges associated with entry into supermarkets. However, the Commission has identified [ ] as likely potential entrants, that are likely to enter quickly and to a sufficient extent in the pace of a price rise by the combined entity. Further, the Commission considers that should the combined entity raise prices by 5-10%, supermarkets would be likely to use their countervailing power, discussed below, to encourage entry and/or develop their house brands given that the two supermarkets compete so fiercely with one another, as indicated in the industry background section. The Commission therefore concludes that there would be a degree of constraint on the combined entity provided by potential competition post acquisition.

Countervailing Power in the Fabric Softener Market

207. The potential for a business to wield market power may be constrained by countervailing power in the hands of its customers, or when considering buyer

market power (oligopsony or monopsony), its suppliers. In some circumstances, this constraint may be sufficient to eliminate concerns that an acquisition would be likely to lead to a substantial lessening of competition.

208. Industry participants indicated that the two major supermarket chains have a significant amount of countervailing power in the fabric softener market, and the Commission agrees. This arises from the factors listed:

- At least 95% of fabric softener is sold in the stores of the two major supermarket chains.
- Generally, supermarkets choose which products they will stock and the shelf space and positioning of the products (which affects sales of the relevant products). Within each supermarket's promotional programme, the individual supermarket chooses which product ranges it will promote and the pricing and promotional regimes for the relevant products. As previously noted at above, the rigorous competition between supermarkets means they are unlikely to simply pass on to consumers any price increase.
- Foodstuffs sell fabric softener in its premium (Pams) and generic (Budget) house brands. [ ]. As discussed above, house brands are becoming particularly strong competitors. [ ], said house brands are used by supermarket chains throughout the world to keep downward pressure on prices of branded players. [ ] house brands were also used to gain leverage in terms of getting more promotional spend from suppliers on the basis that they will have to promote their brands to compete with the house brand. House brands serve the additional purpose of creating customer loyalty to the particular store, and can therefore be viewed as another mechanism supermarkets use to compete with each other.
- Supermarkets indicated that they may also support a new entrant as a price fighter if the combined entity were to increase prices by 5-10% and/or decrease the quality of its product. Supermarkets have done this in the past. For example, [ ]

Conclusion on Countervailing Power

209. The Commission concludes that supermarkets will be able to exert a *significant* degree of countervailing power against the ability of the *combined* entity to raise prices.

Conclusion on the Fabric Softener Market

210. The Commission considers that the combination of existing competition, potential competition and countervailing power would be sufficient to constrain the combined entity in the fabric softener market.

OVERALL CONCLUSION

211. The Commission has considered the probable nature and extent of competition that would exist, subsequent to the proposed acquisition, in the markets for:

- the manufacture and wholesale supply of laundry detergent in New Zealand (the laundry detergent market);
- the manufacture and wholesale supply of dishwashing detergent (excluding automatic) in New Zealand (the dishwashing detergent market); and
- the manufacture and wholesale supply of fabric softener in New Zealand (the fabric softener market).

212. The Commission considers that the appropriate counterfactual is the status quo.

213. The Commission concludes that there is sufficient existing competition to constrain the combined entity from exercising market power in that national market for the manufacture and supply of the laundry detergent and dishwashing detergent.

214. The Commission considers that the combination of existing competition, potential competition and countervailing power would be sufficient to constrain the combined entity in the fabric softener market.

215. The Commission is therefore satisfied that the proposed acquisition would not have, nor would be likely to have, the effect of substantially lessening competition, in the following markets:

- The market for the manufacture and wholesale supply of laundry detergent in New Zealand (the laundry detergent market);
- The market for the manufacture and wholesale supply of dishwashing detergent (excluding automatic) in New Zealand (the dishwashing detergent market); and
- The market for the manufacture and wholesale supply of fabric softener in New Zealand (the fabric softener market).

DETERMINATION ON NOTICE OF CLEARANCE

216. Pursuant to section 66(3) (a) of the Commerce Act 1986, the Commission determines to give clearance for the proposed acquisition by (Transferee) of (Proposal) of (Transferor).

Dated this 20th day of July 2004

Denese Bates
Division Chair
Commerce Commission

APPENDIX 1

Foodstuffs Planogram Guidelines

Important: Volume/Unit Sold Philosophy

Foodstuffs Auckland base all information released on the philosophy of movement sold. This is inline with Foodstuffs Auckland's 'Consumer Driven Policy'. The market leader is therefore determined by the greater volume of units sold per category. As a result, data for generic plans should also be based on volume/unit sales for both New World Auckland and Pak n Save Auckland, with Key Accounts Auckland Province data differences taken into account.

Days of Supply (DOS)

- All categories will differ dramatically with the average days of supply on shelf; however, the minimum requirement for any one product in most categories is not less than three days of supply.

Product Positioning

- Do not place heavy products and glass on the top shelf. Do not stack products on the top shelf.
- Product lay overs should be avoided where possible.
- Keep air gaps minimal and no less than 0.5cm.
- Product facings and placement should be based on merit (For example, fastest-moving products deserve more facings than slower moving lines).

Cosmetic/Appearance

- As a rule of thumb, try to align shelving and keep air gaps even and consistent.
- If a planogram experiences uneven air gaps, larger air gaps should be placed from the bottom up.
- Be aware of the visual presentation of each category. For example, canned fruit may deserve a bay and a quarter, however, cosmetically, the allocation of one bay looks better.

Product Facings

- This should reflect the store movement data. The greater the movement the better the product positioning.
- The lower the average DOS, the more facings are required. For example, DOS less than 3.0 days requires another facing until greater or equal to 3.0 days.

Private Label

- The Pams brand is a Premium/Mainstream House brand, which is positioned as a comparable quality product at a lower price to the Market Leader. The preferred product positioning for Pams is in the mainstream to premium end of each category. Pams should be placed adjacent to the market leader (where practical) within its segment and be given prominent shelf space and positioning.
- The Budget brand competes on price within each category. It is positioned as the lowest priced alternative to the Market Leader, which is specifically sort after by the price conscious consumer. The shelf positioning for the budget brand is in the economy sub-segment (last in flow adjacent to the economy market leader). The budget brand should also be given prominent shelf space.