



## COMMERCE COMMISSION

### Decision No. 481

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

**THE COCA COLA COMPANY AND  
RIO BEVERAGES LIMITED**

**The Commission:** John Belgrave  
Peter JM Taylor  
Denise Bates QC

**Summary of Application:** The acquisition by Coca Cola Amatil (NZ) Limited to acquire the trademarks and intellectual property associated with the brands owned by Rio Beverages Limited. .

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

**Date of Determination:** Friday 01 November 2002

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## CONTENTS

<b>THE PROPOSAL .....</b>	<b>3</b>
<b>THE PROCEDURES.....</b>	<b>3</b>
<b>THE PARTIES.....</b>	<b>3</b>
The Coca-Cola Company (TCCC).....	3
<b>Coca-Cola Amatil Limited (CC Amatil).....</b>	<b>4</b>
<b>RIO beverages limited .....</b>	<b>4</b>
<b>Other relevant parties.....</b>	<b>4</b>
<b>INDUSTRY BACKGROUND .....</b>	<b>5</b>
<b>MARKET DEFINITION .....</b>	<b>5</b>
Product Dimension.....	6
Undifferentiated/Differentiated Products.....	8
Geographic Extent .....	8
Functional Level .....	9
Conclusion on Market Definition .....	10
<b>COMPETITION ANALYSIS .....</b>	<b>10</b>
Substantially Lessening Competition .....	10
The Counterfactual.....	11
Potential Sources of Market Power.....	11
Conclusion – Competition Analysis Principles .....	12
<b>ANALYSIS OF EXISTING COMPETITION.....</b>	<b>12</b>
Introduction.....	12
Scope for Unilateral Market Power .....	12
Introduction.....	12
<b>THE NEW ZEALAND MARKET FOR FRUIT DRINKS AND FRUIT JUICES .....</b>	<b>14</b>
Conclusions – Co-ordinated Market Power.....	18
Conclusions – Existing Competition .....	18
<b>Constraints from Market Entry .....</b>	<b>18</b>
Introduction.....	18
Barriers to Entry.....	19
Conclusion on Barriers to Entry .....	20
Likelihood of Entry.....	20
Extent of Entry.....	21
Timeliness of Entry.....	21
Conclusion on the Let Test .....	21
<b>Other Competition Factors .....</b>	<b>21</b>
Constraint from Buyers or Suppliers .....	21
Conclusions: The Wholesale Supply of Fruit Juice/Fruit Drinks in New Zealand.....	22
<b>THE NEW ZEALAND MARKET FOR BOTTLED WATER.....</b>	<b>22</b>
State of Existing Competition.....	23
Conclusions – Unilateral Market Power .....	23
Scope for the Exercise of Coordinated Market Power.....	23
Conclusions – Existing Competition .....	23
<b>Constraints from Market Entry .....</b>	<b>24</b>
<b>Other Competition Factors .....</b>	<b>24</b>
Conclusions: The Wholesale Supply of Bottled Water in New Zealand.....	24
<b>THE NEW ZEALAND MARKET FOR NEW AGE BEVERAGES.....</b>	<b>24</b>

State of Existing Competition.....	25
Conclusions – Unilateral Market Power .....	25
Scope for the Exercise of Coordinated Market Power.....	25
Conclusions – Existing Competition .....	25
<b>Constraints from Market Entry .....</b>	<b>25</b>
<b>Other Competition Factors .....</b>	<b>26</b>
Conclusions: The Wholesale Supply of New Age Beverages in New Zealand .....	26
<b>THE NEW ZEALAND MARKET FOR CARBONATED SOFT DRINKS .....</b>	<b>26</b>
<b>Overall Conclusion.....</b>	<b>26</b>
<b>DETERMINATION ON NOTICE OF CLEARANCE.....</b>	<b>27</b>

## THE PROPOSAL

1. The Coca Cola Company (TCCC) has sought clearance to acquire the trademarks and intellectual property associated with the brands owned by Rio Beverages Limited (Rio Beverages).
2. In a separate application, Coca Cola Amatil (NZ) Limited (CCA NZ) has also sought clearance to purchase the remaining business assets of Rio Beverages necessary to operate the Rio Beverages business (Decision 480). That decision is contained in a separate report.
3. While TCCC and CCA NZ are separate entities and there are two transactions, TCCC owns [ ] of CCA NZ. Therefore, the Commission considers TCC and CCA NZ associated and will treat the two parties as one for the purposes of its analysis while writing two reports to reflect the two applications by TCCC and CCA NZ.

## THE PROCEDURES

4. Section 66(3) of the Act requires the Commission either to clear or to decline to clear a notice given under section 66(1) within 10 working days, unless the Commission and the person who gave notice agree to a longer period. Accordingly, a decision on the application was required by 04 November 2002.
5. In its application, TCCC sought confidentiality for specific aspects of the application. A confidentiality order was made in respect of the information for a period of 20 working days from the Commission's determination notice. When that order expires, the provisions of the Official Information Act 1982 will apply.
6. The Commission's determination is based on an investigation conducted by staff.
7. The Commission's approach is based on principles set out in the Commission's *Practice Note 4*.<sup>1</sup>

## THE PARTIES

### The Coca-Cola Company (TCCC)

8. TCCC is a global soft-drink manufacturer, based in Atlanta, USA. TCCC owns a number of soft-drink brands internationally. TCCC licences these brands to (mostly) independent bottlers in various territories, and produces beverage concentrates and syrups. TCCC also handles "big picture" promotional activities for its brands. All other activities are carried out by the licensed bottler in each territory.
9. In New Zealand, the licensed bottler is Coca-Cola Amatil Limited.
10. TCCC brands in New Zealand are Coca-Cola and Diet Coke, Sprite and Diet Sprite, Fanta and Diet Fanta, Lift, Diet Lift and Lift Plus, Powerade, and Hi-C. TCCC also acquired the Schweppes brands in New Zealand in 1999. These are, Schweppes, Roses, Sunkist, and Diet Sunkist.

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

### **COCA-COLA AMATIL LIMITED (CC AMATIL)**

11. CC Amatil operates in New Zealand through its wholly owned subsidiary Coca-Cola Amatil (NZ) Limited. TCCC, through four subsidiary companies, owns [ ] of CC Amatil.
12. CC Amatil's current trademark/bottling agreement with TCCC commenced in 1995, and runs for 10 years. TCCC has an option to renew the agreement for ten years.
13. CC Amatil holds a number of brands itself, that compete with TCCC and Schweppes brands. These include L&P, Deep Spring, and Bubbly.

### **RIO BEVERAGES LIMITED**

14. Rio is a New Zealand incorporated company that supplies a range of branded fruit juice, mineral water and "new age" drinks. Rio is 50% owned by Cerebos Gregg's Limited and has a manufacturing facility in Auckland.
15. Rio manufactures and distributes the following fruit juice brands: *Keri*, *Pacific Orchard*, *Rio Gold*, *Robinson Brothers* and *Top Juice*. It also distributes a number of fruit drinks, which include, *Raro* and *Rio Splice*.
16. Rio's main distribution channels are supermarkets and the route trade (petrol stations, dairies etc), in which it has approximately [ ] chillers.

### **OTHER RELEVANT PARTIES**

#### **Frucor**

17. Frucor is a large New Zealand non-alcoholic beverage company, which was established by the Apple and Pear Marketing Board. The company manufactures and distributes established fruit juice brands such as *Fresh-Up*, *Just Juice*, *McCoy*, and *Citrus Tree*. In 1998 the company was sold to a consortium of financial investors led by United States based Pacific Equity Partners ("PEP"). In 2000 PEP sold 50.1 per cent of Frucor through a public float. Frucor was subsequently purchased by the Danone group, the worlds largest food and beverage manufacturer.
18. Frucor has a strong portfolio of quality brands. Since Frucor's acquisition of Pepsi-Cola Bottlers New Zealand in 1999, Pepsi-Cola has been profitable, and Frucor have signalled its intention to increase the level of investment in the Pepsi brands.
19. Frucor has brands in each of the main categories within the non-alcoholic beverage market. In the fruit juice market it has brands in all the product market segments, which include the three top selling brands, *Just Juice*, *Fresh-Up*, and *Citrus Tree*. Frucor's brand portfolio is strong and is the subject of established product reputation.

#### **The Pepsi-Cola Company**

20. The Pepsi Cola company is an international beverage company, licensing its beverage brands to different territories worldwide. In New Zealand, Pepsi's brands include Pepsi, Pepsi Lite, 7 Up, Miranda, and Mountain Dew, which are distributed through supermarkets, the route trade, vending machines situated at "impulse" outlets, and the "on premise" trade.

#### **Cadbury Schweppes International (Schweppes)**

21. Schweppes is a global confectionery and beverage manufacturer. It is active worldwide in the production of concentrates, non-alcoholic beverages, and the licensing of beverage brands.

22. Schweppes has divested its beverage businesses with its New Zealand business being purchased by TCCC in 1999. Previously, Schweppes had a long term bottling arrangement with CC Amatil. CC Amatil became a Schweppes bottler in New Zealand in 1990 when it acquired the company which held the licence at that time. The expiry date of the current trademark licence/bottling agreement is 1 July 2053.

## INDUSTRY BACKGROUND

23. The non-alcoholic beverage industry is broad in terms of the breadth of product offered by suppliers to this industry. The products supplied by industry producers include: fruit juice, carbonated soft drinks (“CSD”), flavoured milk, mineral water, new age drinks and hot beverages such as tea and coffee. The total size of this industry in terms of sales revenue is approximately \$1.05b, with the CSD segment of the market the largest with approximately \$500m, the non CSD segment approximately \$400m and the hot beverages segment approximately \$175m.
24. The industry is characterised by a number of market segments, which appear to be economic markets in their own right, with products within each segment not close substitutes for products in other segments. The issue of market definition will be discussed later in this report.
25. Branding is a very important characteristic in this industry, as suppliers attempt to establish a point of difference for their products. The Coca Cola brand is a very strong consumer global brand, that enjoys significant brand equity. This is evidenced by the large market share the brand enjoys both globally and in the local market. CC Amatil also distributes other TCCC core brands that serve various product market segments.
26. The main distribution channels used are supermarkets, the route trade, vending machines and the “on premise trade”. General route trade includes dairies, takeaway stores, petroleum outlets, motels, and other general retail stores that stock beverages, such as video stores.
27. Companies invest in chillers through out the route trade and vending machines in different high use areas. These chillers and vending machines tend to contain the owners product, and as such, provide an advantage to a large supplier with a broad product range. However, a significant portion (in some cases 80%) of chiller space is store owned, allowing access for small niche players.

## MARKET DEFINITION

28. 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.*

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

30. It is substitutability at competitive market prices which is relevant in defining markets. Where the Commission considers that prices in a given market are significantly different from competitive levels, it may be necessary for it to assess the effect of a *ssnip* imposed upon competitive price levels, rather than upon actual prices, in order to detect relevant substitutes.
31. The Commission will seek to define relevant markets in terms of four characteristics or dimensions:
- the goods or services supplied and purchased (the product dimension);
  - the level in the production or distribution chain (the functional level);
  - the geographic area from which the goods or services are obtained, or within which the goods or services are supplied (the geographic extent); and
  - the temporal dimension of the market, if relevant (the timeframe).
32. The Commission will seek to define relevant markets in a way that best assists the analysis of the competitive impact of the acquisition under consideration. A relevant market will ultimately be determined, in the words of the Act, as a matter of fact and commercial common sense.
33. Where markets are difficult to define precisely, the Commission will initially take a conservative approach. If the proposed acquisition can be cleared on the basis of a narrow market definition, it would also be cleared using a broader one. If the Commission is unable to clear the proposed acquisition on the basis of the narrower market, it will be necessary to review the arguments and evidence in relation to broader markets.

### **Product Dimension**

34. The delineation of relevant markets as a basis for assessing the competitive effects of a business acquisition begins with an examination of the goods or services offered by each of the parties to the acquisition. Both demand-side and supply-side factors are generally considered in defining market boundaries. Broadly speaking, a market includes products that are close substitutes in buyers' eyes on the demand-side, and suppliers who produce, or are able easily to substitute to produce, those products on the supply-side.
35. The Commission takes the view that the appropriate time period for assessing substitution possibilities is the longer term, but within the foreseeable future.<sup>2</sup> The Commission considers this to be a period of one year, which is the period customarily used internationally in applying the 'ssnip' test (see below) to determine market boundaries. The Commission will take into account recent, and likely future, changes in products, relative prices and production technology in the process of market definition.
36. The applicant submitted that the relevant product market was the broad market for commercial non-alcoholic beverages, while also outlining a market definition based on narrow beverage categories. The categories suggested by the applicant were:

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<sup>2</sup> In *Tru Tone Ltd v Festival Records Retail Marketing Ltd* [ ] 2 NZLR 351 Smellie J and the Court of Appeal on appeal approvingly quoted an earlier decision of the Commerce Commission in *Edmonds Food Ind Ltd v W F Tucker & Co Ltd* (Decision 21, June 1984) where the Commission had ruled: "A market has been defined as a field of actual or potential transactions between buyers and sellers amongst whom there can be strong substitution, at least in the long run, if given a sufficient price incentive". See also *News Limited v Australian Rugby Football League Limited & Ors* (1996) ATPR at 41,687, where Burchett J stated: "Long term prospects that can be more or less clearly foreseen are, to that extent, a present reality, from the point of view of identifying the constraints upon commercial action. This fact emphasises the importance of the principle . . . that substitution possibilities in the longer run may be very significant for market delineation." Also *Re Tooth & Co Ltd v Tooheys Ltd* (1979) 39 FLR 1 emphasises longer run substitution possibilities.

- Carbonated soft drinks;
- Still soft drinks;
- Fruit juices
- Sports drinks;
- Energy drinks;
- Lifestyle drinks;
- Powders;
- Cordials;
- Flavoured milk;
- Plain milk.

37. Frucor also made submission to the Commission, which argued that the market was made up of a series of product markets. Frucor's submission disputed whether there was a distinct lifestyle market and argued that the products that TCCC claimed were lifestyle drinks were in fact sports drinks.
38. Therefore, the Commission has faced two issues with respect to the market definition. The first is whether there is one broad non-alcoholic beverages market or whether there are in fact distinct product markets. The second is, if narrow product markets are defined, how these should be defined.
39. With respect to the first issue, the Commission accepts there is significant overlap between the various beverage categories. However, it notes that when it formerly considered this issue, it defined a separate market for CSD rather than a wider non-alcoholic beverage market (TCCC/Cadbury Schweppes, 1999).
40. Other jurisdictions, for example the UK and the ACCC have also defined the market as a series of separate product markets. For example, the UK defined a separate market for bottled water.
41. The Commission considers that data supplied by the applicant showing that when a new bottled water product was launched it took sales predominantly from other bottled waters, and only to a small degree from other product types is consistent with their being separate product markets. The Commission spoke with several industry participants. The general perception was that bottled waters, fruit juices and CSD's were separate markets. These views are reinforced by seeing how products are displayed within supermarkets and other stores. For these reasons the Commission has concluded that rather than being one large non-alcoholic drinks market there is a series of distinct product markets.
42. Given this conclusion, it is necessary to establish the specific markets. From its investigation the Commission has concluded that there is widespread support for each of fruit juices, CSD, and bottled water being a distinct market. The key question is what market or markets apply to the remaining products, described by TCCC as being the energy, lifestyle, and sports drinks segments.
43. Within these categories, the Commission notes it is difficult to make robust distinctions between the products. For example, a sports drink may have similar characteristics to an energy drink. Some products marketed as energy drinks do not in fact contain many more 'energy enhancing' properties than some carbonated soft drinks.



44. Industry participants generally supported the view that there is one category, termed ‘new age beverages’, which the energy and lifestyle drinks fit into. Most industry participants did not support the view of a separate market for lifestyle drinks.
45. It was widely noted that market categorisation is often arbitrary and decided by marketers at the time of product release. This is also reflective of the nature of the industry, whereby market segments are created quite rapidly by the introduction of new products. For example, energy drinks were relatively unheard of five years ago, but now represent a significant portion of the new age beverage category.
46. Observations of product placement by Commission staff in supermarkets, Star Marts, and dairies support the notion of a single market containing energy, lifestyle, and sports drinks. Whereas there was generally shelf space allocated to each of the fruit juices, CSD’s, and bottled waters, the remaining products were not displayed according to their narrow product type. Instead, they were mixed with each of sports, energy and lifestyle drinks sharing the same shelf space.
47. The Commission has therefore concluded that the boundaries between these product segments have been blurred to such an extent that it is more accurate to consider there is a single market of new age beverages rather than a series of separate product markets.
48. The Commission has therefore identified four markets relevant to the acquisition. These are; carbonated soft drinks, bottled water, fruit juices and fruit drinks, and new age beverages. The Commission notes that other product categories identified earlier in the report are also potential markets but that there is no aggregation in these categories.

#### *Undifferentiated/Differentiated Products*

49. In some instances, market definitional problems arise because of the differentiated nature of the goods or services involved in a business acquisition, caused by differing technical specifications, branding, packaging, warranties, distribution channels and other factors.
50. Where a significant group of buyers within a relevant market is likely to be subject to price discrimination, the Commission will consider defining additional relevant markets based on particular uses for a good or service, particular groups of buyers, or buyers in particular geographic areas. In other cases, the primary focus may switch to the extent to which a business acquisition eliminates competition between the products brought together by the acquisition.
51. Non-alcoholic beverages are highly differentiated even within the relatively narrow markets adopted by the Commission. For many of the products, brand and positioning seem just as important, if not more so, than specific content.

#### **Geographic Extent**

52. The Commission will seek to define the geographical extent of a market to include all of the relevant, spatially dispersed, sources of supply to which buyers can turn should the prices of local sources of supply be raised. For each good or service combination, the overlapping geographic areas in which the parties operate are identified. These form initial markets to which a ssnip is applied. Additional geographic regions are added until the smallest area is determined within which the hypothetical monopolist could profitably impose a ssnip.
53. Generally, the higher the value of the product to be purchased, in absolute terms or relative to total buyer expenditure as appropriate, the more likely are buyers to travel and shop around for the best buy, and the wider the geographic extent of the market is likely to be.
54. Where transport costs are high relative to the final value of a product, a narrower geographic market is more likely to be appropriate. Where product perishability and other

similar practical considerations limit the distance that a product may be transported, this may limit the geographic extent of the market. The timeliness of delivery from alternative geographic sources is similarly relevant.

55. Although buyers and sellers of a particular good or service may interact in markets that are apparently local or regional in extent, those markets may themselves overlap and interrelate so as to form a market covering a larger geographical area. In these situations, the larger market is likely to be the appropriate one for analysing the competitive effects of a business acquisition.
56. The Commerce Act defines a market to be a “market in New Zealand”. However, in many markets New Zealand buyers purchase products from both domestic and from overseas suppliers. Where imported products are close substitutes for domestic products, the overseas suppliers will be part of the relevant market. In such circumstances the Commission, in order to comply with the wording of the Act, is likely to define a national market and then, as discussed later in the competition analysis, to consider the extent to which overseas suppliers exercise a competitive constraint on the participants in the domestic market.
57. Non-alcoholic beverages are marketed New Zealand wide and sold via outlets which have a national presence. Distinctions can be made between supermarkets and route trade such as Star Marts, petrol stations, and dairies in that there is a difference in the way the product is packaged and sold as well as the customer need the product is addressing. Supermarkets stock primarily on-chilled large ‘take home’ packs of beverage at prices that are significantly below those charged at the route trade, whereas route trade premises target the ‘drink now’ market with the majority of product sold chilled in single serve packaging.
58. However, Supermarkets also have a route trade display, stocking chilled single serve products, and the route trade outlets also stock a limited amount of non-chilled take home packs. Therefore there is no precise distinction between the route trade and the supermarket trade.
59. The Commission defines the markets for non-alcoholic beverages as national markets, with no separate sub-markets by type of retail outlet.

### **Functional Level**

60. The production, distribution and sale of a product typically occurs through a series of functional levels – for example, the manufacturing/import level, the wholesale/distribution level and the retail level. It is often useful to identify the relevant functional level in describing a market, as a proposed business acquisition may affect one horizontal level, but not others.<sup>3</sup> Alternatively, some acquisitions, such as those involving businesses at different vertical levels, may raise issues related to vertical integration. Generally, the Commission will seek to identify separate relevant markets at each functional level affected by an acquisition and assess the impact of the acquisition on each.
61. Both Coca Cola and Rio Beverages are involved in the bottling and wholesaling of non-alcoholic beverages. Should market power be expressed post acquisition, it is most likely to

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<sup>3</sup> *Telecom Corporation of New Zealand Ltd v Commerce Commission* (1991) 4 TCLR 473, 502 The High Court (Greig J, Shaw WJ, Prof M Brunt) noted: “If we ask what functional divisions are appropriate in any market definition exercise, the answer, ..., must be whatever will best expose the play of market forces, actual and potential, upon buyers and sellers. Wherever successive stages of production and distribution can be co-ordinated by market transactions, there is no difficulty: there will be a series of markets linking actual and potential buyers and sellers at each stage. And again, where pronounced efficiencies of vertical integration dictate that successive stages of production and distribution must be co-ordinated by internal managerial processes, there can be no market.”

be expressed at the wholesale level. Therefore, the Commission concludes that the functional level affected by the proposed acquisition is the wholesale supply of product.

### **Conclusion on Market Definition**

62. The Commission concludes that the relevant markets are the New Zealand markets for the wholesale supply of:

- Fruit drinks and fruit juices
- Bottled water
- Carbonated soft drinks and
- New age beverages

## **COMPETITION ANALYSIS**

### **Substantially Lessening Competition**

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

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

64. Section 2(1A) provides that substantial means “real or of substance”. Substantial is taken as meaning something more than insubstantial or nominal. It is a question of degree.<sup>4</sup> What is required is a real lessening of competition that is not minimal. The lessening needs to be of such size, character and importance to make it worthy of consideration.<sup>5</sup>

65. Section 3(2) provides that references to the lessening of competition include references to the hindering or preventing of competition.<sup>6</sup>

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

- the probable nature and extent of competition that would exist in a significant section of the market, but for the acquisition (the counterfactual);
- the nature and extent of the contemplated lessening; and
- whether the contemplated lessening is substantial.<sup>7</sup>

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

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

<sup>4</sup> *Commerce Commission v Port Nelson Ltd* (1995) 6 TCLR 406, 434; *Mobil Oil Corporation v The Queen in Right of NZ* 4/5/89, International Centre for Settlement of Investment Disputes, Washington DC, International Arbitral Tribunal ARB/87/2 (paras 8.2, 19, 20).

<sup>5</sup> *Dandy Power Equipment Ltd v Mercury Marina Pty Ltd* (1982) ATPR 40-315, 43-888; *South Yorkshire Transport Ltd v Monopolies & Mergers Commission* [ ] 1 All ER 289.

<sup>6</sup> For a discussion of the definition see *Commerce Commission v Port Nelson Ltd*, supra n 6, 434.

<sup>7</sup> See *Dandy*, supra n 5, pp 43–887 to 43-888 and adopted in New Zealand: *ARA v Mutual Rental Cars* [ ] 2 NZLR 647; *Tru Tone Ltd v Festival Records Retail Marketing Ltd* [ ] 2 NZLR 352; *Fisher & Paykel Ltd v Commerce Commission* [ ] 2 NZLR 731; *Commerce Commission v Carter Holt Harvey*, unreported, High Court, Auckland, CL 27/95, 18/4/00.

and, in relation to s47:

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

68. For the purposes of the analysis, the Commission takes the view that a lessening of competition and a strengthening of market power may be taken as being equivalent, since they are the two sides of the same coin. Hence, it uses the two terms interchangeably. Thus, in considering whether the acquisition would have, or would be likely to have, the effect of substantially lessening competition in a market, the Commission will take account of the scope for the exercise of market power, either unilaterally or through co-ordination between firms.
69. When the impact of enhanced market power is expected predominantly to be upon price, the anticipated price increase relative to what would otherwise have occurred in the market has to be both material, and able to be sustained for a period of at least two years, for the lessening, or likely lessening, of competition to be regarded as substantial. Similarly, when the impact of increased market power is felt in terms of the non-price dimensions of competition, these also have to be both material and able to be sustainable for at least two years for there to be a substantial lessening, or likely substantial lessening, of competition.

### **The Counterfactual**

70. The Commission uses a forward-looking, counterfactual, type of analysis in its assessment of business acquisitions, in which two future scenarios are postulated: that with the acquisition in question, and that in the absence of the acquisition (the counterfactual). The impact of the acquisition on competition can then be viewed as the difference between those two scenarios. It should be noted that the status quo cannot necessarily be assumed to continue in the absence of the acquisition, although that may often be the case. For example, in some instances a clearly developing trend may be evident in the market, in which case the appropriate counterfactual may be based on an extrapolation of that trend.
71. Rio Beverages has been successfully operating in New Zealand for sometime and is under no compulsion to sell. [ ] Rio Beverages has not been for sale on the general market.
72. The Commission concludes that, if the acquisition does not proceed, Rio Beverages is likely to remain under its current ownership for the foreseeable future given that it is not on the general market. For the purposes of analysis, the Commission therefore proposes to use the status quo as the counterfactual.

### **Potential Sources of Market Power**

73. In differentiated products markets, where the product offerings of different firms vary, and in which buyers make their purchase decisions on the basis of product characteristics as well as of price, the products of firms are by definition not perfect substitutes for each other. The substitutability between products will vary depending upon differences in their various characteristics, which may include their physical specifications, brand image, associated services and location of sale. In simple terms, differentiated products can be thought of as being arranged in a “chain of substitutes”, where those in adjacent positions in the chain tend to be close substitutes, and those positioned further apart are less close substitutes.
74. The supply-side characteristics of differentiated products markets are important, as the potential market power of the combined entity may be offset by the actions of rivals. However, rivals may not be able to offer a competitive constraint where they are unable either to re-position their products closer to that of the combined entity to replace the lost localised competition, or to strengthen the promotion of existing products. A further

possible constraint would be lost if it were not possible for new products to be added through new entry.

75. As previously noted, non-alcoholic beverages are highly differentiated products where suppliers regularly enter the market with new products to fulfil (or create new) market niches. Innovation and dynamism are both strongly pronounced characteristics of this industry. New markets are regularly created via the introduction of new and innovative beverages. Competitors seeking to obtain market share in the new markets quickly copy these new products. Supermarket purchasing staff report being inundated for requests for shelf space for new firms wanting to supply new products or variants of newly introduced products.
76. Consequently, the Commission has focused on the extent to which rivals can expand their supply or range to constrain any attempt by the merged entity to prevent access to the market.

### **Conclusion – Competition Analysis Principles**

77. The Act prohibits business acquisitions that would be likely to have the effect of substantially lessening competition in a market. The Commission makes this assessment against a counterfactual of what it considers would be likely to happen in the absence of the acquisition. In the present case the counterfactual is considered to be the status quo. A substantial lessening of competition is taken to be equivalent to a substantial increase in market power. A business acquisition can lead to an increase in market power by providing scope either for the combined entity to exercise such power unilaterally, or for the firms remaining in the market to co-ordinate their behaviour so as to exercise such power.
78. In broad terms, a substantial lessening of competition cannot arise from a business acquisition where there are sufficient competitive constraints upon the combined entity. The balance of this Decision considers and evaluates the constraints that might apply in the non-alcoholic beverage markets under the following headings:
- existing competition;
  - potential competition from entry; and
  - other competition factors.

## **ANALYSIS OF EXISTING COMPETITION**

### **Introduction**

79. One consequence of a merger between competitors is that the number of firms competing in a market is reduced or, put another way, concentration is increased. This raises the possibility that competition in the market may be substantially lessened through the exercise of unilateral or coordinated market power. These are the subject of the analysis in this section.

### **Scope for Unilateral Market Power**

#### *Introduction*

80. An examination of concentration in a market post-acquisition can provide a useful guide to the constraints that market participants may place upon each other, including the combined entity. Both structural and behavioural factors have to be considered. However, concentration is only one of a number of factors to be considered in the assessment of

competition in a market. Those other factors are considered in later sections, as noted above.

81. Market shares can be measured in terms of revenues, volumes of goods sold, production capacities or inputs (such as labour or capital) used. All measures may yield similar results in some cases. Where they do not, the Commission may, for the purposes of its assessment, adopt the measure which yields the highest level of market share for the combined entity. The Commission considers that this will lead to an appropriately conservative assessment of concentration, and that the factors which lead to the other different market share results are more appropriately considered elsewhere during the assessment of the acquisition.<sup>8</sup>
82. In determining market shares, the Commission will take into account the existing participants (including 'near entrants'), inter-firm relationships, and the level of imports. This is followed by a specification of the Commission's 'safe harbours', an estimation of market shares, and an evaluation of existing competition in the market. Each of these aspects is now considered in turn.

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<sup>8</sup> For example, where market share measured in terms of capacity produces a significantly lower share of the market in the hands of participants than a measure in terms of sales volumes, the constraint on a combined entity from that unemployed capacity might be taken into account when identifying near entrants or the constraint from new market entry. In some cases, the model of market power being used may influence the choice as to which market share measure is used.

## THE NEW ZEALAND MARKET FOR FRUIT JUICE AND JUICES

83. The fruit juice market is characterised by several product market segments, which include chilled juice and shelf stable juice. Shelf stable juice (reconstituted juice) accounts for approximately 86% of the total fruit juice market and is manufactured from imported juice concentrates. Chilled juices are generally preservative free with a shelf life of up to 7 days. They are sold mostly in the single serve form through supermarkets.
84. In previous decisions<sup>9</sup> it was noted that fruit juices can be substituted by various other beverage products in some situations. However, for the purposes of conducting a competition analysis relating to the respective proposals, a narrow market definition was adopted. The market was defined as the manufacture, importation and wholesale distribution of fruit juice products. This includes products such as ‘pure’ fruit juices, fruit juices produced from concentrate, and fruit flavoured drinks.
85. New Zealanders consume approximately 67m litres of fruit juice each year. This figure equates to a per capita consumption of 18.5 litres, which is compared to the higher per capita consumption rates in Australia (32 litres) and the United States (68 litres). The fruit juice market is mature with a growth rate of 4% between 1997 and 2000.

### *Existing Participants*

86. TCCC owns *Pacific Orchard* and *Frutopia* brands; CCA owns the *Fruitbox* brand; and Rio Beverages owns the *Keri*, *Rio Gold*, *Thextons*, *Rio Splice*, *Robinson Brothers*, and *Frucci* brands. The leading supplier of fruit juices is Frucor with Just Juice, Fresh Up, McCoy, and Citrus Tree brands.
87. There are some niche players, for example, Phoenix Organic Limited, which manufactures organic juices, but most deliver to a broad consumer need.

### *Inter-firm Relationships*

88. Companies that are part of the same corporate grouping, or that have similar strong relationships, cannot be relied upon to provide an effective competitive constraint to one another. Other less formal relationships between companies may also give rise to limitations on the extent of rivalry between them. Relationships between persons in the relevant market and other businesses may also affect rivalry in a market.
89. There is a NZ Juice industry association which is involved in standards and labelling. However, this does not impact on competition within the market.

### *Imports*

90. In markets where imports are present, the Commission will consider whether actual competition from imported products is the equivalent to that from domestic supply. In undertaking this evaluation, the Commission will take into account the existence of any limits on quantities of imported product (the price elasticity of supply), and the effects on trade of various factors. Imports channelled through the parties to an acquisition, or persons associated with them, will be added to their domestic production in assessing market share, rather than being treated as independent sources of supply.
91. Potential imports may also provide a constraint on domestic suppliers. This is considered as part of the assessment of the constraint from market entry below.

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<sup>9</sup> Decision 283, *New Juice Ltd/Rio Beverages and Cerebos Greggs Ltd*, 30 January 1997, and *Frucor Holdings Ltd and Frucor Beverages Ltd/Dew Drop Juices Ltd*, AUT/BA F7/1, M 2302.

92. Imports aren't significant in the fruit juice/fruit drinks market. However, many firms, such as Charlies Juice, import pasteurised or concentrated juice from Australia for re-packaging and distribution in New Zealand.

#### *Safe Harbours*

93. Once the relevant market has been defined, the participants have been identified, and their market shares estimated, the Commission's 'safe harbours' can be applied. Under these safe harbours, a business acquisition is considered unlikely to substantially lessen competition in a market where, after the proposed acquisition, either of the following situations exist:

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

94. As noted below, market shares by themselves are insufficient to establish whether competition in a market has been lessened. Other relevant issues are discussed in later sections.

#### *Market Shares*

95. On the basis of the preceding discussion, the Commission proposes to use volume as its primary measure of market share and concentration. The resulting shares are shown in Table One.



**Table One:****Fruit Juice/Fruit Drinks: Estimated Volumes (000's litres) and % market share**

	<b>Volume</b>	<b>%</b>
Coca-Cola	[ ]	[ ]
Rio Beverages	[ ]	[ ]
<b>Combined Entity</b>	[ ]	[ ]
Frucor Beverages	[ ]	[ ]
Other	[ ]	[ ]
House Brands	[ ]	[ ]
<b>Total</b>	[ ]	<b>100</b>

*State of Existing Competition*

96. There are a number of factors that indicate that the acquisition will not affect the competitiveness of the market. Aggregation in respect of fruit juice and fruit drinks will be minimal post acquisition as Coca-Cola's existing ready-to-drink fruit juice and fruit drink interests at [ ] of the market are minor. Therefore, though the merged entity will have a significant market share [ ], it is little different from that which Rio already has.
97. Industry participants note strong competition in the fruit juice/fruit drink market. Frucor Beverages is very strong in this market with its Just Juice, Fresh Up, McCoy, and Citrus Tree brands. In addition there are a number of niche players, this will not change post acquisition.
98. Most new entry is seen in the form of a large number of niche products, such as organic and specialist juices.

*Conclusions – Unilateral Market Power*

99. TCCC will not gain unilateral market power in the fruit juices/drinks market as a result of its proposed acquisition of Rio Beverages.

**Scope for the Exercise of Coordinated Market Power***Introduction*

100. A business acquisition may lead to a change in market circumstances such that coordination between the remaining firms either is made more likely, or the effectiveness of pre-acquisition coordination is enhanced. Firms that would otherwise compete may attempt to coordinate their behaviour in order to exercise market power by restricting their joint output and raising price. In extreme cases, where all firms in the market are involved and coordination is particularly effective, they may be able to behave like a collective monopolist. Where not all firms are involved, and market share in the hands of the

collaborators is reduced, coordinated market power becomes more difficult to exercise because of competition from the independent firms in the market.

101. In broad terms, successful coordination can be thought of as requiring two ingredients: ‘collusion’ and ‘discipline’. ‘Collusion’ involves the firms individually coming to a mutually profitable expectation or agreement over coordination; ‘discipline’ requires that firms that would deviate from the understanding are detected and punished (thereby eliminating the short-term profit to be gained by the firm from deviating).
102. When assessing the scope for coordination in the market during the consideration of a business acquisition, the Commission will evaluate the likely post-acquisition structural and behavioural characteristics of the relevant market or markets to test whether the potential for coordination would be materially enhanced by the acquisition. The intention is to assess the likelihood of certain types of behaviour occurring, and whether these would be likely to lead to a substantial lessening of competition.

### *Collusion*

103. “Collusion” involves firms in a market individually coming to a mutually profitable expectation or agreement over coordination. Both explicit and tacit forms of such behaviour between firms are included.
104. The structural and behavioural factors that are usually considered to be conducive to collusion are set out in the left-hand column in Table 2. The significance of these is explained more fully in the Commission’s *Practice Note 4*. The right-hand column of the Table then assesses the extent to which those factors are present, or are likely to be enhanced post-merger, in the Fruit Juice/Fruit drinks market. A high proportion of ‘yes’ responses would suggest that the market was particularly favourable to ‘collusion’; a high proportion of ‘no’ responses the reverse.

**Table Two:****Testing the Potential for ‘Collusion’ in the New Zealand Fruit Juice/Fruit Drink Market**

<b>Factors conducive to collusion</b>	<b>Presence of factors in the market</b>
High seller concentration	Yes
Undifferentiated product	No
New entry slow	No
Lack of fringe competitors	No
Price inelastic demand curve	No
Industry’s poor competition record	No
Presence of excess capacity	Yes
Presence of industry associations/fora	Yes – But of limited influence

105. The assessment of the relevant structural and behavioural conditions in the market for fruit juices and fruit drinks in Table Two suggests that the market is not particularly likely to be susceptible to collusion.
106. Although seller concentration is high, there are a number of fringe competitors with a reasonable market share. The industry is characterised by a range of competitors and an elastic demand curve.
107. Given that the potential for collusion is low, the Commission does not consider it necessary to examine whether the conditions relevant to discipline are present.

*Conclusions – Co-ordinated Market Power*

108. It appears unlikely that the proposed acquisition would materially enhance the likelihood of co-ordinated market power in the New Zealand market for fruit juice and fruit drinks.

**Conclusions – Existing Competition**

109. The Commission considers that the scope for the exercise of co-ordinated market power would not be enhanced by the acquisition.

**CONSTRAINTS FROM MARKET ENTRY****Introduction**

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

111. Where barriers to entry are clearly low, it will not be necessary for the Commission to identify specific firms that might enter the market. In other cases, the Commission will seek to identify likely new entrants into the market.
112. The Commission will consider the history of past market entry as an indicator of the likelihood of future entry. The Commission is also mindful that entry often occurs on a relatively small scale, at least initially, and as such may not pose much of a competitive constraint on incumbents within the relevant time frame.

### **Barriers to Entry**

113. The likely effectiveness of the threat of new entry in constraining the conduct of market participants, following a business acquisition that might otherwise lead to a substantial lessening of competition in a market, is determined by the nature and height of barriers to entry into that market.
114. The Commission considers that, for the purpose of considering this issue, a barrier to entry is best defined as an additional or significantly increased cost or other disadvantage that a new entrant must bear as a condition of entry. In evaluating the barriers to entry into a market, the Commission will generally consider the broader ‘entry conditions’ that apply, and then go on to evaluate which of those constitute entry barriers.
115. It is the overall obstacle to entry posed by the aggregation of the various barriers that is relevant in determining whether entry is relatively easy or not, and therefore whether or not potential entry would prevent a substantial lessening of competition.
116. For entry to act as an antidote to a substantial lessening of competition stemming from a business acquisition, it must constrain the behaviour of the combined entity and others in the market.
117. Frucor, in its submission to the Commission, outlined space for refrigeration in the route trade as a significant barrier to entry for all non-alcoholic beverages. Frucor submitted that it isn’t access to refrigeration per se that acts as a barrier to entry, but access to ‘foot space’ in the route trade. That is, refrigeration can be purchased or leased at a cost that is not prohibitive, but access to floor space in Star Marts, petrol stations, and dairies can be problematic.
118. Evidence shows that this is not a concern in supermarkets, which do not have the same space constraints as smaller operators, such as dairies and Star Marts.
119. In the route trade, space for refrigeration is limited due to limited floor space. This means that a new entrant seeking to distribute via the route trade can encounter difficulty getting access to refrigeration. This is important as for some products the route trade can account for up to 70% of sales by value.
120. Ownership of the fridges depends on the type of outlet. Star Mart, for example, owns most of its own refrigeration (proprietary refrigeration), while a dairy will typically have its refrigeration supplied by the beverage companies selling product in its store.
121. In a typical dairy, TCCC will have between one and three fridges, Frucor and Rio Beverages are likely to have one each. These outlets will also typically have a ‘white fridge’ used to store products such as milk along with competing beverages, such as niche juices, and beverages sold by smaller competitors.
122. Beverage companies that supply refrigeration are generally fiercely protective over its use, in particular, the stocking of competitors products. That is, if TCCC provide a dairy with refrigeration then only TCCC products can be stored in that fridge. [

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123. However, other forms of distribution are also evident. When Red Bull entered the market it introduced its own ‘barrel’ chillers to overcome a shortage of space in refrigerators. Red Bull is now an established product and also has space allocated to it in most route trade outlets.

124. Other ways of overcoming this potential constraint are also apparent, for instance, [ ]

125. Route trade operators are generally cautious about stocking product that is not well known in the market or backed up by a good national advertising and support campaign. This is due to the limited refrigeration space in the route trade. Supermarkets are known to be more prepared to stock products that aren’t currently well known as supermarkets have more shelf space and floor space for new refrigeration units.

126. There is evidence of new, un-proven, products gaining access to chiller space in the route trade. For example, Sanitarium’s newly released flavoured water has a strong presence in most route trade outlets. [ ]

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127. The Commission concludes that though access to chiller space may make entry difficult, it does not create an insurmountable barrier, as shown by the entry of new products. There is no evidence that the transaction will have any affect on the ability of a new player to enter the market. Therefore, this does not appear to be a barrier that would cause a substantial lessening of competition.

#### *Conclusion on Barriers to Entry*

128. The Commission concludes that there are no significant barriers to entry to deter expansion or new entry into the fruit juice/fruit drinks market.

#### The “LET” Test

129. In order for the threat of market entry to be such a constraint on the exercise of market power as to alleviate concerns that a business acquisition could lead to a substantial lessening of competition, entry of new participants in response to the exercise of market power must be likely, sufficient in extent and timely (the *let* test). If they are to act as a constraint on market participants following a business acquisition which might otherwise lead to a substantial lessening of competition in a market, entry must be relatively easy, or to put it another way, barriers to entry must be relatively low.

#### *Likelihood of Entry*

130. The mere possibility of entry is, in the Commission’s view, an insufficient constraint on the exercise of market power to 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 firm will 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.

131. In general, it is the pre-merger price that is relevant for judging whether entry is likely to be profitable. That in turn depends upon the reaction of incumbents to entry in terms of

their production volume, together with the output volume needed by the entrant in order to lower its unit costs to the point where it can be competitive.

132. As previously noted, the industry has a record of innovation and the introduction of new products. Industry participants report regular approaches by potential new entrants seeking to introduce new product into the market. There are numerous large international firms that could enter the New Zealand market for fruit juices/fruit drinks at any given time given the necessary incentive.

#### *Extent of Entry*

133. If entry is to constrain market participants, then 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. The Commission will not consider entry that might occur only at relatively low volumes, or in localised areas, to represent a sufficient constraint to alleviate concerns about market power.
134. Small-scale entry into a market, where the entrant supplies one significant customer, or a particular product or geographic niche, may not be difficult to accomplish. However, further expansion from that “toe-hold” position may be difficult because of the presence of mobility barriers, which may hinder firm’s efforts to expand from one part of the market to another. Where mobility barriers are present in a market, they may reduce the ‘extent’ of entry.
135. The extent of new entry is likely to be limited to niche players given the maturity of the fruit juices/fruit drink market and the slow growth in the market.

#### *Timeliness of Entry*

136. If it is effectively to constrain the exercise of market power to the extent necessary to alleviate concerns about a substantial lessening of competition, entry must be likely to occur before customers in the relevant market are detrimentally affected to a significant extent. Entry that constrains must be feasible within a reasonably short timeframe from the point at which market power is first exercised.
137. Given the lack of entry barriers, the Commission considers that entry could occur at any time.

#### *Conclusion on the Let Test*

138. The Commission concludes that the various components of the LET test are satisfied. Therefore, the Commission concludes there is potential for new entry into this market at any time by a reasonable number of players.

## **OTHER COMPETITION FACTORS**

### **Constraint from Buyers or Suppliers**

139. The potential for a firm to wield market power may be constrained by countervailing power in the hands of its customers, or alternatively, when considering buyer (oligopsony or monopsony) market power, its suppliers. In some circumstances, it is possible that this constraint may be sufficient to eliminate concerns that a business acquisition may lead to a substantial lessening of competition.
140. Where a combined entity would face a purchaser or supplier with a substantial degree of market power in a market affected by the acquisition, the Commission will consider

whether that situation is such as to constrain market participants to such an extent that competition is not substantially lessened.

141. Buyers are known to wield a reasonable level of countervailing power in the market. The major supermarkets and petrol companies are all substantial purchasers of beverage products. Supermarkets and petrol companies account for approximately [ ] of Coca-Cola sales.
142. In addition to buying power, the supermarkets also have influence through their involvement in the promotion and retail of their own brands of non-alcoholic beverages, in competition with other beverage manufacturers.
143. This is not expected to change post acquisition. Supermarkets noted that [ ]

### **Conclusions: The Wholesale Supply of Fruit Juice/Fruit Drinks in New Zealand**

144. The preceding analysis shows that the market for the wholesale supply of fruit juice and fruit drinks in New Zealand would continue to be competitive, despite the position that the merged entity would have in the market. The market is characterised by a strong rival in Frucor and number of fringe and potential competitors.

### **THE NEW ZEALAND MARKET FOR BOTTLED WATER**

145. The Bottled water market is made up of a large number of brands along with ‘house brands’ sold by supermarket. This market includes sparkling water and ‘near waters’ such as those with additives and flavourings.

#### *Existing Participants*

146. Although TCCC does not have a bottled water product, CCA NZ sells the *pump* and *Deep Spring* brands in New Zealand. Rio beverages own and sell the *Kiwi Blue* brand.
147. Frucor has the rights to the *H2Go* (Pepsi Cola International), *NZ Natural* and *Wet Rock* bottled water brands.
148. There are a number of other participants, many with international backing which will allow them to expand significantly in the New Zealand market and many willing to provide contract packing facilities to new entrants. These participants include Montana Wines, Kiwi Bottlers 96 Limited, and Nestle New Zealand Limited.

#### *Inter-firm Relationships*

149. There are no identified industry relationships that are likely to impact on competition in the market.

#### *Imports*

150. Bottled water can be imported into the New Zealand market with relative ease. A number of firms, such as the Delmaine Trading Company Limited already import bottled water into the New Zealand market.

*Market Shares***Table Three:****Bottled Water: Estimated volumes (000's litres) and % market share**

	<b>Volume</b>	<b>%</b>
Coca-Cola	[ ]	[ ]
Rio Beverages	[ ]	[ ]
<b>Combined Entity</b>	[ ]	[ ]
Frucor Beverages	[ ]	[ ]
Other	[ ]	[ ]
Private Labels	[ ]	[ ]
<b>Total</b>	[ ]	<b>100</b>

151. The post acquisition combined share is approximately [ ]. This does not include supermarket house brands. Frucor is also strong in this market with [ ] of the market. The proposed acquisition will fall outside of safe harbours. There are many products in other non-alcoholic beverage markets that act as near substitutes to bottled water. This restrains the ability of bottled water suppliers to abuse any market power.

152. This market is also experiencing a high degree of growth and innovation. Any market opportunities created by an abuse of market power are likely to be taken advantage of by new entry, either by existing competitors in the non-alcoholic beverage market, or from imported product.

*State of Existing Competition*

153. Industry participants report strong competition in this market, such that no competitor is likely to have the ability to raise prices. This will not change post acquisition.

*Conclusions – Unilateral Market Power*

154. TCCC will not gain unilateral market power in the bottled water market as a result of its proposed acquisition of Rio Beverages.

**Scope for the Exercise of Coordinated Market Power**

155. *(See preceding analysis)*

**Conclusions – Existing Competition**

156. The Commission considers that the scope for the exercise of co-ordinated market power would not be enhanced by the acquisition.



**CONSTRAINTS FROM MARKET ENTRY**

157. (See preceding analysis)

**OTHER COMPETITION FACTORS**

158. (See preceding analysis)

**Conclusions: The Wholesale Supply of Bottled Water in New Zealand**

159. The preceding analysis shows that the market for the wholesale supply of bottled water in New Zealand would continue to be competitive, despite the position that the merged entity would have in the market. The market is characterised by a number of fringe and potential competitors.

**THE NEW ZEALAND MARKET FOR NEW AGE BEVERAGES**

160. This market includes those drinks sold as sports, energy, and lifestyle drinks. There is significant differentiation within this market and products are aggregated into a single market more from the chain of substitutes concept rather than because each product is a direct substitute for the other.

161. This market is one of the fastest growing non-alcoholic beverage markets. There is a high degree of innovation and market participants note a large number of approaches from potential new entrants.

*Existing Participants*

162. There are a number of domestic and international participants in this market. TCCC has Powerade, Burn, and Lift Plus, while Rio Beverages have Ikon, and E2. Competing with these products is Frucor's energy drink, V and its sports drink, G Force. There are also numerous imported products, including the Red Bull energy drink.

163. [

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*Inter-firm Relationships*

164. Interfirm relationships do not impact on competition within this market.

*Imports*

165. Imports represent a growing portion of this market. Firms such as Red Bull and Dirty Dog are both large international firms with the capacity to establish a strong presence in New Zealand.

*Market Shares***Table: Four****New Age Beverages: Estimated volumes (000's litres) and % market share**

	<b>Volume</b>	<b>%</b>
Coca-Cola	[ ]	[ ]
Rio Beverages	[ ]	[ ]
<b>Combined Entity</b>	[ ]	[ ]
Frucor Beverages	[ ]	[ ]
Other	[ ]	[ ]
<b>Total</b>	[ ]	<b>100</b>

*State of Existing Competition*

166. The acquisition will result in a moderate level of aggregation, which will breach safe harbours. However, underlying the relatively small market share held by the 'other' category are a number of large international competitors, which could quickly establish a more significant presence in the New Zealand market. This power would be further eroded by the high degree of innovation and rapid growth in the market.

167. Industry participants report strong competition in the market. Frucor is the dominant player with its 'V' drink enjoying a significant presence in the market. However, Red Bull has made a successful entry into the market and also enjoys a strong position.

*Conclusions – Unilateral Market Power*

168. TCCC will not gain unilateral market power in the new age beverages market as a result of the proposed acquisition of Rio Beverages.

**Scope for the Exercise of Coordinated Market Power**

169. *(See preceding analysis)*

**Conclusions – Existing Competition**

170. The Commission considers that the scope for the exercise of co-ordinated market power would not be enhanced by the acquisition.

**CONSTRAINTS FROM MARKET ENTRY**

171. *(See preceding analysis)*

## **OTHER COMPETITION FACTORS**

172. (See preceding analysis)

### **Conclusions: The Wholesale Supply of New Age Beverages in New Zealand**

173. The preceding analysis shows that the market for the wholesale supply of new age beverages in New Zealand is currently competitive, despite the position that TCCC currently has in the market. The market is characterised by a number of fringe and potential competitors.

## **THE NEW ZEALAND MARKET FOR CARBONATED SOFT DRINKS**

174. This segment is the largest in the non-alcoholic beverages market, with a value of approximately \$500m retail sales pa. Products in this segment include such well known products as cola flavoured drinks (*Coca Cola*, and *Pepsi*), lemonade flavoured drinks (*Sprite*, *7 Up* and the *Schweppes* range), and orange flavoured drinks (*Fanta* and *Mirinda*). The market is mature with a growth rate of 4% between 1997 and 2000.

175. The proposed acquisition will not result in any aggregation in this market segment. This will, therefore, not be considered any further.

## **OVERALL CONCLUSION**

176. The Commission has considered the probable nature and extent of competition that would exist in the markets for; fruit drinks/fruit juices, bottled water, new age beverages and carbonated soft drinks. The Commission considers that the appropriate benchmark for comparison is the status quo.

177. The Commission has considered the nature and extent of the contemplated lessening. The proposed acquisition results in the merged entity obtaining a market share which falls outside the Commission's safe harbour guidelines.

178. The Commission has also considered the nature and extent of the contemplated lessening, in terms of the competitive constraints that would exist following the merger from:

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

179. 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 markets for the wholesale supply of non-alcoholic beverages in New Zealand.

**DETERMINATION ON NOTICE OF CLEARANCE**

180. Accordingly, pursuant to section 66(3)(a) of the Commerce Act 1986, the Commission determines to give clearance for the acquisition by Coca Cola Amatil (NZ) Limited to acquire the trademarks and intellectual property associated with the brands owned by Rio Beverages Limited. .

Dated this 1<sup>st</sup> day of November 2002

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John Belgrave

Chair