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## COMMERCE COMMISSION

### DECISION NO. 287

Determination pursuant to the Commerce Act 1986, and in accordance with a delegation given terms of s 105 of the Commerce Act, in the matter of an application for clearance of a proposed business acquisition involving:

NEWMANS INTERNATIONAL LIMITED

and

TAURA NATURAL FOODS LTD

**The Commission:** P C Allport  
K M Brown

**Summary of Proposal  
Business Acquisition:**

The proposed acquisition by Newmans International Limited of:

- (a) certain businesses of Taura Natural Foods Limited; and
- (b) certain assets of Taura Natural Foods Limited.

**Determination:** Pursuant to s 66(3)(a) of the Commerce Act, and in accordance with a delegation granted under s 105 of the Commerce Act, the Commission determines to give a clearance for the proposed business acquisition.

**Date of Determination:** 27 March 1997

AUT/BA-N  
M2331

## MEMORANDUM

To: P C Allport (Convenor)  
K M Brown

From: J A Preston  
A Mladenovic

Date: Wednesday, 26 March 1997 (Working Day 7)

Subject: **Section 66 Notice Seeking Clearance for a Proposed Business Acquisition: Newmans International Limited and Taura Natural Foods Limited: Investigation Report**

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**Confidential information in this report is contained in square brackets**

**Working day 8: Thursday, 27 March 1997**

**Working day 10: Wednesday, 2 April 1997**

### INTRODUCTION

- 1 On 17 March 1997 the Commission received a notice, pursuant to s 66 (1) of the Commerce Act 1986, whereby Newmans International Limited (“Newmans”) is seeking clearance for the proposed acquisition by Newmans of various businesses and assets of Taura Natural Foods Limited (“Taura”).
- 2 The businesses currently carried out by Taura which Newmans proposes to acquire are the development, manufacture and marketing of:
  - beverages comprising concentrated fruit juices, ready to drink fruit juices, cordials and milkshake syrups;
  - fruit preparations comprising fruit pulp for yoghurt;

- jams comprising contracted retail jams, fruit spreads, specialist jams and diabetic jams;
  - ketchup, tomato sauce, mayonnaise, french dressing and thousand island dressing;
  - confectionery toppings comprising caramels, chocolate, strawberry, boysenberry and vanilla; and
  - citrus juices, concentrates and by-products.
- 3 The assets of Taura which Newmans proposes to acquire are land and buildings at 6 Owens Place, Tauranga, and the goodwill, plant and equipment and all other assets, existing finished and unfinished stock and intellectual property rights, relating to the businesses described in paragraph 2 above.
- 4 Section 66 (3) of the Commerce Act requires the Commission either to clear or to decline to clear a notice given under s 66 (1) of the Commerce Act within 10 working days after the date of registration of the notice, unless the Commission and the person who gave the notice agree to a longer period. As the notice seeking clearance (“the notice”) under consideration in this report was registered on 17 March 1997 and no extension of time has been agreed, a determination on the notice is due by no later than 2 April 1997.
- 5 In this report we have concluded that the proposed acquisition by Newmans will not result in an effect described in s 47 (1) (a) or (b) of the Commerce Act. Accordingly, we have recommended that you give clearance for the proposed acquisition covered by the notice pursuant to s 66 (3) (a) of the Commerce Act.

## **Request for Confidentiality of Fact and Specific Information**

- 6 The notice sought confidentiality orders in respect of both the fact of the proposed acquisition and confidential information relating to Newmans and/or Taura in the event that such information was sought.
- 7 On 21 March 1997 the solicitors acting for Newmans confirmed that their client's request for a confidentiality order as to the fact of the proposed acquisition had been waived.
- 8 The notice does not identify any confidential information. On 21 March 1997 the solicitors acting for Newmans confirmed that their client does not seek a confidentiality order in respect of the information contained in clause 12.2 of the notice. Clause 12.2 contains estimated market shares based on estimated sales values in 1996 for fruit pulp supplied in New Zealand for use in yoghurt products.
- 9 There is no other information provided to the Commission in relation to the notice for which a confidentiality order has been sought.

## **The Parties**

### *Newmans*

- 10 Newmans is based in Tauranga and currently carries on the businesses of development, manufacture and marketing of:
- fruit pulps for yoghurt;
  - fruit toppings and ripples for ice-cream;
  - industrial bakery jam spreads;
  - industrial tomato sauces;

- industrial mayonnaise; and
- marinades.

11 Newmans is owned by Jenton Overseas Investment Pte Limited, a Singaporean company.

### *Taura*

- 12 Taura currently carries on the businesses described in paragraph 2 above, being the businesses Newmans proposes to acquire in accordance with the notice. It also carries on the further business of development, manufacture and marketing of customised concentrated/dried fruit products, but Newmans does not propose to acquire this business. Taura has decided to sell the relevant businesses to enable it to concentrate its resources on the development of its Ultra Rapid Concentration (“URC”) business which involves the development, manufacture and marketing of customised concentrated/dried fruit products for bakery products, breakfast cereals, confectionery, ice-cream, muesli/granola bars, fruit bars and snack foods. Taura currently owns and operates URC plants in New Zealand, Australia and Belgium, with a plant currently being constructed in the United States. Taura has no direct competitor in the world in respect of these products and is a leader in the technology associated with their production.
- 13 If the proposed acquisition does not take place Taura intends to break up and to cease operations.
- 14 Taura is based in Mt Maunganui and is owned 80% by Berrivale (NZ) Limited (“Berrivale NZ”). The capital of Berrivale NZ is in turn entirely owned by Berrivale Orchards Limited of Australia.

## Market Definition

- 15 Paragraph 2 above describes the businesses currently carried out by Taura which Newmans proposes to acquire in accordance with the notice. Paragraph 10 above lists the businesses currently carried out by Newmans.
- 16 The notice claims that the only market in which Taura and Newmans both currently carry on businesses, and, therefore, in which horizontal aggregation would occur if the proposed acquisition is implemented, “...is the supply of fruit pulp to yoghurt manufacturers”. The notice also claims that “[ ]he relevant market is the market for fruit pulp for use in yoghurt products”, and “[ ]n respect of the relevant market, the product is fruit pulp, the functional level is the manufacturing market and the geographical area is the whole of New Zealand” (see clauses 9.1 to 9.5 of the notice).
- 17 Although Newmans has identified horizontal market aggregation as a result of the proposed acquisition only in respect of the market for the supply of fruit pulp to yoghurt manufacturers, paragraphs 2 and 10 above indicate the development, manufacture and marketing of other products which might prima facie result in horizontal aggregation; namely, retail jams, fruit spreads, specialist jams, diabetic jams, tomato sauce, mayonnaise (all developed, manufactured and marketed by Taura), industrial bakery jams, industrial tomato sauce and industrial mayonnaise (all developed, manufactured and marketed by Newmans). However, discussion with Mr Warner, managing director of Newmans, has identified:
- that Taura manufactures retail jams whereas Newmans manufactures bulk packaged jam for industrial bakery purposes, with each pack weighing between 5kg and 25kg. The factory system requirements differ for the production of retail jams and industrial bakery jams. Even if there was any aggregation as a result of the proposed acquisition, Newmans and Taura are relatively small jam manufacturers compared to, say, Heinz-Wattie Limited (“Heinz-Wattie”);

- that the level of aggregation in respect of tomato sauce manufacture would be insignificant. Newmans produces only about 1 tonne each month. Taura produces about 500 tonnes annually, entirely for McDonald's restaurants. Once again, Heinz-Wattie is the major producer of tomato sauce; and
  
  - that the level of aggregation in respect of mayonnaise manufacture would be insignificant. Newmans produces only around 1 tonne each month for a single customer, Davis Trading Co Limited. Taura produces some 300 to 500 tonnes annually, once again, exclusively for McDonald's restaurants.
- 18 On 13 October 1995 the Commission gave clearance to the proposed acquisition by J Wattie Foods Limited of Kraft General Foods New Zealand Limited. The businesses of these companies are now carried out by Heinz-Wattie. The investigation report covering the proposed acquisition (refers file AUT/BA-J1/1, M2278) considered, *inter alia*, the jam and marmalade, tomato sauce and salad dressings and mayonnaise markets. The report makes it clear that there is a healthy competitive environment in respect of each of these three markets, with Heinz-Wattie being a relatively large supplier in all of them.
- 19 In conclusion, we concur with the notice that the only horizontal market aggregation arising from the current proposed acquisition is in respect of fruit pulp supplied for yoghurt manufacture.
- 20 Following discussions with a number of relevant industry participants, we have identified the relevant market, in order to assess the competition effects of the proposed acquisition, as:

*the market for the supply of fruit pulp to yoghurt manufacturers in New Zealand.*

- 21 Yoghurt producers require fruit pulp to be prepared according to their specifications, which include additives such as thickeners, colours, flavours and preservatives.
- 22 The notice states that “Newmans is unaware of any existing products that could substitute for fruit pulp in yoghurt with the exception of artificial flavourings.” We have considered whether a broader product market definition is appropriate and have found that there are no substitutes for fruit preparations comprising fruit pulp. Consumer tastes are such that yoghurt, at least in New Zealand, must contain pieces of real fruit. We have also considered whether fruit preparations comprising fruit pulp used in other products, such as jams, might be used as substitutes by yoghurt manufacturers. Our conclusion is that fruit preparations comprising fruit pulp for use in yoghurt are manufactured according to unique product specifications which are only suitable for yoghurt production.
- 23 The relevant functional markets are manufacture/importation and marketing. Neither Newmans or Taura are vertically integrated in other functional markets related to fruit preparations comprising fruit pulp for yoghurt production.
- 24 The geographic market is New Zealand. There appear to be no geographic restrictions on supply of the relevant product, and our enquiries have shown that the relevant product is readily transported from the South Island to the North Island and vice versa.



## Competition Analysis

### *Market Shares*

- 25 Information contained in clause 12.2 of the notice indicates estimated pre-acquisition market shares (based on sales value) of 85% for Taura and 12% for Newmans in respect of fruit preparations comprising fruit pulp supplied to yoghurt manufacturers in New Zealand. Turnover of the relevant product in New Zealand is shown as being about \$5.7 million annually. This reflects the relatively small quantity of fruit preparation used in yoghurt (the inclusion rate of fruit preparation into finished yoghurt is between 10% to 13% by volume) and the fact that the yoghurt market in New Zealand is small. Discussions with competitors and yoghurt manufacturers tend to support the high market share estimates for Taura. This high level is probably attributable to the advantages of the aseptic processing technology employed by Taura, compared to the conventional open processing system used by other manufacturers, and the small size of the New Zealand market for fruit pulp preparations for yoghurt manufacture.
- 26 If the proposed acquisition proceeds it will result in high market concentration; in excess of 90% (although even pre-acquisition Taura is by far the largest supplier of fruit preparations for yoghurt manufacture in New Zealand).
- 27 The focus of our enquiries thus was to test the extent to which the high post-acquisition market share would be constrained by other features of the relevant market, including constraints provided by current direct competition to Newmans and Taura, by supply-side substitution, by yoghurt manufacturers, by imported fruit preparations for yoghurt production and by the threat of new entry into the relevant market.
- 28 In the course of our investigation we had discussions with Barker fruit Processors Limited (“Barker”), All-Berry House Limited (“All-Berry”) (both current competitors to Newmans and Taura), Heinz-Wattie, Frucor Holdings Limited (“Frucor”), Tip Top Ice Cream Limited (“Tip Top”) (all identified in the

notice as being able to easily divert their production to the relevant market), The New Zealand Dairy Group Limited (“Dairy Group”), Meadow Fresh Foods Limited (“Meadow Fresh”), Kiwi Co-op Dairies Limited (“Kiwi”), International Fine Foods Limited (“Fine”) (the four largest manufacturers of yoghurt in New Zealand), and Food Spectrum Pty Limited (“Spectrum”), an Australian company manufacturing fruit preparations for yoghurt production.

### *Current Competition*

- 29 Both Barker and All-Berry are currently relatively small producers of fruit preparations for yoghurt manufacture, with Barker apparently the third largest producer after Newmans and Taura. Barker supplies mainly fruit preparations to the baking industry while All-Berry is predominantly involved in the manufacture of ice-cream ripples.
- 30 Neither seemed overly concerned by the proposed acquisition. Both, especially Barker, believe that there is a constraint on market power provided by the Australian producers. Given the right profit signals, both said they could increase production above their current levels although, currently, in terms of bulk supply, Taura had a competitive advantage because of its aseptic processing technology.
- [ ]

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- 31 Our conclusion after speaking to Barker and All-Berry is that existing competitors have the ability and capacity to raise production of fruit preparations for yoghurt manufacture given the right incentives.

#### *Supply-side Substitution*

- 32 The notice suggests that Heinz-Wattie, Frucor and Tip Top (which is wholly-owned by Heinz-Wattie) currently have the technology and skills to enable them to switch production to fruit preparations for yoghurt manufacture. Both Heinz-Wattie and Tip Top currently process fruit pulps as raw materials for their own production requirements, rather than to sell to industrial markets.
- 33 After talking to these companies, our conclusion is that they all currently have, or could easily obtain, the technology and expertise to manufacture fruit preparations for yoghurt production - there are no major hurdles and if the benefits were sufficiently high there would appear to be no economic reason as to why resources would not be redeployed. However, a redirection in strategic intent towards their core businesses would be necessary which, in practice, seemed, in their views, highly unlikely.

#### *Yoghurt Manufacturers*

- 34 The notice claims that Dairy Group, Meadow Fresh, Kiwi and Fine have all until recently themselves produced fruit pulps for use in the production of their own yoghurts. The notice further states that each company "...retains plant and equipment and the technical skills suitable for the production of fruit pulps for the yoghurt market". Our investigation has established that these claims are largely not correct. Meadow Fresh (which sells yoghurt under the "Meadow Fresh" brandname) has never produced its own fruit preparations for yoghurt manufacture. Dairy Group and Fine (which sells yoghurt under the "Yoplait" brandname) ceased production of their own fruit preparations about 10 and 7 years ago, respectively. None of these companies currently retain the plant and equipment and the technical skills necessary for making fruit preparations for yoghurt production. The only Yoghurt manufacturer which produces fruit

preparations in-house is Kiwi (although small quantities are also sourced externally). Kiwi manufactures Yoghurt through its subsidiary, Mainland Products Limited, under the brandname “Ski”.

- 35 Our conclusion is that yoghurt manufacturers are unlikely to provide a significant constraint on market power in the relevant market.

### *Imports*

- 36 The current competitors to Newmans and Taura have indicated that Australian produced fruit preparations for yoghurt manufacture provide a constraint on domestic producers. Two of the yoghurt manufacturers indicated that fruit preparations are “freely accessible” from Australia and that there is “strong competition” from Australia. [ ]

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- 37 We have had a discussion with Spectrum, which said that it is able to cost-effectively supply fruit preparations to yoghurt manufacturers in New Zealand. Spectrum also said that there were no real impediments to exporting its fruit preparations to New Zealand.
- 38 Two other yoghurt manufacturers spoken to about imports from Australia said that they thought imports would be more expensive because of transport costs. They also said that there were logistical problems associated with distance and that consequently inventory holding costs would be higher.
- 39 Our conclusion based on discussions with competitors to Newmans and Taura, major yoghurt manufacturers in New Zealand and Spectrum is that the threat of imports from Australia poses a real constraint on market power in New Zealand. (In fact, two of the yoghurt manufacturers have indicated to us that, in view of this constraint, they are positive about the proposed acquisition, expecting it to result in efficiency gains, better quality and greater innovation in the domestic market.) If Newmans/Taura post-acquisition attempted to raise its prices and/or reduce the quality of its fruit preparation for yoghurt production, we are satisfied that domestic yoghurt producers would look to sourcing fruit preparations from

across the Tasman, and that Australian firms, given the right volume orders, would be able to supply in a cost-effective manner.

### *New Entry*

- 40 Another possible constraint on market power is the ease of new entry into a market. In the present investigation we have considered the conditions associated with new entry in terms of access to raw materials, the availability and capital costs of plant and equipment, access to technical skills and legislative and regulatory barriers.
- 41 Access to fruit for processing into fruit preparations for yoghurt production is not difficult. Fruit can be purchased either domestically or from international markets. In respect of the latter, we were told that international brokers are easy to find, are very active and provide a good service. Prices are internationally competitive and it is cheap to ship frozen fruit from overseas.
- 42 Technology in the relevant market has been described to us as low level and well known. The process underlying fruit preparations is relatively simple, fundamentally involving cooking fruit according to required specifications. The conventional method uses an open kettle system. An alternative method is the aseptic processing technology which, in New Zealand, is currently only used by Taura. The advantage of aseptic processing is the sterility level achieved. In terms of large bulk supplies it appears that the aseptic technology provides a competitive advantage. We have been told that the policy of at least one domestic yoghurt producer is that bulk supplies of fruit preparations must be supplied to it as aseptically packed. An aseptic system costs around \$1.3 million to purchase brand new.
- 43 The information we have received is that technical skills needed to produce fruit pulp preparations of an acceptable quality are available to prospective new entrants.

- 44 Legislative and regulatory barriers do not impose any particularly onerous conditions on entry to the relevant market. These are typically resource management, occupational safety and health, food hygiene, hazard analysis and critical control path analysis requirements.
- 45 Our conclusion is that new entry could be achieved without significant barriers and that the real possibility of new entry provides a constraint on market behaviour.

## CONCLUSION

- 46 We conclude that implementation of the proposed acquisition by Newmans would not result, or would not be likely to result, in any person acquiring or strengthening a dominant position in the relevant market.

## RECOMMENDATION

- 47 We have had regard to the factors set out in s 3 (9) of the Commerce Act and are satisfied that the proposal would not result, or would not be likely to result, in any person acquiring or strengthening a dominant position in a market. It is recommended that, in terms of s 66 (3) (a) of the Commerce Act, the Commission give clearance to the proposal.

A Mladenovic  
Investigator

J A Preston  
Chief Investigator

## **Determination to Grant Notice of Clearance: Newmans International Limited and Taura Natural Foods Limited**

We agree/disagree with the recommendation.

We are satisfied/not satisfied that implementation of the proposed business acquisition would not result, or would not be likely to result, in any person acquiring or strengthening a dominant position in a market.

Accordingly, pursuant to s 66 (3) (a) of the Commerce Act 1986, and in accordance with a delegation given under s 105 (1) of the Commerce Act, we hereby give clearance for Newmans International Limited, or any interconnected body corporate thereof, to acquire:

- (a) the businesses of Taura Natural Foods Limited which Newmans International Limited proposes to acquire, described in the notice seeking clearance dated 12 March 1997; and
- (b) the assets of Taura Natural Foods Limited which Newmans International Limited proposes to acquire, described in the notice seeking clearance dated 12 March 1997.

In terms of s 66 (5) of the Commerce Act, this clearance shall expire twelve months after the date of this notice. Brief particulars of this clearance will appear in the Commission's public register.

This clearance is given only to the proposed acquisition described in the notice seeking clearance dated 12 March 1997.

Dated at Wellington this                      day of                      1997.

P C Allport  
Member

K M Brown  
Member

The Seal of the Commerce Commission  
was affixed hereto in the presence of:

P C Allport  
Member

Date:    /    /1997