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

Date: 5 December 2008

The Registrar
Business Acquisitions and Authorisations
Commerce Commission
P0 Box 2351
WELLINGTON

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

EXECUTIVE SUMMARY

1. EXECUTIVE SUMMARY

1.1 Coca-Cola Amatil (NZ) Limited ("**CCA**" or the "**Applicant**") seeks clearance, pursuant to s 66(1) of the Commerce Act 1986, to acquire the "Baker Halls®" and "Baker Halls Original®" brands (which include both registered and unregistered trademarks) ("**the Brands**"), a hot-fill production line ("**the Production Plant**"), and other associated business assets from Old Fashioned Foods Limited ("**OFF**").

1.2 The Commission is already familiar with the New Zealand non-alcoholic beverages ("**NAB**") market, which it has identified as being extremely competitive due, in particular, to the low barriers for existing or new competitors to enter or expand their product ranges into new market segments.

1.3 The assets to be acquired are complementary to the Applicant's existing business.

1.4 The Applicant submits that the proposed acquisition will not result in a substantial lessening of competition in any NAB market segment for the following reasons:

(a) **[ ]**% of the Production Plant capacity is already contracted to CCA. The acquisition of the Production Plant will therefore have no material impact on available capacity in the NAB market.

(b) The acquisition will lead to a change in ownership, and incremental addition to the Applicant's product range, of trademarks relating to the Brands together with the related Production Plant. Otherwise the competitive landscape will remain unchanged. OFF's other cordial brands "Thriftee" and "Quench" will not move with the acquisition, **[ ]**

(c) Existing competition including from Barkers, GSK as well as Pam's and Signature Range will remain effective post-acquisition. These competitors currently exercise real price and quality constraints on the Applicant and the Baker Hall business, and will continue to do so post-acquisition.

(d) More than **[ ]** of cordial products are distributed through the grocery trade. Supermarkets, with unique buyer power, are themselves participants in the cordial segment and they exercise significant countervailing power over manufacturers and importers of all NABs.

(e) The supply-side substitutability between cordials and other NAB products is strong. Effectively production of cordials is simply an earlier production phase for the production of non-alcoholic ready-to-drink ("**NARTD**") beverages. For example, the Production Plant is used to produce **[ ]** The Applicant estimates that **[ ]**% of the equipment for manufacturing sports drinks and functional water is the same as that used to manufacture cordials. In the broader NAB industry there are over 40 participants, manufacturing, importing and marketing NAB in New Zealand, ranging from global conglomerates to local manufacturers.

(f) Consistent with the Commission's previous findings in the NAB market, generally there are no material barriers to entry or expansion by either existing or new participants. Ingredients are readily available on the international markets, production facilities are both simple to establish, and to obtain under contract bottling or canning arrangements, where there remains excess capacity in New Zealand and in Australia. No significant marketing investment is required to launch new products and new brands, and **[ ]** shelf space can be made available at short notice, for a trial period (or longer if a retailer is interested in encouraging entry) for any product that presents an attractive consumer proposition.

(g) There are also potential constraints from imports in the cordials category. New Zealand processing facilities contract manufacture and pack for Australian distributors, and vice versa. Packaging and food safety requirements apply on a trans-Tasman basis. This means, in effect, participants in most NAB market segments remain constrained by a real threat of entry and expansion from Australian and other global manufacturers and allows New Zealand manufacturers to have export opportunities to Australia. The cumulative effect of these features creates a keen and dynamic rivalry that constrains New Zealand manufacturers in relation to the importation of products manufactured in the Australia and globally.

The above features demonstrate the existence of effective competition in the cordial segment of the NAB market, which indicates this segment will remain competitive post-acquisition. Accordingly, the proposed acquisition will not give rise to, or be likely to give rise to a lessening of competition in those any relevant market.

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PART I: TRANSACTION DETAILS

2. THE TRANSACTION

2.1 The Applicant seeks clearance to acquire, directly or indirectly, the hot-fill bottling production line, brands and associated business assets that are used for the marketing and manufacture of cordial products bearing the Brands (the "**Baker Hall business**") from Old Fashioned Foods Limited ("**OFF**") together with the other assets described in the Agreement for Sale and Purchase between CCA and OFF ("**the Acquisition**").

2.2 **[ ]**

2.3 The Brands that will be acquired are the trademarks relating to the Baker Hall business (which includes both registered and unregistered trademarks, principally the "Baker Halls®" and "Baker Halls Original®" brands).

2.4 **[ ]** percent of the current production capacity on the hot-fill bottling production line that is intended to form part of the Acquisition ("**the Production Plant**") is currently utilised to contract manufacture and pack beverage products on behalf of CCA by OFF. **[ ]**

2.5 **[ ]**

3. NOTICE GIVEN BY CCA

3.1 This notice is given by:

Coca-Cola Amatil NZ Limited
The Oasis
Mt Wellington
Private Bag 14916
AUCKLAND
Attn: Caroline Beaumont
General Counsel
Ph: 09 970 8152

3.2 All correspondence and notices in respect of this application should be directed in the first instance to:

Russell McVeagh
Barristers & Solicitors
PO Box 8
AUCKLAND

Attn: Sarah Keene / Troy Pilkington
Ph: +64 9 367 8133/8108
Fax: +64 9 367 8595
Email: sarah.keene@russellmcveagh.com / troy.pilkington@russellmcveagh.com

4. CONFIDENTIALITY

4.1 Confidentiality is sought in respect of all items deleted from the public copy of this application (confidential information). The items are indicated in the non-public version in square brackets ("**[ ]**").

4.2 In respect of the confidential information, confidentiality is claimed under section 9(2)(b)(ii) of the Official Information Act 1982, on the grounds that the information is commercially sensitive and valuable information which is confidential to the participants, and disclosure of it is likely to give unfair advantage to competitors of the participants and/or unreasonably to prejudice the commercial position of the persons involved.

4.3 CCA requests that it be notified of any request made to the Commission under the Official Information Act for release of the confidential information, and that the Commission seeks its views as to whether the information remains confidential and commercially sensitive, at the time responses to such requests are being considered.

5. DETAILS OF THE PARTICIPANTS

Acquirer group

5.1 The proposed acquirer is Coca-Cola Amatil (NZ) Limited ("**CCA**").

5.2 CCA is a company incorporated in New Zealand.

5.3 CCA is ultimately 100% owned by Coca-Cola Amatil Limited ("**CCA Australia**") which is a publicly listed Australian company. CCA has the exclusive license to bottle the “Coca-Cola brand” beverages in New Zealand and it employs 1100 people and has five bottling plants in New Zealand.

Target business

5.4 The Baker Hall business is a cordial manufacturing and marketing business, based in Auckland that is 100% owned by OFF, a leading manufacturer and exporter of food and beverages globally.

5.5 Contact details for the Baker Hall business are:

c/- Old Fashioned Foods Limited
PO Box 112-141
Penrose
AUCKLAND 1642

Attn: Ross McKenzie
CEO
Ph: +64 9 571 0402
Fax: +64 9 571 0352

5.6 Further information concerning OFF operations may be found at http://www.oldfashionedfoods.co.nz

6. INTERCONNECTED AND ASSOCIATED PARTIES

CCA

6.1 CCA is ultimately 100% owned by CCA Australia.

Baker Hall and OFF

6.2 OFF is the current owner of the Production Plant (through its ultimately 100% owned subsidiary PLC (NZ) Limited) and the Brands associated with the operation of the Baker Hall business.

7. BENEFICIAL INTERESTS

7.1 There are no relevant beneficial interests.

8. LINKS BETWEEN PARTICIPANTS

8.1 Currently, certain NAB products sold by the Applicant are manufactured, processed and packed by OFF as set out in an arm's length production and packing services agreement (pursuant to which OFF manufactures certain beverages for the Applicant). OFF's production and packing agreement may be varied but will remain in force for at least 18 months after the Acquisition. **[ ]**

8.2 In addition, each of CCA and OFF are members in the NZJBA and Food & Grocery Council.

9. BUSINESS ACTIVITIES OF EACH PARTICIPANT

CCA

9.1 CCA is active in the manufacture, distribution and sale of alcoholic and non-alcoholic beverages. CCA manufactures NABs at the following plants:

(a) Fruit juice beverages in Springs Rd, East Tamaki and Hickory Place, Christchurch;

(b) CSDs, cordials and other soft drinks (except for juice drinks and bottled water products) in Mount Wellington, Auckland and Brightlings Road, Christchurch, as well as the contract packing arrangement with OFF; and

(c) Water in Putaruru.

9.2 CCA is the sole manufacturer of the TCCC's branded beverages in New Zealand. CCA also manufactures and markets its own NAB brands. CCA manufactures and imports for sale the TCCC Beverages, as well as brands owned by CCA, in the following NAB market segments in New Zealand:

(a) **Fruit drinks, nectars and juices:** Keri fruit juices (Original, Crush and Premium), Thexton's fruit juices and drinks, Sunfresh Orange (postmix);

(b) **CSDs:** Coca-Cola, Coca-Cola Zero, Diet Coke, Vanilla Coke, Schweppes range (including Lemonade, Flavours range, Sparkling range, Mixers range), Sprite, Sprite Zero, Lift, Diet Lift, Fanta, L&P, L&P Sweet As, Deep Spring range;

(c) **New age beverages:**

- *Energy*: Relentless, Lift Plus and Lift Plus Sugar Free;
- *Sports*: Powerade;
- *Lifestyle*: e2 Drinks;

(d) **Bottled water**: Kiwi Blue (still water, sparkling water), Pump (still water) and AquaShot (flavoured water); and

(e) **Cordials**: Schweppes Cordials (Raspberry, Lemon, Lime), Roses Cordials (Lime, Lemon, Blackcurrant).

9.3 More information concerning CCA's activities can be found at http://www.coke.co.nz/ and http://www.makeeverydropmatter.co.nz/.

The Baker Hall business

9.4 The Baker Hall business manufactures and supplies at wholesale the following cordial products: Bakers Halls Cranberry & Blackcurrant, Baker Halls Lemon & Barley, Baker Halls Orange & Barley, Baker Halls Lime Juice, Baker Halls Apple & Pomegranate, Baker Halls Low Calorie Blackcurrant, Baker Halls Low Calorie Lemon & Barley, Baker Halls Low Calorie Orange & Barley, Baker Halls Low Calorie Lime, Baker Halls Blackcurrant Extra Strength Vitamin C, Baker Halls Lemon Lime & Bitters and Baker Halls Mango & Passionfruit.

The factual

9.5 In the factual, the Applicant will add the products of the Baker Hall business to the CCA product range that are currently manufactured and produced by OFF on behalf of CCA at the Production Plant for consumption in New Zealand. **[ ]**

The counterfactual

9.6 In the counterfactual CCA believes the Baker Hall business would be sold to another party. It is unclear whether other parties would be interested in purchasing the Baker Hall business if CCA does not, or if so, who these other parties may be. In any event, under alternative ownership CCA believes it is likely to be operated in much the same way as under current ownership.

9.7 In light of the wide-ranging competitive constraints operating in the NAB market, regardless of the outcome of the process, the Applicant considers the most appropriate counterfactual to be the status quo, namely, the Baker Hall business continues to have a presence in the New Zealand NAB market in much the same way as it does today.

Comparison of the factual with the counterfactual

9.8 **[ ]**

9.9 The factual will not be materially different to the counterfactual. The Applicant will remain constrained in the cordial segment by existing competition in the cordials segment and near entrants in the broader NAB market by the threat of imports, and by the strong countervailing power of the supermarket retailers described in more detail below.

10. THE REASONS FOR THE PROPOSAL

10.1 The Acquisition would provide the Applicant with the opportunity:

(a) To secure for the future, through ownership, the beverage production capacity that is already contracted to CCA through the contract packing arrangements with OFF. **[ ]** The Applicant sees commercial benefits in owning and controlling its own production capacity in order to reduce transaction costs and streamline manufacturing operations across various plants. It is expected that the purchase of plant and equipment will also provide significant cost synergies in terms of improved procurement, production optimisation and logistics.

(b) **[**

(c) **]**

(d) To complement the Applicant's cold-filled range in the cordial product segment with a hot-filled cordial range; and

(e) To utilise any available synergies across the businesses to produce the best products, in the most efficient way, utilising the latest thinking on consumer trends and product innovation to create the highest quality, leading NABs at competitive prices.

PART II: IDENTIFICATION OF MARKETS AFFECTED

11. HORIZONTAL AGGREGATION

Cordial Beverages

11.1 There is product overlap between the Applicant and the Baker Hall business in the manufacture and supply of cordial beverages.

Product Dimension

11.2 The Commission has previously considered the NAB market in *The Coca-Cola Company and Cadbury Schweppes Limited*[1], and *The Coca-Cola Company and Rio Beverages Limited*[2] ("***TCCC/Rio***"). In those decisions, the Commission found the relevant markets to be separate New Zealand markets for the manufacture and importation for wholesale supply of fruit juice beverages, new age beverages, CSDs and bottled water within the NARTD beverage product range.

11.3 In addition to the NARTD product segments previously identified by the Commission, as outlined at paragraph 11.2, there are the following additional non alcoholic non-ready-to-drink product segments within the NAB market:

(a) Cordials, being fruit juice syrup, squash and other cordial products (usually with a percentage of juice content) made from sweetened fruit extract and sold in liquid concentrate form for dilution with water by the consumer ("**cordials**");[3]

(b) Powdered fruit drinks ("**PFDs**"), being products obtained from fruit juice by the physical removal of virtually all the water content. The resulting product is sold in pre-sweetened powder form for dilution with water by the consumer;[4] and

(c) Tea, coffee, hot chocolate and hot malt drinks ("**Hot Drinks**"), comprising beverages that are sold in dry form for the combination with hot or boiling water by the consumer.

11.4 The Applicant is of the view that all NAB products fall within a single product market, and that there is a chain of substitution operating between the various product segments within the NAB market. This view is based primarily on the strong degree of supply-side substitutability between NAB products. It is recognised that the key to market definition is substitutability, the extent to which customers can readily switch between products, or suppliers can readily switch their facilities between the manufacture and supply of alternative products.[5]

11.5 On the supply side, there is substitutability across the range of NAB products:

(a) Cordial products are manufactured, using a mixture of concentrated fruit juice, flavourings, colourings, sugar and water, by a process that is very similar to the process used for the manufacture of other reconstituted fruit juice beverages.

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[1] TCCC/Cadbury Schweppes, 1999 (referred to in Decision 481, para 39).
[2] Decision 481, *The Coca-Cola Company and Rio Beverages Limited* (1 November 2002).
[3] The Applicant considers that lower rates of growth in cordials (and also CSDs), over the last 10 years, reflect public perceptions of the relative healthiness of sport and energy drinks (types of still drink), as well as bottled water, compared with cordials and CSDs. The Applicant expects this trend to continue into the future.
[4] Examples of PFD brands in New Zealand include Vitafresh (manufactured by OFF), Raro and Refresh (manufactured by Cerebos Gregg's Limited).
[5] *Ophthalmological Society of New Zealand Incorporated v Commerce Commission* (2004) 10 TCLR 994 (HC) para 191.

For example, the Applicant estimates that **[ ]**% of the equipment for manufacturing sports drinks and functional water is the same as that used to manufacture cordials. The ingredients for the different cordials are readily obtainable in abundant supply, so there is no constraint on manufacturers varying the composition of products within the cordial category.

(b) Suppliers in the market can, and do, obtain supply from other manufacturers, e.g. it is the Applicant's understanding that Foodstuffs' Pam's private label brand is manufactured under contract by Barker Fruit Processors Limited ("**Barkers**"). The Applicant considers that Pinto would also have the ability to produce house-brand products.

(c) There are no brand constraints, as brands and brand reputation can easily be transferred to products of different composition. The supermarket chains effectively determine the profile and success of external brands and can easily support the transfer of brands across other products to enhance competition, or the emergence of new brands. In addition, they are able to use their own house-brands to maximise supply-side substitutability.

11.6 Consequently, from the supply side, cordials are substitutable for both pre-prepared fruit juice beverages, PFDs and many other product segments with the NAB market.

11.7 On the demand side, in common with all NAB products, there are a range of options that consumers may switch between when purchasing cordials. Consumers make purchase decisions based on price, taste and convenience and are less concerned with technical differences in product description, composition or method of manufacture. Industry practice, based on consumer behaviour, is to view the variety of different products and brands, within the NAB market, as a continuum, with all products answering different consumer need states or preferences to a greater or lesser extent.

11.8 The Applicant is of the view that the relevant product market is the NAB market as a whole, and that cordials are simply one of a range of product categories within that broader market. The Applicant is however also conscious of the previous view of market definition adopted by the Commission in *TCCC / Rio.* For the purposes of the balance of this application, therefore, the Applicant focuses on the cordials market segment. As no competition issues arise in the analysis on this narrow market segment they similarly do not arise in the broader NAB market.

Customer Dimension

11.9 The parties and their respective competitors supply cordials to the two multiple grocery retailers, i.e. supermarket chains (namely, Foodstuffs and Progressive) (**"grocery trade**"). The Applicant estimates that more than **[ ]**% of all cordials that are manufactured or imported into New Zealand are supplied to the grocery trade.

11.10 Accordingly, on the customer side, there is only one material category of retail customer. Therefore, the Applicant considers that the customer dimension of the market remains as described in *TCCC/Rio*[6], namely the markets for the "wholesale supply to retail customers".

Functional Dimension

11.11 Each of CCA and OFF manufacture and/or import cordials for sale at wholesale. The Applicant is of the view that the relevant functional dimension to the market is the manufacture and importation for wholesale supply of NAB products.

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[6] *TCCC/Rio*, paras 57, 58.

Geographic Dimension

11.12 In *TCCC/Rio* the Commission considered the markets for NAB products to be national markets. The Applicant considers this to be the appropriate geographic market definition, with the reservation that there is also significant constraint from imported product. Sourcing raw materials and/or finished products, or the threat of such sourcing, from other countries within the Pacific Rim is a real alternative and therefore demonstrates the ease with which imported product can impose competitive constraint on product manufactured in New Zealand. Supply from Australia and the rest of the world represents a strong competitive constraint:

(a) The efficiencies of scale that overseas-based NAB manufacturers can achieve by extending runs at their international plants using excess capacity makes expansion into New Zealand commercially attractive as only the variable costs need to be attributed to the increased production for the overseas market as the fixed manufacturing overheads are already absorbed by the existing production of NAB product for domestic supply;

(b) Tariffs on imported NAB from Australia do not constitute a material barrier to expansion;

(c) Food Standards Australia New Zealand ("**FSANZ**") develops common food standards (including standards relating to product composition and labelling) for food sold in both New Zealand and Australia.

(d) A quantity of cordial products are manufactured in Australia and imported into New Zealand. For example, all of Buderim Ginger Limited's ("**Buderim**"), Lloyds Products Pty Limited's ("**Bickfords**") and GlaxoSmithKline NZ Limited's (“**GSK**”) cordial products are manufactured overseas and imported into New Zealand.

(e) **[ ]** Foodstuffs formed a joint-venture with Australia's largest grocery wholesaler and distributer (and also owner of the 'Action' chain of supermarkets in Australia) Metcash Trading Limited Australasia in 2006 in order to enable the two companies to source private label products jointly on a trans-Tasman basis for their private label supply requirements.

11.13 However, in light of the limitation on the Commission’s ability to define more broadly relevant markets, pursuant to the Commerce Act, the relevant geographic market would be national in scope, with significant import constraints.

Market Definition Summary

11.14 The Applicant is of the firm view that the proposed Acquisition will not give rise to competition concerns, regardless of the market definition adopted by the Commission. The Applicant considers that the relevant product market is the supply of NAB products at wholesale to retailers in New Zealand. For the balance of this application the Applicant proceeds to discuss specifically competitive effects in one segment of that market, being the wholesale supply of cordials.

12. CURRENT COMPETITORS

Cordial market segment participants

12.1 In the cordial market segment, like the other NAB market segments, there are a number of participants competing with CCA and the Baker Hall business:

(a) Barkers produces "Barkers" cordial as well as bakery fillings, jams, toppings, yoghurt fruits, ice cream ripples, low-moisture fillings, juice and drink concentrates, retail and food service preserves, sauces and condiments. It is a family business based in Christchurch with between 100 - 500 employees. Barkers cordial products are manufactured using the hot fill production process and consequently contain no preservatives. Barkers is currently the third largest competitor in the New Zealand cordial segment and OFF advises that it understands that Barkers is the private label supplier of Pam's hot-fill cordial to Foodstuffs.

(b) GSK is the local subsidiary of a global pharmaceutical company, GlaxoSmithKline, and is New Zealand's largest pharmaceutical company and sells the Ribena branded blackcurrant fruit drink. It is manufactured in a range of overseas plants from blackcurrants grown in New Zealand. The product range includes a syrup diluted by customers with water, and products sold ready to drink, whether still or sparkling.

(c) Foodstuffs Group ("**Foodstuffs**") is the country's biggest grocery distributor and one of New Zealand's largest businesses[7] and produces the Pam's/Budget ranges. It is New Zealand owned and operates a number of supermarkets (New World, Pak n Save, 4 Square). Foodstuffs produces extensive range of private label product (including the Pam's and Budget brands) and offers an extensive range of cordial products.

(d) Progressive Enterprises Limited ("**Progressive**") operates a number of supermarkets (Countdown, Woolworths, Foodtown, Fresh Choice and SuperValue) and holds around 45% of the New Zealand grocery market. The company produces Signature Range, Home Brand, Select, Naytura and Freeform private label brands which target different market segments and currently produces cordial products under the Signature Range brand.

(e) Buderim is an Australian listed company and produces the Buderim range of cordials which it exports and distributes throughout New Zealand.

(f) Kaban Industries Limited ("**Kaban**") is based in Christchurch and produces the Kaban range of cordials.

(g) Liquimaid Products Limited ("**Liquimaid'**) is the Wellington based manufacturer of "Fresha" branded cordial.

(h) Wests New Zealand Limited ("**Wests**") is the oldest and longest continuous manufacturer of cordials and soft drinks in New Zealand, dating back to 1876 and produces Wests brand cordial. Wests is based in Dunedin predominantly supplies the South Island market.

(i) Thorncroft Drinks Limited ("**Thorncroft**") is an English based business that specialise in making cordials mostly from traditional recipes. Thorncroft make a range of traditional and neutriceutical cordials. Thorncroft's cordials are imported and distributed in New Zealand by Interlink Foods Limited ("**Interlink**") which is an Auckland based confectionery and grocery importer. Interlink was established in 1978 and distributes a wide range of grocery and confectionery lines through its sales force nationally to grocery retail chains.

(j) Bickfords is the Australian based manufacturer of "Bickfords" cordial. The company has been producing cordial since the 1840s. It is located in Adelaide and distributes throughout Australia and New Zealand.

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7 Foodstuffs. Retrieved August 29, 2008 from http://www.foodstuffs.co.nz/OurCompany/WhoWeAre/

(k) Sykes Cordials Limited ("**Sykes**") produces the range of Sykes branded cordial. Sykes cordial was originally formulated and sold in the early 1900s.

(l) Nichols Plc ("**Nichols**") is a UK based manufacturer of Vimto (a grape, blackcurrant and raspberry cordial) which is imported and distributed into New Zealand and 65 other countries around the world.

(m) Belvoir Fruit Farms Limited ("**Belvoir**") is the English based manufacturer of the Belvoir branded cordial. Belvoir cordials are imported and distributed throughout New Zealand.

NAB competitors who are near entrants in the cordials market segment

12.2 Due to the strong supply side and demand side substitutability between various NAB market segments, listed below are several NAB market participants that the Applicant considers could be viewed as being likely cordial market segment entrants should opportunities in the cordial market segment arise:

(a) Cerebos Gregg's Limited ("**Cerebos Gregg's**") is part of the trans-Tasman group of Cerebos companies that are ultimately owned by Japanese global food and beverage group Suntory Limited. Cerebos Gregg's manufactures and wholesales the "Raro" and "Refresh" range of PFDs in New Zealand. Raro has been a leading brand of PFDs in New Zealand for 45 years. In New Zealand, Suntory Limited has recently purchased Frucor Beverages Group Limited ("**Frucor**"). Frucor's operations are outlined in more detail at 12.2(b) below.

(b) Frucor is an Auckland based company that is the largest manufacturer of fruit juice beverages within New Zealand and a participant in the wholesale supply of most NAB market segment in New Zealand. Frucor's fruit juice beverage brands include Just Juice, Fresh Up, McCoy, Citrus Tree and Arano. Frucor produces concentrate juice under the Fresh Up brand. Although Fresh Up Concentrate is a pure fruit juice concentrate, it is similar to cordial in that it is diluted with water by the consumer. Given this current presence in the New Zealand NAB market it will be easily open to Frucor to expand into the cordial market segment.

(c) The Pinto Fruit Juice Company Limited ("**Pinto**") is the largest New Zealand owned and operated fruit juice company and is based in the Bay of Plenty. It has particular expertise in the processing of feijoas and grapefruit into fruit juice and could be considered likely to enter the cordial market segment should market opportunities arise.

(d) Charlie's Trading Company Limited ("**Charlie's**") is a New Zealand owned company listed on the New Zealand Stock Exchange. It is a significant player in the New Zealand beverage market, and increasingly in Australia and South East Asia. Its principal brands, Charlie’s and Phoenix Organics, are household names and Charlie’s brand recognition is higher than any other juice brand in New Zealand.[8] Should market opportunities arise, Charlie's could be considered a potential cordial market entrant. It owns manufacturing facilities in both New Zealand and Australian sufficient to be used for cordials.

(e) Golden Circle Limited ("**Golden Circle**") is an Australian based manufacturer of fruit beverages and CSDs. Golden Circle imports products to New Zealand. It is an unlisted public company with over 850 shareholders.[9] Golden Circle has a range of over 500 products and considers itself a tropical fruit specialist.

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[8] Charlie's Group Limited. Retrieved **August 29**, 2008 from http://www.charliesgroup.co.nz/
[9] Golden Circle. Retrieved **August 29**, 2008 from http://www.goldencircle.com.au/corporate/aboutUs.cfm

Golden Circle sells a range of cordial products in the Australian market but does not currently import these cordial products into New Zealand.

(f) Tasman Bay Food Group Limited ("**Tasman Bay**") is a contract manufacturer of bakery and beverage products based in Stoke, Nelson, New Zealand. Its beverage products include Tasman Bay Juice Company Premium Fruit Juice and Orchard Road Fruit Drink Concentrates. Tasman Bay also owns FutureFoods New Zealand Ltd ("**FutureFoods**"), which aims to provide healthier choices and quality, affordable food products to school canteens. FutureFoods beverage products include the Frozen Juicies range, Moosies Milk Freeze, Cool Sips Flavoured Water and Fruit Drinks, Calciyum Flavoured Milk and Fruit Hitz. Should market opportunities arise, Tasman Bay could be considered a potential cordial market entrant, certainly through a contract packer.

(g) Brownlie Brothers Limited ("**Simply Squeezed**") is New Zealand's leading supplier of squeezed chilled style juices.[10] It has national chilled distribution and manufactures all forms of locally sourced fruit juices specializing mainly in orange and apple. The company considers itself as the number one chilled juice company in New Zealand[11] and should market opportunities arise Simply Squeezed could be considered a potential cordial market entrant.

13. DIFFERENTIATED PRODUCT MARKETS

Extent of Product Differentiation

13.1 As noted above at paragraph 11.7, consumers demonstrate a desire for variety in NAB products and are willing to switch their purchases between NAB products. Consistent with the finding of the Commission in *TCCC/Rio*[12] all NABs are differentiated to an extent. NAB manufacturers differentiate their products by continuously innovating and launching new products with differing characteristics.

14. VERTICAL INTEGRATION

14.1 The proposal will not result in any material vertical integration effects. The Applicant's level of vertical integration will not materially change due to the Acquisition.

15. PREVIOUS ACQUISITIONS AND COMMISSION NOTIFICATIONS

15.1 There have been no previous acquisitions involving the Applicant or OFF (or any interconnected body corporate or predecessor thereof) as an applicant or target notified to the Commission in the last three years.

15.2 The Applicant has not undertaken any other acquisition of assets of a business or shares in any markets material to the Commission's present investigation in the past three years.

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[10] MarketNewZealand.com. Retrieved **August 29**, 2008 from http://www.marketnewzealand.com/MNZ/Profiler/0/446/Simply-Squeezed.aspx

[11] Scoop Independent News. (29 September, 2006). *Simply Squeezed Forms Investment Partnership.* Retrieved **August** 29, 2008 from http://www.scoop.co.nz/stories/BU0609/S00502.htm

[12] *TCCC/Rio*, para 51.

PART III: CONSTRAINTS ON MARKET POWER BY EXISTING COMPETITION

16. EXISTING COMPETITORS IN MARKET

16.1 As outlined at paragraphs 12.1(a) to 12.1(m), the Applicant is currently constrained in the cordial beverages market segment and will remain constrained by existing competitors post-Acquisition. These participants' respective market shares are set out below.

Table 1 - Market shares by value and volume in the New Zealand cordial market segment (through supermarkets)

	Brands	Sales by value ($000s)	Market share by value	Sales by volume (thousands of reconstituted litres[13])	Market share by volume
CCA - Roses	Roses	[ ]	[ ]	[ ]	[ ]
CCA - Schweppes	Schweppes	[ ]	[ ]	[ ]	[ ]
The Baker Hall Business	Baker Halls	[ ]	[ ]	[ ]	[ ]
Merged Entity		**[ ]**	**[ ]**	**[ ]**	**[ ]**
Barker Fruit Processors Ltd	Barkers	[ ]	[ ]	[ ]	[ ]
Foodstuffs (manufactured by Barkers)	Pam's	[ ]	[ ]	[ ]	[ ]
Barkers' total production		**[ ]**	**[ ]**	**[ ]**	**[ ]**
Old Fashioned Foods Ltd	Thriftee	[ ]	[ ]	[ ]	[ ]
Progressive (manufactured by OFF)	Signature Range	[ ]	[ ]	[ ]	[ ]
OFF's total production		**[ ]**	**[ ]**	**[ ]**	**[ ]**
GlaxoSmithKline	Ribena	[ ]	[ ]	[ ]	[ ]
Buderim Ginger Ltd	Buderim	[ ]	[ ]	[ ]	[ ]
Kaban Industries Ltd	Kaban	[ ]	[ ]	[ ]	[ ]
Liquidmaid Products Ltd	Fresha	[ ]	[ ]	[ ]	[ ]
Wests NZ Ltd	Wests	[ ]	[ ]	[ ]	[ ]
Thorncroft Drinks Ltd	Thorncroft	[ ]	[ ]	[ ]	[ ]
Lloyd Products Pty Ltd	Bickfords	[ ]	[ ]	[ ]	[ ]
Sykes Cordials Ltd	Sykes	[ ]	[ ]	[ ]	[ ]
Nichols Plc	Vimto	[ ]	[ ]	[ ]	[ ]
Belvoir Fruit Farms Ltd	Belvoir	[ ]	[ ]	[ ]	[ ]
Other		[ ]	[ ]	[ ]	[ ]
TOTAL		**[ ]**	**100.00%**	**[ ]**	**100.00%**

Source: ACNielsen data from September 2007 to September 2008

16.2 Although the aggregated share of supply by the Applicant and the Baker Hall business exceeds the Commission's safe harbour thresholds in the cordial market segment, the segment is intensely competitive and none of the factors that generate that intensity of competition will be altered as a result of the Acquisition. These factors are:

(a) Barkers, GSK and OFF will remain in the cordial market segment exercising strong competitive constraint on CCA post-Acquisition;

(b) Strong Australian suppliers, such as Buderim and Bickfords, already have a market presence in the market and have the ability easily to expand;

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[13] " Reconstituted Litres" describes how many finished beverage litres can be made up after dilution with water.

(c) The grocery trade competes in the market through private label house-brands. The most significant influence on the current market dynamics is the substantial constraint imposed by private label brands, which, combined, represent **[ ]**% (value) of the cordial market segment;

(d) The grocery trade exercises strong countervailing market power. The two main supermarkets continuously test the supplier's prices through tender rounds for the supply of cordials under their own brands as outlined at paragraphs 24.1 to 24.5 below; and

(e) There are no material barriers to entry or expansion as outlined at paragraphs 23.1 to 23.22 below.

17. CONDITIONS TO EXPANSION BY EXISTING COMPETITORS

Consumers are price-sensitive

17.1 As explained in paragraph 11.7, consumers are highly price sensitive and switch readily between brands within the cordial market segment, and to other NAB product segments.

Production and distribution

17.2 To produce or expand in the NAB market segment in New Zealand, including the cordial market segment, suppliers require access to:

(a) base ingredients;

(b) flavourings; and

(c) bottling packing facilities.

17.3 There is a high degree of supply-side substitutability between different products within all the NAB market segments. This is underpinned by three key features:

(a) At the production and distribution level, the ingredients necessary to make NABs are readily available on the international market and in abundant supply;

(b) All manufacturers have the capability, manufacturing technology and know-how to produce NAB products across all NAB market segments, and such technology and know-how is also readily available internationally; and

(c) Switching between simple manufacturing processes presents no difficulty for an established manufacturer, requiring very little adjustment or incremental costs, and would always be desirable given the initial establishment and start-up costs and the objective to recover these.

Furthermore, the commercial complementarity of NAB products results in industry participants possessing a ready capability to switch production capacity between all other NAB segments and the cordial segment. Accordingly, as there are no major hurdles and if the benefits were sufficiently high there would appear to be no economic reason as to why manufacturers of any of the other categories within the NAB market would not redeploy resources to enter in the cordial segment and vice versa. A competitor's presence in one market allows it easily to expand into other market through existing distribution relationships. Equally, parties that choose not to invest in the necessary plant to manufacture any of the NAB products in New Zealand, including cordials, would have no difficulty obtaining supply of product from manufacturers, both in New Zealand and overseas.

17.4 Some cordials are examples of aseptic beverages, which contain no preservatives. Accordingly, these products are flash heat-treated and cooled rapidly using a process known as "hot-fill". Products produced by hot-fill technology can be marketed as being "more natural" as they do not require the addition of preservatives and therefore are preferred by some consumers. Examples of hot-fill cordial products include the Brands and Barkers branded products. Similar to the manufacture of juice beverages, the "hot-fill" products must go through a thermal processing system whereby the liquid product is circulated through a heat exchanger and heated to approximately 90-95°C to kill all bacteria and micro organisms. Hot filling also requires packaging strong enough to withstand the high temperatures involved in the filling process. Accordingly, energy and sports drinks, and some fruit drinks, are substitutes with cordials from the supply side due to the fact that the production process is identical. A party which can produce a cordial is therefore able to switch easily to producing a sports drink or fruit drink with no significant extra expense and vice versa.

17.5 Most other cordial manufactured in New Zealand, such as CCA's Roses and Schweppes brands, are manufactured using the cold-fill process. Cold-filling traditionally has been the technology of choice for a broad range of products, including many fruit juice beverages, and is often used in combination with pasteurisation, filtration and/or the use of preservatives to ensure shelf life stability. In addition some cold-filled products can be rendered shelf-stable by their acid/pH levels, for example CSDs and some fruit juice beverages. Cold-fill products are generally filled under "clean-room" conditions. It is generally considered that cold-fill technology can offer a more economical route to the shelf-stabilisation of beverage products as it can offer significant energy cost savings over time, significant packaging cost savings (as cold-filled products can be packaged in less sophisticated structures) and facilitate faster machine speeds.

17.6 Similar production equipment is required for the production and manufacture of the various types of NAB products, allowing hot-filled products and cold-filled products to be produced in the same facility. Data illustrating the low costs of switching between and expanding into additional categories of NAB (see Table 2) establishes that from a supply side all categories of NAB products are substitutable.

Technical production capability

17.7 There are no technical knowledge barriers to entry by new participants, or expansion by existing participants. Further, there is no factor preventing cordials from being bottled within a single plant with other fruit juice beverages, water, energy drinks, sports drinks and CSDs if it was of sufficient size, even though they would require multiple production lines and services (although there is a relatively large degree of supply side substitutability between the manufacture of these various NAB categories as described at Table 2).

17.8 The commercial complementarities of the NAB market segments described above result in these market segments demonstrating a large capacity for supply-side substitution (although, as mentioned at paragraph 17.3, this supply side switching is not a common occurrence in practice). A competitor's presence in one segment allows it easily to expand into other segments through existing distribution relationships. This is particularly the case for the cordial market segment whereby a competitor's presence in any of the other NAB market segment would easily allow it to expand into the cordial market segment.

No material barriers to expansion by New Zealand based manufacturers

Technical production switching

17.9 As noted above, there are few, if any, entry or expansion conditions, taking into account the ability to import, that would hinder (or have previously hindered) new entry or further expansion by local or overseas NAB suppliers. For example, there are no tariffs to be paid, import licences to be obtained, or quarantine requirements, to satisfy before a new entrant can import cordial products from Australia or the EU.

17.10 Similar equipment is required for the production and manufacture of the various types of NAB products. This is important as it means barriers to entry are particularly low for manufacturers operating in one NAB product category that are contemplating expanding into another NAB product category. It is relatively inexpensive to gain access to the equipment necessary to manufacture NABs.

17.11 There is an active second hand equipment market and cheaper new equipment is also being manufactured in China. Refurbished equipment, combined with new equipment where necessary, costs around 60 per cent of the price of new equipment. The main advantage of using refurbished equipment is cost, speed of delivery, and that it carries a guarantee similar to that provided on new equipment.

17.12 It would be relatively easy for a supplier with spare capacity to switch an existing filling line from manufacturing one type of NAB to manufacturing another, eg to switch from manufacturing any other variety of fruit juice beverage to manufacturing cordials. The cost of switching varies depending on the type of change required to be carried out to the manufacturing line, the number of staff required to carry out the switch, and the particular NAB production processes between which the line must be switched. Table 2 provides an indication of the time and staff required for various “switches”.

Table 2 – Approximate time required to change production

Type of change to the manufacturing line	**Time to change line**	**No. of staff required to change line**	**Additional comments**
From: any NAB To: a product that is not sensitive, eg a carbonated drink or one with preservatives to prevent micro organism growth	**[ ]**	**[ ]** staff	Time estimation includes time to clean out the process area, time to run out the original packaging and to run in new packaging
From: a sweetened beverage To: a product that is sensitive to micro organism growth, eg water, other drinks are not carbonated and do not include preservatives	**[ ]**	**[ ]** staff	Time estimation includes a period extensive cleaning to remove any micro organisms or residue likely to breed micro organisms
Minor change of primary packaging from one packaging shape to another that is very similar (ie a bottle with the same or similar footprint)	**[ ]**	**[ ]** staff	Time estimation includes time to: · adjust labellers; · adjust equipment heights; · adjust guide rails, etc
Major change of primary packaging from one packaging shape to another that is very different (ie from a PET bottle to a glass bottle)	**[ ]**	**[ ]** staff	This is enough time for a full line changeover

Source: CCA estimates

17.13 Alternatively, it is possible for an existing competitor to simply expand an existing line by adding additional machinery onto it. For example, the Applicant estimates that **[ ]**% of the equipment for manufacturing sports drinks and functional water is the same as that used to manufacture cordials. Therefore, a combined hot-fill fruit juice beverage, new age beverage and cordial line could be created sharing a single depalletiser, bottle rinser, capping and seaming machine, pasteuriser, labeller, case packager, palletiser and (to some extent) conveyor system. This means that often where an existing line is in place, the cost of installing a new line is minimal in comparison to the estimated initial set-up costs.

17.14 Consequently, existing NAB manufacturers within New Zealand can be considered to be potential entrants into the cordial segment, at any time, should market opportunities be identified. As outlined at paragraph 12.2(b), an example of such a manufacturer is Frucor. Frucor produces a range of dilute-to-taste juice concentrates under its "Fresh-Up" brand and consequently can be considered to be likely to enter the cordial segment if it identified any market opportunities post-Acquisition.

17.15 Of course, the ability of a manufacturer to expand an existing line depends on the existing line's current utilisation. If the line is already heavily utilised, it is usually not feasible to add onto it. However, if the line is not heavily utilised, or alternatively if the manufacturer chooses to switch some of its production from, for example, fruit juice beverage into hot-fill cordial, then the barriers to expansion are quite low.

Access to raw materials

17.16 Entry into the manufacture of cordials requires access to a supply of fresh fruit, juice concentrate or flavoured syrup. Contracts for the supply of fruit can be easily secured, and juice concentrates are commonly imported from overseas. Flavoured syrup concentrates are commonly procured from flavour houses such as Givauden, Symrise or Firmenich. These flavour houses will design a unique flavour for a new brand, or simply sell the manufacturer a generic one such as 'lime' or 'orange'. Alternatively, it is possible to license an existing brand from its brand owner.

17.17 Access to sugar is freely available through, for example, New Zealand Sugar Company Limited (Chelsea Sugar Refinery), and access to flavourings is relatively simple and represents a small portion of the total cost of NAB products, for example, ingredients are readily available from international flavour houses.

17.18 The other raw materials necessary to manufacture NAB products are also freely available with, for example, Visypet (NZ) Limited (Visypet), Alto Packaging Limited (Alto), VIP Plastic Packaging (NZ) Limited (VIP), TSL Plastics Limited (TSL) and Amcor Packaging New Zealand Limited (Amcor) offering bottles.

17.19 Consequently, the Applicant does not consider that access to ingredients or raw materials represents a barrier to expansion.

Access to contract packers

17.20 The capital expenditure of establishing a new manufacturing facility can be reduced significantly by using contract packers, of which there are many. Contract packers are third parties that may just package the final product, or alternatively they may also manufacture and bottle the beverage as well as packaging the final product.

17.21 In practice, this means that a new entrant may set up a relatively small operation in New Zealand, and contract the services of a contract packer to perform all filling and packaging functions.

Table 3 – Available capacity of fruit beverage, cordial, sports and lifestyle contract packers in New Zealand[14]

Company	Production Lines (CCA estimate only)	Available capacity (CCA estimate only)
[ ]	[ ]	[ ]
[ ]	[ ]	[ ]
[ ]	[ ]	[ ]
[ ]	[ ]	[ ]
[ ]	[ ]	[ ]

Source: CCA estimates

17.22 Consequently, the Applicant does not consider that access to filling and/or packaging functions represents a barrier to expansion.

No material barriers to expansion by overseas based manufacturers

17.23 The competitive constraint from imported product means that the Acquisition will not cause a substantial lessening of competition in New Zealand as any increase in price in locally manufactured product would create a market opportunity for imported product to exploit, for the reasons outlined below.

17.24 As cordials do not spoil during transit, importation is feasible and reasonably cost effective. CCA estimates that it costs approximately between **[ ]** per bottle, based on a 20 ft container costing NZ$**[ ]** and depending on the number of packs being shipped, to import product from Australia which makes imports a viable proposition. The efficiencies of scale that overseas based NAB manufacturers can achieve by extending runs at their international plants, using excess capacity, makes expansion into other geographic markets commercially attractive. This is primarily due to the fact that only the variable costs need to be attributed to the increased production for the overseas market, as the fixed manufacturing overheads are already absorbed by the existing production of NAB products for domestic supply.

17.25 Further, tariffs on imported NAB products do not constitute a material barrier to expansion. Under New Zealand's Closer Economic Relations trade agreement with Australia, imports from Australia will not attract any duty, and as part of New Zealand's liberalisation of trade, tariffs on all foods (including NAB products) from elsewhere have steadily decreased.

17.26 New Zealand has the same food standards as Australia as FSANZ develops common food standards (including standards relating to product composition and labelling) for food sold in both New Zealand and Australia. This common regulation means that there

[14] These figures represent CCA's best estimates. CCA is unaware of the actual annual volumes of capacity at each contract packer as this represents commercially sensitive information. CCA is, however, of the view that the annual requirements of a cordial product could easily be fitted within the available capacity of all the contract packers listed in Table 3.

are no unique packaging or product composition requirements that could act as a barrier to prevent Australian manufacturers from entering the New Zealand market.

17.27 GSK is able to successfully import its entire range of cordial products into New Zealand and Frucor and others are able to successfully export various fruit juice beverage products to Australia and elsewhere. Further, New Zealand supermarkets fulfil at least some proportion of their NAB, including their cordial products, purchasing requirements with product manufactured overseas. This shows that the transport cost differential between locally manufactured and overseas manufactured product is not sufficiently material to prevent imported product from exerting significant competitive constraint on the New Zealand manufacturers.

17.28 The low barriers to overseas manufacturers importing product into New Zealand mean that there do not appear to be any material barriers to expansion for existing competitors with large scale operations overseas and consequently there are various large overseas NABs manufacturers, including Buderim, Golden Circle and Bickfords who are well placed to expand their presence into the New Zealand market, and can be considered likely to expand into the New Zealand cordials market segment in the near future.

17.29 Currently, amongst others, GSK, Buderim and Bickfords, import all their cordial products into New Zealand. This illustrates that the transport cost differential between locally manufactured and overseas manufactured product is not sufficiently material to prevent imported product from exerting significant competitive constraint on the New Zealand manufacturers across product segments.

17.30 **[ ]**

Access to distribution not a barrier

17.31 Each of the current participants in the market segment has established a distribution network suited to the volume of cordials which they sell, but which could be expanded if they wanted to increase their volume in response to changes in the market segment.

17.32 Further, there are no distribution impediments to a new entrant, who could rely on existing logistics organisations such as the Foodstuffs owned "cash and carry outlets", namely, James Gilmour & Co Limited ("**Gilmours**"), Toops Wholesale Limited ("**Toops"**) and Trents Wholesale Limited ("**Trents"**),[15] other independently owned distributors of food and beverage products,[16] and/or the central distribution systems that have been developed by the supermarkets (to whom manufacturers and importers can directly deliver) meaning they do not need to have established distributions systems.

Marketing effort not a barrier

17.33 The marketing cost of a new product varies with the particular NAB product segment. However, the Applicant estimates that a cordial with a good recipe could be successfully launched with just $**[ ]** for above-the-line promotions (such as media advertising) and potentially no expenditure for below-the-line promotions in order to achieve a credible market position for that particular product.

17.34 The success of a new brand is not dependent on advertising or promotional spend but is instead influenced by a number of factors, the most important of which is the product's ability to "appeal" to a group of consumers. Appeal is a matter of recipe, price and product positioning.

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[15] Gilmours, Toops and Trents operate a comprehensive cash and carry operation to service the needs of dairies, service stations, catering and institutional customers.
[16] Such distributors include: Crean Foodservice Limited, Tasman Liquor Company Limited, James Crisp Ltd, Wilson Consumer Products Limited, Northern Foods (1991) Limited and Polar Food Distributors Limited.

17.35 New entrants are able to spend considerably less on new products than the Applicant as new entrants are typically given preferential treatment by the retailers, so the retailers give increased product exposure and "facing" to new entrants than they do to CCA. Retailers place emphasis on margin and boutique and smaller cordial suppliers can often offer retailers better margins due to their lower level of overheads incentivising retailers to contract with these smaller suppliers, even in the absence of below-the-line promotions. **[ ]**

Retailers' multi-listing policies encourage expansion

17.36 The supermarkets stock several competing brands of cordials. Retailers do not allow a supplier to have a category exclusively. Retailers do this to maintain their bargaining power during procurement, to support their use of promotional calendars and to provide consumers with a greater range of choice.[17]

Supermarkets encourage expansion

17.37 Supermarkets have a strong incentive to keep suppliers' prices low. Any attempt by the major NAB product manufacturers to increase average price of cordials would be immediately detected, and would encourage the supermarkets to use their strong market position to encourage entry or expansion of NAB product manufacturers by providing them favourable distribution and supply terms. For example, the supermarkets provided favourable shelf-facing to Bickfords as it entered into the New Zealand market.

Product loyalty not a barrier

17.38 Consumer price sensitivity places a real constraint on the ability of cordial beverage suppliers to increase their prices. This illustrates that the lack of an existing cordial brand would not be likely to be a significant barrier to entry or expansion and that this preference for novelty and sensitivity to price creates opportunities for new entrants. An example of this is the proliferation of private label product in the cordial market segment in recent years. Accordingly, Signature Range cordial achieved a **[ ]**% segment share in its first two years and now has close to **[ ]**% of the market after just 6 years.

18. EXAMPLES OF EXPANSION BY EXISTING COMPETITORS

18.1 The most recent example of expansion in the New Zealand cordial market segment is that of Buderim. Buderim has steadily increased its segment share over the past 6 years since it was introduced into New Zealand to now have **[ ]**% of the segment.

19. CONCLUSIONS ON CONSTRAINT BY EXISTING COMPETITION ON EXERCISE OF UNILATERAL MARKET POWER

19.1 The Applicant and the Baker Hall business are currently constrained by the existing competition in the NAB market, and the combined entity will remain so after the proposed Acquisition. In particular:

(a) *Barkers, GSK and OFF will remain as effective competitors in the cordial market segment*: After the Acquisition, Barkers (**[ ]**% by value), GSK (**[ ]**% by value) and OFF (**[ ]**% by value) will be the second, third and fourth largest suppliers of cordials in New Zealand. In addition, Barkers and OFF will remain

[17] The use of such multiple supplier policies in the grocery trade was acknowledged by the Commission in Decision No. 542 *Fonterra Cooperative Group Limited and National Foods Limited* (9 December 2004) at paragraphs 142 to 143.

the suppliers of private label product to Foodstuffs (**[ ]**% by value) and Progressive (**[ ]**% by value) respectively. Therefore all three companies, as well as the private label products offered by Progressive and Foodstuffs, will act as real competitive constraint on the parties post-Acquisition as they have done so in the past.

(b) *Ease of entry and expansion:* As evidenced above, the cordial market segment has low barriers to expansion, and there exists strong existing international competitors (described at paragraphs 17.28 to 17.30) who are in a position to expand into the New Zealand market and locally based competitors, such as Frucor, that are well positioned to expand into the cordial segment. These factors act as a constraint on the pricing of NAB products.

(c) *Ease of imports:* Imports are currently prevalent in all the NAB market segments, and due to low transport costs in comparison to product price, a product that does not spoil during transit, no or low tariffs (that are due to be reduced further in the near future) combined with common food standards with Australia (as described at 17.23 to 17.27), imports will remain a viable constraint.

(d) *Countervailing power of acquirers*: The Applicant sells **[ ]**% of its cordial products through the grocery trade and is likely to continue to do so post-Acquisition. These customers are sophisticated buyers who can and do exercise considerable buyer power in their negotiations with NAB suppliers. They are able to play suppliers against each other (including themselves by virtue of these customers' house-brands) to ensure that they continue to obtain competitive prices. This competitive tension will continue post-Acquisition.

Supermarkets have a variety of supply options both within and outside of New Zealand to fulfil their private label cordial requirements, and can quickly change volumes to respond to increased demand. Supermarkets retain ownership of the private label brand, and remain free to price at the retail level as they see fit. Private label brands, such as Pam's and Signature Range, are generally priced below the average manufactured brand price, providing constraint on the retail price of competing manufactured brands.

The supermarket chains have and will continue to have significant countervailing buyer power, because of the quantity of their products that are sold via supermarkets, through the potential threat of encouraging expansion by overseas competitors, and/or further focus on private label products.

19.2 As a result, the Applicant is firmly of the view that the Acquisition will not substantially lessen competition in this market. To the contrary, the Acquisition would have a pro-competitive effect due to the synergies it would afford the merged entity.

20. MARKET CHARACTERISTICS FACILITATING OR IMPEDING COORDINATION

20.1 The risk of coordinated effects post-Acquisition is low. The cordial market segment is characterised by a number of features which condition against prospects for coordinated effects. Consistent with the approach taken by the High Court in *Brambles New Zealand Ltd v Commerce Commission* (2003) 10 TCLR 868 (HC), the conditions for concluding that there would be effective and sustainable coordinated behaviour as a result of the Acquisition simply do not exist in the various NAB markets, namely:

(a) Low barriers to expansion;

(b) The asymmetry of market shares and of costs;

(c) A differentiated product offering that is differentiated by brand perception and product characteristics;

(d) The large number of fringe competitors;

(e) The countervailing power of acquirers; and

(f) The ease with which imported product can compete in the New Zealand market in this segment and the high proportion of the market which is currently comprised of imports.

20.2 The Acquisition does not affect any of these factors and therefore cannot be said to facilitate coordination.

21. NO EVIDENCE OF PRICE CO-ORDINATION, PRICE MATCHING OR PRICE FOLLOWING

21.1 Neither the Applicant nor OFF is aware of any past or current co-ordination of its activities with any other competitors in supply to the New Zealand market.

21.2 In the Applicant's experience NAB market segments, including the cordial market segment, do not show any evidence of price coordination, price matching or price following behaviour by market participants.

22. NO RISK OF CO-ORDINATED BEHAVIOUR

22.1 In summary, the Applicant is currently subject to vigorous competition in the cordial market segment and in the broader NAB market. The proposed Acquisition will not impact on this intense competition. In particular, the low barriers to expansion in all NAB market segments, the asymmetric nature of the market shares, the presence of fringe competitors, the existence of excess capacity, and the ability of national retailers to monitor and react to any attempt at coordination all indicate that the exercise of coordinated market power is unlikely to cause concern post-Acquisition.

22.2 For all the reasons set out above, the application of the tests in the Commission's Guidelines reveal that there would not be scope for the exercise of co-ordinated market power in this market.

PART IV: CONSTRAINTS ON MARKET POWER BY POTENTIAL COMPETITION

23. CONDITIONS OF ENTRY

23.1 As discussed in the section relating to conditions for expansion, there are no relevant regulatory or legislative barriers to entry.

23.2 Facilities for the production of NAB products in all NAB market segments, including the cordial market segment, are virtually standard and ubiquitous and therefore are readily able to be purchased, second hand or new, to varying sizes and specifications, on the international market. The minimum efficient scale of operation in this industry is not high. A new entrant wishing to operate at significant scale would not incur additional expense over and above what had been required of the incumbents to achieve such scale.

23.3 To begin self-manufacturing, a new entrant would first need to acquire a plant. The plant would need to be furnished with a suitable "process area" for manufacturing and bottling the beverage, and a "bottling and packaging area" for appropriately wrapping and/or boxing the finished product so it is ready for distribution.

Process area

23.4 A list of the equipment required to establish a typical process area for the manufacture of NABs and cordial is set out in Table I in confidential Appendix One. The exact pieces of equipment required, their size, quality and quantity varies slightly with the particular NAB being manufactured.

23.5 Today, much of this equipment can be obtained brand new from a large number of Chinese manufacturers at significantly less expense than from European suppliers, such as Jiangsu Hy-Filling Packaging Machine Co Ltd, Zhangjiagang Jiazhou Beverage Machinery Co Ltd and Zhongde Equipment Co Ltd. As NAB manufacturing equipment, including cordial manufacturing equipment, is fairly standard, it is also relatively easy to find suitable second hand machinery of an appropriate size and speed available domestically or internationally.

23.6 Alternatively, a new entrant may choose to invest in the top-of-time line European equipment. This would be the most expensive option for entry, and is feasible depending on the size and funding of the entrant. Realistically, a smaller scale entrant is likely to invest in cheaper technology initially, and later upgrade their plant with European machinery when they had gained a foothold in New Zealand.

Bottling and packaging area

23.7 A typical packaging area for packaging cordials generally has all of the pieces of equipment listed in Table II in confidential Appendix One. As with process equipment, much of the bottling and packaging equipment required can be purchased brand new but very cheaply from a range of Chinese manufacturers. There is also global availability of second hand equipment for bottling and packaging equipment.

23.8 Alternatively, the new entrant may choose to invest in the top-of-line European equipment. However, a new entrant is more likely to do so as part of a plant upgrade once it has gained a foothold in New Zealand.

23.9 Unless stated otherwise, the costs quoted in Table II in confidential Appendix One are the approximate costs of acquiring appropriate "high speed" machinery, that is, machinery capable of packaging 1500 to 2000 bottles per minute. Second hand high-speed equipment is generally less efficient and may only package around 600 to 2000 bottles per minute.

23.10 Investment in high speed equipment would be necessary if the manufacturer has a production run similar to that of CCA. However, many new entrants would not be manufacturing such high volumes, in which case investment in a fully automated low-speed line (capable of producing 200-400 bottles per hour) would be all that is required. Notably, equipment suitable for a low-speed line is generally much less expensive than equipment suitable for a high-speed line.

Total establishment costs

23.11 The Applicant estimates that a plant complete with process, bottling and packaging areas, using second hand equipment, could be installed for less than US$**[ ]**. The cost estimates also include the cost of:

(a) upgrading an existing plant building to make it suitable for installation and operation of the manufacturing equipment;

(b) installing any necessary services;

(c) installing all equipment; and

(d) setting up line controls.

Timeframe to establish a new plant

23.12 A new manufacturing plant could be established in **[ ]**.[18]

23.13 Establishing a manufacturing line capable of bottling cold-fill cordial is simpler and likely to take less time than establishing a manufacturing line for hot-fill cordials. Therefore, establishing a plant to manufacture hot-fill cordials is more likely to take the full timeframe of **[ ]** months, whereas establishing a plant capable of manufacturing cold fill cordials is likely to take closer to **[ ]** months.

23.14 As described at Appendix One, packaging lines do not require significant investment and are readily available on the international market. In relation to packing requirements, the Applicant is aware that there is currently significant excess capacity in all New Zealand based packaging facilities as outlined at paragraphs 17.20 and 17.21 and Table 3.

23.15 A new entrant launching its first product would be able to engage a contract packer and thereby avoid any sunk costs involved with setting up a bottling plant. Furthermore, a new entrant could make substantial use of contract haulage, and companies that have no distribution network of their own are able to engage contract hauliers to carry out their requirements.

23.16 As described at paragraph 18.1 Buderim has recently achieved a segment share of **[ ]**% in the cordial market segment within six years of commencement of operations. Buderim has achieved this growth with minimal promotional expenditure.

[18] This estimated timeframe excludes account of any time required to acquire land, seek development approvals or build the plant structure itself. However, many new entrants would already have land or access to a suitable building. Possibly, the new entrant may even rent a space and upgrade it as necessary.

23.17 Competitors can enter the cordial market segment with a small manufacturing base. For example, Kaban illustrates that a small scale presence in the market by New Zealand based manufacturers is feasible.

23.18 Due to the ease of importation for cordials, conditions of entry to commence supply in the New Zealand cordial market segment are low and a number of international NAB manufacturers who have not yet made a full scale entry into New Zealand are well placed to make such an entry.

23.19 Distribution of cordials is straight-forward. Cordials do not spoil during transit and therefore do not require refrigeration or special treatment during shipment. Cordials manufactured in New Zealand are transported from source by truck. Cordials manufactured overseas are transported to New Zealand on shipping lines and then are transported from the port to retailers by truck. As such, distributional requirements do not constitute a barrier to entry.

Potential New Entrants

23.20 As described in paragraphs 17.14 and 17.28 to 17.30 potential new entrants include:

(a) Golden Circle; and

(b) Frucor.

23.21 An overseas-based new entrant could start up operations and compete almost immediately, provided it obtains the required supermarket listing arrangements to give it the scale to compete effectively, and it is likely that the supermarkets would encourage such an entry.

Conclusion on Potential Entry

23.22 The actual current threat of full-scale entry by overseas competitors either by the purchase of a processing facility, or more likely by the importation of cordials, is and will continue to be a significant constraint on competitive conduct in this segment. In addition, the ease of entry and expansion by small-scale producers will ensure that these competitors continue to exercise significant price constraints in the cordial market segment.

PART V: OTHER POTENTIAL CONSTRAINTS

24. CONSTRAINTS ON MARKET POWER BY THE CONDUCT OF ACQUIRERS

24.1 As described at paragraph 11.9 above, the key categories of acquirers will continue to be the two main customers in the grocery trade, namely Foodstuffs and Progressive.

Grocery trade

24.2 The Commission has previously considered the countervailing power of Foodstuffs and Progressive in *Burns Philp* regarding the wholesale market for consumer yellow spreads. 95% of consumer yellow spreads were sold at wholesale to these two supermarket chains. The Commission noted in that decision that, on the basis of its market inquiries (para 124):

> [a]ll persons spoken to during the Commission's investigation of the proposed merger affirmed the very high countervailing power of the two major supermarket chains in the . . . market[,]

and concluded that:

> supermarkets will be able to exert a large degree of countervailing power against the ability of the merged entity to raise prices.

24.3 As described at paragraph 19.1(d), similar considerations apply to the wholesale NAB markets, including the cordial market segment. Sales to the grocery trade are at substantial levels. Both supermarkets engage in competition through private label products produced by facilities provided by parties other than CCA and the Baker Hall business.

24.4 Foodstuffs and Progressive account for more than **[ ]**% of all cordial sales. To ensure that their products reach as many consumers as possible, beverage manufacturers must negotiate to have their beverages represented by these customers. Accordingly, a significant level of countervailing power can be exercised by these customers in negotiations with the Applicant and other beverage manufacturers.

24.5 Perhaps the most important area in which grocery trade customers exercise their countervailing power is in their control over in-store marketing and space allocation. **[ ]** As new drinks and new NAB categories continue to emerge, competition for shelf space is likely to intensify and further enhance the bargaining power of grocery trade customers. The competition for promotion slots, the threat of entry or expansion of overseas brands, and the otherwise strong bargaining position of supermarkets in relation to NAB manufacturers/wholesalers means that the countervailing power of the two large supermarket chains will continue to constrain any attempted exercise of market power by the merged entity.

25. CONSTRAINTS ON MARKET POWER BY THE CONDUCT OF SUPPLIERS

25.1 The raw materials used in the manufacture of cordials are all also used by many other manufacturers in many other industries. Consequently, the merged entity will not enjoy pricing that is materially more favourable than those of its competitors or that which either of the Baker Hall business or the Applicant currently enjoys. Accordingly, there is no scope for the combined entity to attempt to exercise market power in respect of raw material suppliers.

This Notice is given by Coca-Cola Amatil (NZ) Limited

The Applicant hereby confirms that:

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

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

Dated 3 December 2008

Signed by Coca-Cola Amatil (NZ) Limited

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Caroline Beaumont, General Counsel