

Determination

Turners & Growers Fresh Limited and Freshmax NZ Limited [2020] NZCC 6

The Commission:	Anna Rawlings Dr John Small Dr Derek Johnston
Summary of application:	An application from Turners & Growers Fresh Limited seeking clearance to acquire 100% of the shares in Freshmax NZ Limited.
Determination:	Under section 66(3)(a) of the Commerce Act 1986, the Commerce Commission determines to give clearance to the proposed acquisition.
Date of determination:	1 April 2020

Confidential material in this report has been removed. Its location in the document is denoted by [].

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The proposed acquisition

1. On 11 February 2020, the Commerce Commission registered an application (the Application) from Turners & Growers Fresh Limited (T&G) seeking clearance to acquire, either directly or through a nominated related company, 100% of the shares in Freshmax NZ Limited (Freshmax) (the Proposed Acquisition).

Our decision

2. The Commission gives clearance to T&G as it is satisfied that the Proposed Acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in a market in New Zealand.

Our framework

3. Our approach to analysing the competition effects of the Proposed Acquisition is based on the principles set out in our Mergers and Acquisitions Guidelines (our guidelines).¹
4. Our decision on the Proposed Acquisition was taken during the period of a nationwide lockdown implemented to address the COVID-19 pandemic. During this time, some retailers and customers have ceased to buy produce and wholesalers (and other parties) are restricted in their ability to travel to secure new supply relationships with growers within New Zealand or overseas. In reaching our decision on the Proposed Acquisition, we considered how the relevant markets would typically be expected to operate, on the basis that the impact of COVID-19 is likely to be transient.

The substantial lessening of competition test

5. As required by the Act, we assess mergers and acquisitions using the substantial lessening of competition test.
6. We determine whether a merger is likely to substantially lessen competition in a market by comparing the likely state of competition if the merger proceeds (the scenario with the merger, often referred to as the factual), with the likely state of competition if the merger does not proceed (the scenario without the merger, often referred to as the counterfactual).²
7. A lessening of competition is generally the same as an increase in market power. Market power is the ability to raise price above the price that would exist in a competitive market (the 'competitive price'),³ or reduce non-price factors such as quality or service below competitive levels.

¹ Commerce Commission, *Mergers and Acquisitions Guidelines* (July 2019).

² *Commerce Commission v Woolworths Limited* (2008) 12 TCLR 194 (CA) at [63].

³ Or below competitive levels in a merger between buyers.

When a lessening of competition is substantial

8. Only a lessening of competition that is substantial is prohibited. A lessening of competition will be substantial if it is real, of substance, or more than nominal.⁴ Some courts have used the word ‘material’ to describe a lessening of competition that is substantial.⁵
9. As set out in our guidelines, there is no bright line that separates a lessening of competition that is substantial from one which is not. What is substantial is a matter of judgement and depends on the facts of each case.⁶

When a substantial lessening of competition is likely

10. A substantial lessening of competition is ‘likely’ if there is a real and substantial risk, or a real chance, that it will occur. This requires that a substantial lessening of competition is more than a possibility but does not mean that the effect needs to be more likely than not to occur.⁷

The clearance test

11. We must clear a merger if we are satisfied that the merger would not be likely to substantially lessen competition in any market.⁸ If we are not satisfied – including if we are left in doubt – we must decline to clear the merger.

The parties and the acquisition

The applicant

12. T&G grows, imports and wholesales fresh produce in New Zealand and exports locally grown fresh produce. T&G also operates a produce distribution network and undertakes a small amount of contract ripening for customers. T&G is a wholly owned subsidiary of T&G Global Limited.

The target

13. Freshmax imports and wholesales fresh produce in New Zealand. Freshmax also provides distribution, fumigation, packing, ripening, quality control and cool-store services. As part of Freshmax’s packing business, it provides packing services to My Food Bag.
14. Freshmax is a wholly owned subsidiary of Freshmax NZ Group Limited (Freshmax Group). The wider Freshmax Group is also involved in growing and exporting fresh produce. These parts of the business will remain with the Freshmax Group and are not part of the Proposed Acquisition.

⁴ *Woolworths & Ors v Commerce Commission* (2008) 8 NZBLC 102,128 (HC) at [127].

⁵ *Ibid* at [129].

⁶ *Mergers and Acquisitions Guidelines* above n1 at [2.23].

⁷ *Woolworths & Ors v Commerce Commission* (2008) 8 NZBLC 102,128 (HC) at [111].

⁸ Section 66(3)(a).

The rationale for the proposed acquisition

15. The Proposed Acquisition would see T&G acquire Freshmax and expand the scale and scope of its business in terms of the supply of fresh produce. T&G submitted that the Proposed Acquisition would allow it to combine its operations with some of the value-added services that Freshmax currently provides (and T&G currently does not). These services include the packing services Freshmax provides to meal-kit delivery businesses and its cool-chain distribution services. T&G submitted that the Proposed Acquisition would also deliver approximately \$[] in operating cost saving synergies per annum.⁹

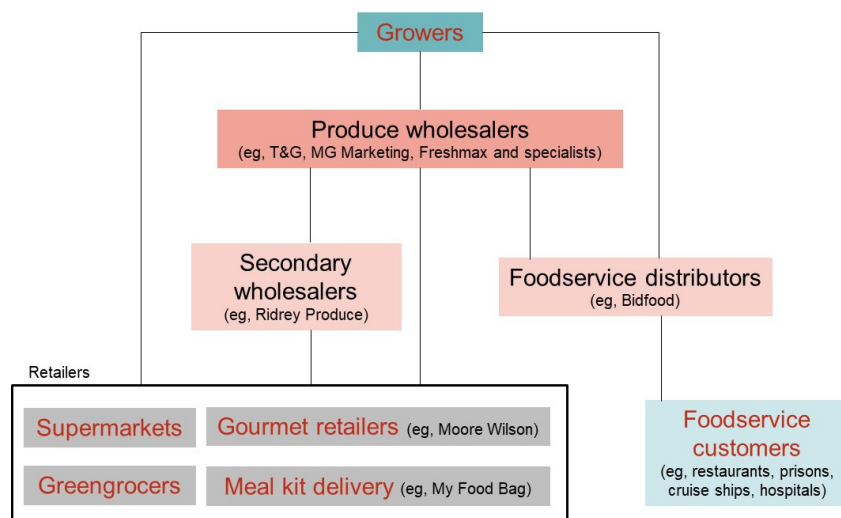
Industry background

16. Relevant to the Proposed Acquisition, T&G and Freshmax overlap in the:
- 16.1 wholesale supply of fruit and vegetables (fresh produce) to supermarkets and other parties in New Zealand;
 - 16.2 provision of cool-chain distribution services to supermarkets; and
 - 16.3 provision of contract ripening services.
17. We set out below background on these parts of the industry.

Wholesale supply of fresh produce

18. Figure 1 sets out the fresh produce supply chain in New Zealand at a high-level. Relevant to the Proposed Acquisition, T&G and Freshmax are each one of a number of produce wholesalers. Wholesalers are not the only suppliers of fresh produce in New Zealand. As Figure 1 shows, fresh produce is also directly supplied by growers to retailers and other customers.

Figure 1: Fresh produce supply chain¹⁰



⁹ Application at [3.7-3.8].

¹⁰ In Figure 1, growers include both growers in New Zealand and growers overseas. Growers overseas sell produce to produce wholesalers and other parties, who import that produce into New Zealand.

19. T&G and Freshmax both operate wholesale produce markets (or trading floors) in Auckland, Wellington and Christchurch.¹¹
20. There are several other produce wholesalers who also operate wholesale produce markets in the locations in which T&G and Freshmax overlap. These parties are:
 - 20.1 Market Gardeners Limited, trading as MG Marketing, which operates wholesale produce markets in Auckland, Wellington and Christchurch;¹²
 - 20.2 Fresh Direct Limited (Fresh Direct), which operates wholesale produce markets in Auckland, Wellington and Christchurch;¹³ and
 - 20.3 Seeka Fresh Limited (Seeka Fresh), which operates a wholesale produce market in Auckland.
21. Secondary wholesalers (eg, Ridrey Produce) are suppliers that buy fresh produce from the major produce wholesalers and on-sell it to retailers.
22. Woolworths New Zealand Limited (Woolworths), Foodstuffs North Island Limited and Foodstuffs South Island Limited (collectively, Foodstuffs) are major buyers of fresh produce, both direct from growers and through wholesalers. Woolworths and Foodstuffs account for a material proportion of the revenue that T&G and Freshmax earn from the wholesale supply of fresh produce.¹⁴
23. A significant change that has occurred in the fresh produce supply chain in recent years has been a shift towards growers directly supplying supermarket chains and other customers.¹⁵ This has materially reduced the volume of produce sold through wholesalers. Wholesalers like T&G and Freshmax continue to supply produce where they can add value in the supply chain to:
 - 23.1 independently owned supermarkets (eg, a Pak’N Save store that wants to buy and select its own produce);
 - 23.2 small retailers not big enough to buy direct or who want the convenience of one-stop shop buying; and
 - 23.3 growers that are too small or that do not have the capability to sell direct.

¹¹ T&G also operates markets in nine other locations across New Zealand – Whangarei, Hamilton, Tauranga, Gisborne, Hastings, New Plymouth, Palmerston North, Nelson and Dunedin.

¹² MG Marketing also operates markets in six other locations across New Zealand – Hamilton, Tauranga, Palmerston North, Nelson, Dunedin and Invercargill.

¹³ Fresh Direct also operates markets in Tauranga and Palmerston North.

¹⁴ Application at [1.11(e)] of the executive summary.

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Cool-chain distribution

24. The major wholesalers of fresh produce in New Zealand also provide cool-chain distribution services for major retailers, including the consolidation, storage and distribution of produce. Woolworths and Foodstuffs are customers of cool-chain distribution services.

Contract ripening

25. Some produce (eg, bananas, avocados) is picked in an unripened state and ripened later in purpose-built facilities. A significant proportion of these ripening facilities are used by wholesalers like T&G to ripen bananas that they have imported. However, some ripening is also undertaken for other parties on contract.

Market definition

26. Market definition is a tool that helps identify and assess the close competitive constraints the merged entity would face. Determining the relevant market requires us to judge whether, for example, two products are sufficiently close substitutes as a matter of fact and commercial common sense to fall within the same market.
27. We define markets in the way that best isolates the key competition issues that arise from a merger.¹⁶ In many cases this may not require us to precisely define the boundaries of a market. What matters is that we consider all relevant competitive constraints, and the extent of those constraints. For that reason, we also consider products and services which fall outside the market but which still impose some degree of competitive constraint on the merged entity.
28. We have not found it necessary to reach a view on the exact scope of the relevant markets for the purposes of assessing the competitive impact of the Proposed Acquisition. Our decision on the Proposed Acquisition would be unchanged regardless of how narrowly or broadly we defined the relevant product or geographic markets.
29. As part of our consideration of the relevant market(s) affected by the Proposed Acquisition, we considered whether:
- 29.1 there is one broad product market for wholesale supply of fresh produce, or more narrowly defined markets based on produce type or categories of produce;
 - 29.2 the relevant fresh produce market is a single market for the wholesale supply of fresh produce or whether there are distinct customer markets, delineated based on customer size; and/or how they purchase fresh produce;
 - 29.3 the supply of produce by growers direct to retailers falls within the scope of any wholesale market(s) for the supply of fresh produce; and

¹⁶ *Mergers and Acquisitions Guidelines* above n1 at [3.10]-[3.12].

- 29.4 the geographic scope of the relevant markets is national, or whether North and South Island or regional markets exist.
30. For the purposes of assessing the competitive impact of the Proposed Acquisition, we have largely begun with the market definitions proposed by T&G in the Application. T&G submitted that the relevant markets for assessing the Proposed Acquisition are the markets for:¹⁷
- 30.1 the wholesale supply of fresh produce in New Zealand;
- 30.2 the supply of cool-chain distribution services in New Zealand, which involves the provision of specialised refrigerated equipment for the distribution of chilled foods across New Zealand; and
- 30.3 the supply of contract ripening services in the South Island, which involves the ripening of different types of produce for customers.

Markets for the supply of fresh produce

31. At its broadest, the relevant market for the supply of fresh produce is a national market for the wholesale supply of fresh produce in New Zealand. As discussed further below, we received some evidence suggesting that there could be narrower markets for the supply of produce in discrete local areas and to specific types of customers. However, it is not necessary for us to reach a view on these points. As noted above, our decision would be unchanged regardless of how narrowly or broadly we defined the relevant market(s) for the supply of fresh produce.

Product dimension

32. T&G submitted that all categories of fresh produce are in the same market because there is a high degree of demand and supply-side substitutability. It submitted that the requirements to wholesale the different types of fresh produce are identical, regardless of the type (or origin) of fruit or vegetable that is being supplied. It also submitted that retailers switch between purchasing different types of produce depending on the price and quality of that produce.¹⁸
33. For the purposes of assessing the competitive impact of the Proposed Acquisition, we have defined a broad product market for all types of fresh produce. On the supply-side, the infrastructure and systems required to wholesale fresh produce is largely the same, regardless of the type of produce being supplied.¹⁹ This supports the adoption of a broad market. The services provided by wholesalers are close substitutes for those provided by growers, regardless of the type of produce grown. The major produce wholesalers that operate produce markets in each of Auckland, Wellington and Christchurch (including T&G and Freshmax) also all supply a full range of produce, meaning that these wholesalers are close substitutes for supply to retailers and other customers. We note that while from a demand-side perspective

¹⁷ Application at [7.1].

¹⁸ Application at [7.5-7.6].

¹⁹ Although, we note that cool storage is not needed to the same degree for all types of fresh produce (eg, salad greens require cold storage whereas root crops do not).

all types of produce are not fully substitutable for each other (eg, a potato is not a substitute for a kiwifruit), information from industry participants and customers indicates that retailers vary the type of produce they buy on any given day depending on the quality, price and availability of produce, and what is being demanded by consumers.

Functional dimension

34. T&G submitted that there is a single market for the supply of fresh produce to all retailers, regardless of the method of supply. It submitted that customers purchase fresh produce in a variety of ways, such that the relevant market encompasses multiple supply methods including direct category supply and market trading sales.²⁰ T&G also included the supply of produce by growers direct to customers within the scope of the relevant market for the supply of fresh produce.
35. For the purposes of assessing the competitive impact of the Proposed Acquisition, we have considered a functional market for the wholesale supply of fresh produce. This market includes all methods by which produce wholesalers sell produce to customers. The supply of produce by growers direct to retailers falls outside the scope of this market because it is unlikely that a grower would switch to direct supply in response to a SSNIP in wholesale charges, or that a retailer who buys from a wholesaler would switch to going direct to numerous growers in response to a SSNIP in wholesale prices.²¹ We consider the ability of retailers and other customers to buy produce direct from growers (and equally growers to sell direct, bypassing wholesalers) as a potential constraint as part of our competition assessment.

Customer dimension

36. T&G submitted that there is a single market for the supply of fresh produce to all retailers, regardless of a retailers' size.²²
37. For the purposes of assessing the competitive impact of the Proposed Acquisition, we have considered a single customer market for the wholesale supply of fresh produce. During our investigation, we received some information which suggested that there could be discrete customer markets. Some customers (eg, smaller retailers) may generally have less choice for supply. This is because these customers (so as to minimise the logistics costs involved in buying produce) are likely to have a preference for buying fresh produce from large wholesalers that can supply them all types of produce and who operate local market trading floors at which they can physically inspect produce (ie, buy from a one stop shop). These customers do not generally purchase produce from specialist wholesalers or direct from growers.²³ However, it is not necessary for us to reach a view on this point as the competitive

²⁰ Application at [7.8].

²¹ Growers are charged for the services offered by wholesalers, with most wholesalers operating a model where they take a percentage commission on the value of sales.

²² Application at [7.8].

²³ [

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constraints outlined in our competitive effects section would hold, irrespective of how narrowly we consider the relevant customer market.

Geographic dimension

38. T&G submitted there is a national market for the wholesale supply of fresh produce because wholesalers supply retailers throughout New Zealand. It submitted that the locations of on-site premises (ie, trading floors or distribution centres) throughout the country do not dictate the reach of any wholesaler, given that the cost of freight is not prohibitive.²⁴
39. For the purposes of assessing the competitive impact of the Proposed Acquisition, we have defined the geographic scope of the relevant market(s) for the wholesale supply of fresh produce as national.
40. We received some information which suggested that the geographic scope of the relevant markets could be narrower than national. Outside of Auckland, Wellington and Christchurch, the specific locations in which the large wholesalers operate produce markets varies. The number and scale of markets operated is different in Auckland compared to other centres. These two factors may impact on the extent of produce sales that particular wholesalers make in an area. This may be particularly relevant to smaller retailers that have a preference for visiting local market trading floors to physically inspect and buy produce.²⁵ However, it is not necessary for us to reach a view on this point. As noted above, our decision would be unchanged regardless of how narrowly or broadly we defined the geographic scope of any market(s) for the wholesale supply of fresh produce.

Market for cool-chain distribution services

41. We agree with T&G that, at its broadest, the relevant market for the supply of cool-chain distribution services is a national market. We received some evidence suggesting that there could be narrower geographic markets for the supply of cool-chain distribution services based on the locations of cool-stores/distribution centres (and the areas served by such facilities).²⁶ However, it is not necessary for us to reach a view on this point. As noted earlier, our decision would be unchanged regardless of how narrowly or broadly we defined the relevant market(s) for the supply of cool-chain distribution services.

Market for contract ripening services

42. As noted, T&G submitted that a third relevant market is a South Island market for the supply of contract ripening services.²⁷

²⁴ Application at [7.3].

²⁵ []

²⁶ []

²⁷ Application at [7.1].

43. We agree with T&G that the geographic scope of any markets for the supply of contract ripening services are narrower than national markets. This is because produce tends to be contract ripened in facilities close to a retailers' premises because it is fragile and easily damaged once ripe and customers of contract ripening services do not necessarily procure these services on a national basis.²⁸ The relevant markets are at their broadest North Island and South Island markets, although the geographic scope could be narrower, regional markets.

The without the merger scenario

44. To assess whether a merger is likely to substantially lessen competition in a market, we compare the likely state of competition if the merger proceeds (the scenario with the merger, often referred to as the factual), with the likely state of competition if the merger does not proceed (the scenario without the merger, often referred to as the counterfactual).²⁹

45. If the Proposed Acquisition does not proceed, T&G submitted that it is likely that []. However, T&G noted that businesses in the New Zealand fresh produce industry face increasingly challenging conditions, and submitted that it [].³⁰

46. Absent its sale to T&G, Freshmax submitted that [

].³¹ However, Freshmax also told us that:³²

46.1 [],³³ and

46.2 [].

²⁸ Application at [(6.5(a))].

²⁹ *Mergers and Acquisitions Guidelines* above n1 at [2.29].

³⁰ Application at [5.1].

³¹ Application at [5.2].

³² Commerce Commission interview with Freshmax (10 March 2020).

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47. Through our investigation, we established that [].³⁴
48. For the purposes of considering the competitive effects of the Proposed Acquisition we have adopted a without-the-acquisition scenario of the status quo. A without-the-acquisition scenario where Freshmax (under new ownership) continues to operate as wholesaler in the relevant markets independently of T&G is the most competitive scenario that is likely to occur.

How the Proposed Acquisition could substantially lessen competition

49. We have considered whether the Proposed Acquisition could have the effect of substantially lessening competition in any of three ways.
50. First, we have tested whether the Proposed Acquisition could give rise to unilateral effects. Unilateral effects may occur when a firm acquires a current or potential competitor that would otherwise provide a competitive constraint. The Proposed Acquisition would mean that any existing or potential competition between T&G and Freshmax is lost. We have tested whether this means that the merged entity would be able to raise prices (or reduce quality) in the relevant markets. We have assessed:
- 50.1 whether the merging firms impose a competitive constraint on one another now (or would do in the future);
 - 50.2 whether there are other competitors in the market that could replace the lost competition;
 - 50.3 whether any barriers to entry and expansion by competitors can be overcome; and
 - 50.4 the extent to which customers and grower suppliers have special characteristics that would enable them to resist a price increase by the merged entity (an increase in any commission rate charged to grower suppliers and/or the prices at which retailers and other customers are sold produce on a wholesale basis).
51. Secondly, we have tested whether the Proposed Acquisition could increase the potential for coordinated effects. Coordinated effects can occur when a merger or acquisition makes it significantly more likely that the remaining firms can collectively exercise market power to increase prices (or reduce quality). Coordinated effects are more likely when a market is characterised by certain features, which make it easier to reach, and then to sustain, an agreement or understanding.³⁵ Our approach was to test whether the relevant markets were vulnerable to coordination (by looking at whether the characteristics above apply) and then consider how the Proposed Acquisition might change the likelihood of coordination. As with unilateral effects,

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³⁵ See *Mergers and Acquisitions Guidelines* above n1 at [3.89].

we considered the potential for coordination around any commission rate charged to grower suppliers and/or the prices at which retailers and other customers are sold produce on a wholesale basis.

52. Finally, we have tested whether the Proposed Acquisition could give rise to vertical effects. Vertical effects can arise where the merging firms operate at different levels in the supply chain (for example, a wholesaler and a retailer). A merger between such firms might give the merged entity the ability and incentive to refuse to supply a downstream rival (or only supply at high prices), which could adversely affect competition (this is known as input foreclosure).³⁶ In this case, we have also tested whether the Proposed Acquisition might give T&G the ability and incentive to foreclose other growers and importers by restricting their access to downstream customers (this is known as customer foreclosure).

Competition analysis – wholesale supply of fresh produce

53. For the reasons set out below, we are satisfied that the Proposed Acquisition is unlikely to substantially lessen competition in any market(s) for the wholesale supply of fresh produce due to either unilateral, coordinated or vertical effects.

Unilateral effects

54. T&G submitted that the Proposed Acquisition would not be likely to substantially lessen competition in any market(s) for the wholesale supply of fresh produce due to unilateral effects because:³⁷
- 54.1 the market share increment caused by the Proposed Acquisition would be insignificant;
 - 54.2 T&G would remain constrained by numerous existing competitors, including MG Marketing ([]), Fresh Direct, Seeka Fresh and other wholesalers (including more specialist wholesalers that supply a narrower range of fresh produce);
 - 54.3 there are no barriers to existing competitors expanding their current wholesaling services;
 - 54.4 barriers to entry are low, such that T&G would also be constrained by the threat of new entry;
 - 54.5 retailers and growers would continue to exercise significant countervailing power on T&G post-acquisition through an ability to bypass any wholesaler and buy and sell fresh produce directly; and
 - 54.6 the perishable nature of fresh produce means that the scope for T&G to artificially increase price or reduce quality is next-to-none.

³⁶ See *Mergers and Acquisitions Guidelines* above n1 at [5.5]. Other mergers may raise customer foreclosure concerns.

³⁷ Application at 20-36.

55. For the reasons described below, we consider that the Proposed Acquisition is unlikely to substantially lessen competition in the wholesale supply of fresh produce due to unilateral effects because the merged entity would be constrained by:
- 55.1 the presence of competing wholesalers, in particular MG Marketing (but also other smaller wholesalers, including specialist wholesalers); and
 - 55.2 the ability of retailers and other customers to buy direct from growers, by passing wholesalers.

Closeness of competition between T&G and Freshmax

56. Table 1 sets out the New Zealand wholesale produce sales for each of the four major wholesalers in the 2019 calendar year in terms of sales value. Table 1 provides an indication of the relative size of each of the major wholesalers and of the size of T&G compared to Freshmax. The figures in Table 1 are not necessarily reflective of the market shares in a national market for the wholesale supply of fresh produce, as the sales of smaller wholesalers (including specialist wholesalers) are not included. The figures in Table 1 are also not necessarily reflective of what the parties' market shares might be in narrower customer or geographic markets in which the presence (and relative size) of the major wholesalers may vary.

Table 1: Fresh produce sales by major wholesalers, 2019

Wholesaler	Sales value (\$m)
T&G	[]
Freshmax	[]
Merged entity	[]
MG Marketing	[]
Fresh Direct	[]

Source: industry participants

57. Industry participants all agree that Freshmax is not the closest competitor to T&G. MG Marketing is T&G's closest competitor. While T&G and Freshmax do compete in the wholesale supply of fresh produce (both to sell produce to retailers and other customers, and to secure the supply of produce from growers), we found no evidence to indicate that Freshmax provides a material constraint on T&G. Most industry participants (including retailers) were of the view that Freshmax added nothing unique in the wholesale supply of fresh produce and considered that the loss of Freshmax would have no impact on current market conditions. Table 1 shows that the sales of T&G are [].

Constraint from competitors, including their ability to expand

58. While the Proposed Acquisition would mean a loss of existing competition between T&G and Freshmax, we consider that competing wholesalers (in particular, MG Marketing), which have the ability to expand, would provide sufficient constraint to compensate for any loss of competition between the merging parties.
59. Table 1 shows that the merged entity would be similar in size and scale to T&G's closest competitor, MG Marketing. Fresh Direct would remain as the third player in

the market by size. After the current four large wholesalers, other wholesalers are much smaller (eg, []). We consider that these competing wholesalers are likely to continue to organically grow their businesses in the future, in competition with the merged entity.³⁸ The majority of customers that we spoke to did not think that there would be a loss of competition with the Proposed Acquisition. Retailers and other wholesale customers did not consider that they would face a reduction in quality or availability of produce, or face higher prices to buy produce. We also sought information from growers and received no information to indicate that they would face increased commission rates or a reduction in service levels with the Proposed Acquisition. MG Marketing was cited by all parties as a major supplier and credible alternative to the merged entity.

60. If the merged entity were to reduce quality of its the produce it wholesales, it would quickly lose customers to competing wholesalers. Retailers (such as []), told us that the quality of produce is the most important factor in their choice of where to buy produce.³⁹ We also anticipate that the merged entity would quickly lose grower suppliers if it reduced the level of service that it provides to growers post-acquisition.
61. We consider that competing wholesalers are also likely to constrain the merged entity from raising prices beyond a competitive level. The merged entity is unlikely to be able to raise the prices at which it wholesales produce to retailers and other customers without losing the business of those customers to competing wholesalers. The merged entity is also unlikely to be able to raise any commission rates that it charges growers without causing a material proportion of its grower suppliers (who are key to its business) to switch to supplying other wholesalers.
62. Because there are few, if any, fixed supply contracts between wholesalers and growers or between wholesalers and retailers, growers and retailers are able to and do switch wholesalers quickly and with little cost. Retailers and other customers all buy produce from more than one wholesaler and vary (in some cases daily) what they buy from each wholesaler based on the quality, availability and pricing of produce. Even where retailers tend to buy a particular produce item from one wholesaler, evidence indicates that they have and could switch this supply to another wholesaler.⁴⁰ We were also provided evidence of growers switching between wholesalers.⁴¹
63. We have not found it necessary to reach a view on the likelihood of entry by new wholesalers, given the constraint that the merged entity would face from existing competing wholesalers.

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⁴⁰ Application at [8.8(b)].

⁴¹ Telephone call with T&G (5 February 2020).

Countervailing power

64. We consider that customers (both large supermarket chains and other customers) and growers have countervailing power that would enable them to resist a price increase by the merged entity.
65. As noted earlier, a significant change that has occurred in the fresh produce supply chain in recent years has been a shift towards growers directly supplying produce to supermarket chains and other customers. This has materially reduced the volume of produce sold through wholesalers. Industry participants expect this trend to continue in the future.
66. Customers that currently buy produce from wholesalers and also direct from growers all indicated to us that, if they were unhappy with the price or quality of produce supplied by wholesalers post-acquisition, they could buy more produce direct from growers. Even customers that buy little produce direct from growers indicated that they would try and buy more direct from growers in response to a price rise post-acquisition. Where retailers and other customers already buy direct from growers, they would likely face only low costs to buy more direct. There may also be little cost to growers in supplying more produce direct, as the retailer is generally responsible for freight of the produce from the grower, but any costs would be offset by the commission that the grower would avoid paying wholesalers.
67. Because there are few, if any, fixed supply contracts between wholesalers and growers or between wholesalers and retailers, growers and retailers are able to switch to supplying and buying directly relatively quickly.

Perishable nature of fresh produce

68. We consider that the perishable nature of a number of fresh produce lines (eg, salad greens, tomatoes, berries, stone fruit) means that wholesalers are incentivised to compete for sales to clear produce quickly before it spoils. It is therefore unlikely that the merged entity would find it profitable to raise prices (or reduce quality) because of the increased risk of reduced demand and wastage.

Coordinated effects

69. T&G submitted that the Proposed Acquisition would not be likely to substantially lessen competition in any markets for the wholesale supply of fresh produce due to coordinated effects because:⁴²
- 69.1 a large number of competitors would remain, operating a variety of different business models;
- 69.2 the seasonal nature of fresh produce means that the industry is dynamic and susceptible to demand and supply shocks;
- 69.3 there has been significant new entry and expansion in the wholesale supply of fresh produce in recent years;

⁴² Application at [9.2].

- 69.4 there is a lack of price transparency in the industry, with prices being privately and bilaterally negotiated between suppliers and customers; and
- 69.5 there is no evidence that Freshmax represents a material constraint on T&G's prices.
70. For the reasons described below, we consider that the Proposed Acquisition is unlikely to substantially lessen competition in the wholesale supply of fresh produce due to coordinated effects. This is because:
- 70.1 on balance, the market(s) for the wholesale supply of fresh produce are not vulnerable to coordination;
- 70.2 the Proposed Acquisition is unlikely to change the conditions in the market; and
- 70.3 the Proposed Acquisition is unlikely to make coordination more likely, complete or sustainable.

Is the market vulnerable to coordination?

71. The market(s) for the wholesale supply of fresh produce has some features that could make it vulnerable to coordination. Wholesalers are supplying homogenous products, suppliers have some information on each other's prices and volumes, and the market is concentrated between only a few large wholesalers. As a result, the major wholesalers may have a fair degree of insight into each other's businesses on a day-to-day basis. In some contexts, this could assist them to reach and monitor a coordinated outcome.
72. However, we consider that other features of the market(s) for the wholesale supply of fresh produce make coordination unlikely. In particular, demand is not stable and supply is volatile, with frequent supply shocks due to weather conditions. Having already lost a significant portion of their business to direct supply by growers to retailers, wholesalers are incentivised to compete for the business of growers and customers in order to achieve economies of scale in their market operations and to prevent further bypass of wholesalers by growers. In addition, as discussed above, the perishable nature of a number of fresh produce lines means that wholesalers are incentivised to compete for sales to clear produce quickly before it spoils.
73. The prices at which fresh produce is wholesaled to retailers and other customers change daily, and sometimes over the course of a day. There are no displayed prices for produce at wholesale produce markets. Prices are bilaterally negotiated between wholesalers and each individual retailer (or other customer). The volume of produce available and the quality of that produce (which are both impacted by weather conditions) heavily influence the prices at which produce is wholesaled, along with the volume and types of produce being demanded from retailers and other customers for fresh produce. These market features mean that any attempts to reach, monitor and punish deviations from an agreed outcome are likely to be unsuccessful.

74. While the wholesalers do not publish information on the prices at which they sell produce to retailers and other customers, they receive information on competitor pricing via feedback that is provided by customers and grower suppliers. This feedback means that there is a degree of wholesale price transparency amongst industry participants. However, because the prices at which produce is wholesaled to retailers and other customers change often, significant effort would be needed by wholesalers to agree the prices at which produce is wholesaled.
75. Commission rates that wholesalers charge growers on sales are also not transparent across the entire market and it may be hard for wholesalers to coordinate such prices. MG Marketing is the only major wholesaler to publish its commission rates in a tariff schedule.⁴³ Below we consider the potential risk that this might provide a focal point for coordination between fresh produce wholesalers.
76. T&G and Freshmax do not publish details of any commission rates they charge on their websites, and instead directly notify these to growers. Fresh Direct [redacted].⁴⁴ While some wholesalers [redacted],⁴⁵ [redacted].⁴⁶ It is therefore unlikely that the transparency of MG Marketing’s commission rates would provide wholesalers with a focal point for coordination, given that there is no evidence of sufficient market transparency of the commission rates charged by the other major wholesalers that would make coordination more likely. There is also no evidence to suggest that the Proposed Acquisition would increase the transparency of commission rates charged by fresh produce wholesalers.
77. We consider that although the market(s) for the wholesale of fresh produce have some features, such as high concentration levels and a degree of wholesale price transparency, that could potentially make it vulnerable to coordination, coordination is nevertheless unlikely. Any coordination between wholesalers to increase any commission rates charged to growers would only encourage them to supply more produce direct to retailers. Further, the volatile nature of demand and supply in the market also means that coordination in this market is unlikely to be sustainable.

Would the Proposed Acquisition make coordination materially more likely, sustainable or complete?

78. The Proposed Acquisition would reduce the number of major wholesalers of fresh produce from four to three. As a result of the Proposed Acquisition, MG Marketing and T&G would be of a similar size and structure, and therefore capture a large

⁴³ <https://www.mgmarketing.co.nz/assets/Forms/cca7b85cf5/MG-Supplier-Commision-Rates.pdf>.

⁴⁴ [redacted]

⁴⁵ T&G advised that [redacted]. Telephone call with T&G (5 February 2020).

⁴⁶ [redacted]

proportion of the market. These factors will tend to make coordination more likely, sustainable and complete.

79. However, we do not consider that it would materially increase the likelihood of coordination occurring in any market(s) for the wholesale supply of fresh produce. This is because:
- 79.1 the volatile nature of the market(s) discussed above should continue to encourage competition between the merged entity, MG Marketing and Fresh Direct;
 - 79.2 the Proposed Acquisition would not eliminate a particularly disruptive competitor. One industry participant suggested that Freshmax may be such a player and the wholesaler that has been destabilising or preventing coordination from happening.⁴⁷ However, all other industry participants (including retailers) were of the view that Freshmax added nothing unique in the wholesale supply of fresh produce and considered that the loss of Freshmax would have no impact, that the major competition occurred between T&G and MG Marketing, and that this would not change with the Proposed Acquisition; and
 - 79.3 lastly, we consider that the presence of smaller wholesalers (including specialist wholesalers) and the ability of retailers and other customers to buy direct (and equally the ability of growers to supply direct) is likely to continue to disrupt any attempts to coordinate between the merged entity and MG Marketing.

Vertical effects

80. T&G submitted that the Proposed Acquisition would not be likely to substantially lessen competition due to vertical effects because:⁴⁸
- 80.1 T&G would not be able to foreclose other growers (customer foreclosure), as:
 - 80.1.1 it would have no incentive to refuse to wholesale produce not grown by T&G, because this would be unprofitable; and
 - 80.1.2 other growers would be able to sell their produce through competing wholesalers and/or direct to customers; and
 - 80.2 T&G would not be able to foreclose other wholesalers (input foreclosure), none of which are currently dependent on T&G grown produce for their business (T&G grown produce is only wholesaled by T&G).
81. For the reasons described below, we consider that the Proposed Acquisition is unlikely to substantially lessen competition in the wholesale supply of fresh produce due to vertical effects. This is because the merged entity is unlikely to have the

⁴⁷ []

⁴⁸ Application at [10].

ability or incentive to foreclose other growers (customer foreclosure) or competing wholesalers from gaining access to fresh produce (input foreclosure).

Input foreclosure

82. We consider that the merged entity would not have the ability to prevent any competing fresh produce wholesalers from gaining access to fresh produce. The merged entity would not have control over any important input or a particular fresh produce product. Further, T&G grown produce is currently only wholesaled by T&G.⁴⁹ We understand that this would remain the same after the Proposed Acquisition. The merged entity would therefore not be in a position to prevent other wholesalers from getting access to any fresh produce lines that may reduce their ability to impose a significant degree of competitive constraint on the merged entity in future.

Customer foreclosure

83. We consider that the merged entity would not have the ability or incentive to refuse to wholesale fresh produce not produced by them. The merged entity would not control the fresh produce supply chain, as there are competing wholesalers that would remain (eg, MG Marketing). Growers and importers also have the ability to (and do) supply produce directly to retailers and other customers.
84. Even if the merged entity had the ability to refuse to wholesale fresh produce not produced by them, we consider that the merged entity would have no incentive to refuse to wholesale produce grown or imported by third-parties, or wholesale the produce of such parties at less attractive prices than which T&G sells the produce it grows itself. As discussed earlier, growers and importers frequently switch between competing wholesalers. Therefore, should the merged entity refuse to wholesale fresh produce not produced by them, it would likely only result in the merged entity losing sales to competing wholesalers. It would likely also encourage growers and importers to supply a greater volume of produce direct to retailers and other customers.

Competition analysis – cool-chain distribution

85. T&G submitted that the Proposed Acquisition would not be likely to substantially lessen competition in any markets for cool-chain distribution services because:⁵⁰
- 85.1 there are several other existing competitors, such as MG Marketing and Bidfood who do not face any barriers to expanding their current services;
 - 85.2 barriers to entry are low, meaning that T&G would also be constrained by the threat of further new entry; and
 - 85.3 customers would continue to exercise significant countervailing power on T&G post-acquisition through an ability to sponsor a new entry or by self-supplying their own cool-chain distribution services.

⁴⁹ Application at [10.4].

⁵⁰ Application at 36-39.

86. We consider that the Proposed Acquisition is unlikely to substantially lessen competition in any markets for cool-chain distribution services because the merged entity would be constrained by:

86.1 competing suppliers; and

86.2 the ability of customers to self-supply.

87. Woolworths and Foodstuffs are the only customers of cool-chain distribution services.

[

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[

]⁵² We found no evidence of T&G and Freshmax recently competing to win contracts to provide cool-chain distribution services.

88. No industry participants raised concerns about the impact of the Proposed Acquisition on the provision of cool-chain distribution services. This is because T&G and Freshmax are not the only suppliers of cool-chain distribution services. Other large produce wholesalers (eg, MG Marketing) have the ability to provide these services. Woolworths and Foodstuffs also have the ability to self-supply these services.

89. In terms of supermarkets self-supplying these services,

[

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[

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Competition analysis – contract ripening

90. T&G submitted that the Proposed Acquisition would not be likely to substantially lessen competition in any markets for contract ripening services because:⁵⁵

90.1 T&G and Freshmax only provide ripening services to a limited number of existing customers;

90.2 the market share increment caused by the Proposed Acquisition would be insignificant;

⁵¹ Application at [8.39].

⁵² Application at [8.37] and [8.41(b)].

⁵³ []

⁵⁴ []

⁵⁵ Application at 39-41.

- 90.3 there are several other existing competitors who currently contract ripen fruit for customers in the South Island, such as MG Marketing, Fresh Direct and Seeka Fresh; and
- 90.4 existing competitors all have excess capacity that would allow them to expand.
91. We consider that the Proposed Acquisition is unlikely to substantially lessen competition in any markets for contract ripening services because the merged entity would be constrained by competing suppliers.
92. There is little overlap between T&G and Freshmax in the supply of contract ripening services. T&G supplies contract ripening services for [] for [] in Christchurch. Freshmax does a small amount of contract ripening of [] for [] in Christchurch.⁵⁶ We found no evidence of T&G and Freshmax recently competing to win contracts to provide contract ripening services.
93. No industry participants raised concerns about the impact of the Proposed Acquisition on the provision of contract ripening services. This is because T&G and Freshmax are not the only suppliers of contract ripening services. Other large produce wholesalers (eg, MG Marketing) and third-parties also have facilities to ripen produce and undertake ripening on contract.

Overall conclusion

94. We consider that the Proposed Acquisition is unlikely to substantially lessen competition in any relevant market.

⁵⁶ Application at [8.47].

Determination on notice of clearance

95. We are satisfied that the Proposed Acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in a market in New Zealand.
96. Pursuant to section 66(3)(a) of the Act, the Commerce Commission determines to give clearance to Turners & Growers Fresh Limited to acquire 100% of the shares in Freshmax NZ Limited.

Dated this 1st day of April 2020

Anna Rawlings
Chair