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Grocery Chains: The Foodland Bid
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Author's Note:

This paper simply provides an outline of the participants in the proposed takeover of the West Australian grocery wholesaler Foodland Associated Limited by the New Zealand bidder Rank Commercial Limited. The paper identifies some of the key issues involved in a company takeover and related issues such as foreign investment and competition in the market place. The paper is confined to publicly available material and does not engage in an analysis of any associated legal action.

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CONTENTS

1. Summary ................................................. 1

2. The Target of the Takeover ............................... 2

3. The New Zealand Bid for Foodland:
   Status of Coles Myer in the Bid ........................ 4

4. Significant Steps in a Takeover Bid ..................... 5

5. The Competition Issue: Trade Practices Commission .... 7

6. Conclusion ................................................. 9

1993/94 List of PRS Publications
1. Summary

Takeovers and mergers are an inevitable but frequently controversial feature of business life.

The present bid for the Australian grocery wholesaler Foodland again raises concerns over the nature and extent of foreign investment in Australian industry and the effectiveness of existing regulatory controls on corporate behaviour.

More specifically, the present takeover bid is shaping as the first major test of the new merger provisions of the *Trade Practices Act 1974*. \(^1\)

In early June 1994, a New Zealand company, Rank Commercial Limited announced a $501 million takeover bid for 75% of the shares of the Australian grocery wholesaler, Foodland Associated Limited (‘FAL’). FAL is based in Western Australia and it is, effectively, the only wholesale supplier in that State. FAL also operates in New Zealand and it is the New Zealand grocery market activities which are of interest to Rank Commercial Limited.

If the Rank Commercial bid is successful, the West Australian assets of FAL are likely to be sold by Rank Commercial Limited. Coles Myer Limited is reported to have the first option on the Australian assets of FAL. Coles Myer controls about 23% of the market in Western Australia while Woolworths has 25% and small independents make up some 1% of that market. Foodland has the remaining 51%.

The Rank Commercial bid is interesting because it involves a ‘friendly foreigner’ (i.e. a New Zealand company) seeking an entry into the New Zealand grocery market via the acquisition of an Australian company. In addition, the composition of the Australian grocery market is of interest to the Trade Practices Commission (‘TPC’) in terms of competition. A successful takeover by Rank Commercial Limited of FAL and the execution of the option by Coles Myer would see Coles Myer in a position to control over 70% of the grocery market in Western Australia. This may echo an earlier controversial takeover involving Coles which was not opposed at the time by the TPC. (Indeed, there was a view that the Commission had reservations in

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1 The ‘new’ section 50 which came into effect on 21 January 1993, actually returns the merger provisions of the *Trade Practices Act 1974* to a position abandoned by the Fraser Government in 1977. Under the ‘new’ test, a proposed merger or acquisition is examined to establish whether it will result in a substantial lessening of competition in a particular market. The post 1993 provisions replace a test which was based on determining whether a merger or acquisition would result in a dominance of the market.
1985 in relation to its decision not to oppose the merger of G.J. Coles and Coy Limited and the Myer Emporium Ltd to form Coles Myer.\(^2\)

Some of these issues have received widespread coverage in the press. This paper simply identifies the players involved and provides an outline of the steps involved in a company takeover. The conclusion is that there are still some loose ends to tie-up before this proposed takeover can be considered as completed.

## 2. The Target of the Takeover

Foodland Associated Limited ('FAL') is a company listed on the Australian Stock Exchange. FAL's head office is at 18 Miles Road, Kewdale in Western Australia ('WA'). FAL's principal activities and interests are:

- wholesale warehousing and distribution of groceries, chilled and frozen food and liquor and general merchandise;

- ownership and management of shopping and business centres in major country towns in WA;

- grocery and supermarket interests in New Zealand through a wholly owned subsidiary, Foodlands New Zealand Holdings Limited (which in turn owns 100% of Farmers Deka outlets and 57.4% of the supermarket operator, Progressive Enterprises);

- joint ownership with another independent grocery wholesaler, Davids Holdings Limited ('Davids'), of Australian Liquor Marketers (WA) Pty Ltd ('ALM'); ALM has wholesaling operations in New South Wales, Victoria, Queensland, Northern Territory and Western Australia; and

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operating a chain of 44 discount department stores [Venture Stores (1992) Pty Ltd] throughout the eastern states of Australia.\(^3\)

In the past 12 months, FAL has seen sharp movements in its share price. Over this period the share price has ranged from a high of $9.10 to a low of $4.15. The shares recovered from the low of $4.15 to over $5.60 but have fallen again. At the time of preparation of this paper, the share price was below the $5 mark in a soft share market.

A takeover bid for FAL was announced in early June 1994 by a New Zealand company Rank Commercial Limited ('Rank Commercial'). The reported price offered is $5.27 a share for 75% of FAL (a total bid of $501 million).\(^4\) When Rank Commercial made its bid the share price for FAL was $4.50.

The volatility of the share market has tended to complicate consideration of the takeover bid. At $4.50 the reported bid of $5.27 would have appeared to offer a premium (except, of course, for those who bought FAL shares when the market was high).\(^5\)

FAL is, effectively, the only large-scale grocery wholesaler based in Western Australia (with 51% of the market). There are some very small independent wholesalers (1%) but the other main grocery operators in Western Australia are the eastern-based Woolworths and Coles Myer. At present, Coles Myer and Woolworths are not 'wholesalers' as they supply direct to their own retail outlets. On a comparative basis, Woolworths has 25% of the West Australian retail market while Coles Myer has 23%.\(^6\)

It is also important to note that the structure of the wholesale grocery market varies across Australia and contains different wholesaler interests. These interests include, Independent Holdings Ltd ('IHL Ltd'), Composite Buyers Limited, Davids Ltd, Franklins, QIW Ltd and Statewide as well as Woolworths and Coles Myer. The distinction between wholesaler and retailer is also blurred. As already noted,

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3 Source: Australian Stock Exchange DataDisc - historical company extract for Foodland Associated Limited.


5 As mentioned previously, the share price then moved from $4.50 to the $5.60 level but has since fallen back.

some large organisations such as Woolworths and Coles Myer supply groceries direct to their own retail outlets. The national grocery market at June 1994 is divided up as follows:

<table>
<thead>
<tr>
<th>National Grocery Market Share</th>
</tr>
</thead>
<tbody>
<tr>
<td>Woolworths</td>
</tr>
<tr>
<td>The grouping of 'independents':</td>
</tr>
<tr>
<td>Davids Ltd; IHL Ltd; Foodland;)</td>
</tr>
<tr>
<td>QIW Ltd and Composite Buyers)</td>
</tr>
<tr>
<td>Coles Myer</td>
</tr>
<tr>
<td>Franklin</td>
</tr>
<tr>
<td>Others</td>
</tr>
</tbody>
</table>

At present, the major shareholders of FAL appear to be BT Australia Ltd with 13.77% and Whitcoulls Group Ltd (a subsidiary of Rank Commercial) with 14.9%. The acting Chief Executive Officer of FAL is Mr Barry Alty.

3. The New Zealand Bid For Foodland: Status of Coles Myer in the Bid

Rank Commercial Limited is a New Zealand based company headed by Mr Graeme Hart. Mr Hart commenced his business as a trucking operator but has since diversified into other pursuits. He purchased the New Zealand Government Printing Office and last year acquired book shop interests. Mr Hart is reported to prefer long-established businesses with a strong market position i.e. he is not perceived as corporate 'cowboy'. Consistent with this approach, the Rank Commercial bid for FAL is based on a proposal for Rank Commercial to hive-off FAL's New Zealand grocery operations into a separate company and to sell the Australian operations.


Coles Myer is reported to have an option from Rank Commercial to acquire Foodland's Australian assets for $250 million.\textsuperscript{10} Coles Myer is based in Melbourne with its head office at 800 Toorak Road, Tooronga. Coles Myer is a publicly listed company and its major shareholders are:

- (United States) K Mart Corporation 10.81%
- S.L. Nominees Pty Ltd & Associates 10.02%
- The Myer Investment Pty Ltd & Associates 9.51%
- Macquarie Bank Limited 6.59%
- ANZ Banking Group Limited & Associates 6.46%

Coles Myer Limited is Australia's largest retailing organisation. The company operates in Australia and New Zealand. The Chief Executive of Coles Myer is Mr Peter Bartels.\textsuperscript{11}

If Rank Commercial is successful with its takeover bid and it sells the Australian assets of Foodland to Coles Myer, Coles Myer will effectively control in excess of 70% of the grocery market in Western Australia. It would also see a move by Coles Myer to increase its wholesale grocery holdings on a national basis.

4. Significant Steps in a Takeover Bid

The Rank Commercial bid is a formal takeover of more than 20% of the shares of another company. In this case, the target company is FAL and the bid is for 75% of the shares. Under section 615 of the Corporations Law, the acquisition of more than 20% of a the shares of a company is not permitted unless certain procedures are followed. Rank Commercial, as the offeror, must register and dispatch a formal disclosure document called a Part A statement together with the written offer. The draft Part A statement may be examined by the Australian Securities Commission ('ASC') before it is registered with the ASC. Disclosure is also made to the Australian Stock Exchange. Once registered with the ASC, and subject to certain time limits, Rank Commercial must furnish the Part A statement and the written offer


\textsuperscript{11} Source: The information on Coles Myer was obtained from the Australian Stock Exchange DataDisc - historical company extract on Coles Myer Limited.
on both FAL and its shareholders. The period specified for a takeover offer is a minimum of one month and a maximum of six months (section 638 of the Corporations Law).

A Part A statement for a take-over scheme includes the following information:

- the period that the offer remains open;
- the identity and activities of the offerer;
- the type of shares being sought by the offerer;
- the source of funding for the offer;
- any benefits to officers of the target company;
- securities (if any) to be offered as consideration;
- details of recorded sale price (highest and lowest) of the target company's shares in the previous three months; and
- particulars of the offerer's intentions regarding continuation of the target company's business.

As noted above, accompanying the Part A statement is the written offer for the shares.

On receipt of the Part A statement, the target company prepares a Part B statement which is sent to the offerer, the Australian Stock Exchange, the Australian Securities Commission and the shareholders. A Part B statement may include the views of the directors of the target company as to the bid and whether there are competing bids.\(^\text{12}\)

At the time of preparation of this paper, Rank Commercial's Part A statement has not been served on FAL and its shareholders. Depending on the period stipulated for accepting the offer, it could be several months before Rank Commercial knows whether its takeover bid for FAL is successful.

Rank Commercial is a foreign investor and its acquisition of FAL shares will require examination by the Foreign Investment Review Board (FIRB) under the Foreign Acquisitions and Takeovers Act 1975. As a generalisation, it is probably fair to say that the acquisition would not encounter any adverse recommendations by FIRB because of the separate but important trade policy issues involved in the closer

\(^\text{12}\) Section 647 Corporations Law.
economic ties between Australia and New Zealand. Rank Commercial would probably be regarded as a 'friendly foreigner'.

A further complication is, theoretically, the possible entry of a competing bid or even an Australian-based merger of independent wholesalers with FAL. A mega-merger involving FAL, Davids, IHL and Composite Buyers was mooted last year but shelved in November 1993.

As a passing observation, it is somewhat ironic that FAL through its wholly owned subsidiary, Foodlands New Zealand Holdings Limited, acquired its New Zealand assets in Progressive Enterprises from Coles Myer on 7 January 1994. As noted above, Coles Myer now has the option to acquire FAL's Australian assets from the New Zealander, Rank Commercial.

5. The Competition Issue: Trade Practices Commission

A more difficult issue to consider is whether the bid has any implications for competition in the grocery market in Western Australia. Given the size of FAL's share (51%) of the wholesale grocery market in Western Australia, this issue is under examination by the TPC. For that reason, this paper will only provide a brief outline of the relevant merger/acquisition provision (section 50) in the Trade Practices Act 1974. No comment is made on the merits of the proposed FAL takeover.

When the Trade Practices Act 1974 first commenced, the merger/acquisition test was whether such a concentration would lead to a substantial lessening of competition in the market. In 1977, the test was changed to a prohibition on the acquisition of shares or assets

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13 See the discussion on this point in McCrann, T. 'Bartels' big bite is hard to swallow' in The Weekend Australian, 18-19 June, 1994.


15 Source: Australian Stock Exchange DataDisc - historical company extract for Foodland Associated Limited.

which resulted in a position of dominance of the market. One commentator described the dominance test as a lawyer's test which looks to an objective assessment of the structure of the market, while substantially lessening competition is favoured by economists and it is doubly subjective.¹⁷

Moreover, the 1977 changes were not without their critics, with a division of views between the TPC, business, unions and parliamentarians. Indeed, Prime Minister Fraser, whose Government had introduced the 'dominance test', subsequently became one of that test's critics and argued for a return to the previous test.¹⁸

Both the House of Representatives Committee on Legal and Constitutional Affairs ('Griffiths Committee') and the Senate Standing Committee on Legal and Constitutional Affairs ('Cooney Committee') have reported on mergers, takeovers and monopolies.¹⁹

The Griffiths Committee (May 1989) found, by majority, that there was insufficient justification to recommend any amendment to the dominance test. The Cooney Committee (December 1991) found, by majority, that the views of the TPC were persuasive and the Committee recommended a return to the original test of substantially lessening competition.

Section 50 was again amended by the Trade Practices Legislation Amendment Act 1992. The new test (effective from 21 January 1993) is, essentially, a return to the original substantially lessening competition test. To address criticisms that the 'substantial lessening of competition test' added to business uncertainty, the 'new' section 50(3) contains criteria which may be taken into account in determining whether a merger or acquisition would substantially lessen competition. These criteria include:

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• the actual and potential level of import competition in the market;
• the height of barriers to entry to the market;
• the level of concentration in the market;
• the degree of countervailing power in the market;
• the likelihood that the acquisition would result in the acquirer being able to significantly and sustainably increase prices or profit margins; and
• the likelihood that the acquisition would result in the removal from the market of a vigorous and effective competitor.20

The FAL takeover will be the first major test of the 'new' section 50 and the result of the TPC examination is awaited with interest.

6. Conclusion

The Rank Commercial bid for FAL is a bold move but there are still some significant issues to consider. These issues include:

• acceptance by the shareholders of the Part A statement and the reported offer of $5.27 per share;
• the possible emergence of a competing bid;
• the competition issue within the grocery market if Coles Myer exercises its reported option to acquire assets of FAL; and
• the availability of another buyer should Coles Myer decide not to exercise its reported option.

A Part A statement and offer, under a takeover scheme, can remain open for a period of 6 months. At the time of the preparation of this paper a Part A statement has not been publicly issued by Rank Commercial for the FAL takeover. Given the level of interest in this takeover bid, it is suggested that there may not be a resolution of this matter for up to six months or more.

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20 This mirrors an approach followed by Northrop J in TPC v Ansett Transport Industries (Operations) Pty Ltd (1978) 32 FLR 305 at 321.
The bid also brings into the 'play', the Trade Practices Commission (i.e. the reported Coles Myer option) and its regulatory role in examining mergers or acquisitions under the 'new' test contained in section 50 of the Trade Practices Act 1974.