

Determination

Heyden Farms Limited, Henergy Cage-Free Limited and Rasmusens Poultry Farms Limited [2020] NZCC 19

The Commission:	Anna Rawlings Dr John Small Dr Derek Johnston
Summary of application:	An application from Heyden Farms Limited, Henergy Cage-Free Limited and Rasmusens Poultry Farms Limited seeking clearance to merge their respective egg production and wholesale operations.
Determination:	Under section 66(3)(a) of the Commerce Act 1986, the Commerce Commission gives clearance to the proposed acquisition.
Date of determination:	16 September 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 24 July 2020, we registered an application from Heyden Farms Limited (Heyden), Henergy Cage-Free Limited (Henergy) and Rasmusens Poultry Farms Limited (Rasmusen's) (together, the Applicants) seeking clearance to merge their respective egg production and wholesale supply operations (the Proposed Merger).

Our decision

2. The Commission gives clearance to the Proposed Merger as it is satisfied that the merger will not have, or would not be likely to have, the effect of substantially lessening competition in a market in New Zealand.
3. The Applicants are producers and wholesalers of eggs. The egg production industry in New Zealand is currently undergoing significant change due to changes in animal welfare regulations and changing consumer preferences. These changes mean that the Applicants and other egg producers are having to adapt their production methods and these changes are occurring in the industry irrespective of whether the Proposed Merger proceeds. However, factoring in the industry changes into its assessment of this application, the Commission considers the number of competing egg producers, including some that are expanding their operations, are likely to constrain the ability of the merged entity to raise prices, reduce service quality, or coordinate their behaviour.

Our framework

4. Our approach to analysing the competition effects of the merger is based on the principles set out in our Mergers and Acquisitions Guidelines (our guidelines).¹
 - 4.1 We assess mergers using the substantial lessening of competition test. 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
 - 4.2 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.³ 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.⁴

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

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

³ *Woolworths & Ors v Commerce Commission* (2008) 8 NZBLC 102,128 (HC) at [127].

⁴ *Mergers and Acquisitions Guidelines* above n1 at [2.23].

- 4.3 We must clear a merger if we are satisfied that the merger would not be likely to substantially lessen competition in any market.⁵ If we are not satisfied – including if we are left in doubt – we must decline to clear the merger.

The key parties

5. Heyden, Henergy and Rasmusen’s are all producers and wholesale suppliers of eggs.⁶
- 5.1 Heyden produces cage and colony cage eggs, barn laid eggs, and free range eggs at its facilities in Waikato and the Bay of Plenty. It has capacity to farm approximately [] laying hens and last year produced [] eggs, generating sales of [].
- 5.2 Henergy produces barn laid eggs at its facilities near Masterton. It has capacity to farm approximately [] laying hens and last year produced [] eggs, generating sales of [].
- 5.3 Rasmusen’s produces cage and colony cage eggs and free range eggs at its facilities near Whanganui. It has capacity to farm approximately [] laying hens and last year produced [] eggs, generating sales of [] million.
6. With the Proposed Merger, Heyden, Henergy, and Rasmusen’s intend to merge their respective egg production businesses into a new entity, Better Eggs Limited. The respective shareholdings in Better Eggs Limited would reflect the variations in the size of each of the Applicants’ operations, with Heyden holding [] of the shares, Henergy [] and Rasmusen’s [] respectively.

Other relevant parties

7. The New Zealand egg production industry is currently made up of approximately 160 egg farms of varying sizes, which last year farmed a total of approximately 3.9 million laying hens.⁷
8. At present, the two largest eggs producers in New Zealand are:
- 8.1 Zeagold Foods (Zeagold), a subsidiary of Mainland Poultry Limited. Zeagold operates 10 farms across New Zealand. With approximately [] laying hens, Zeagold currently accounts for about [] of total egg production in New Zealand;⁸ and
- 8.2 Independent Egg Producers Co-operative (IEP Co-op) currently has 10 members with each member operating farms in different regions of New

⁵ Section 66(3)(a) of the Commerce Act 1986.

⁶ There are a number of production methods used to produce shell eggs (also known as table eggs) and we discuss these further below.

⁷ Egg Farming in NZ, Egg Producers Federation of New Zealand <https://www.eggfarmers.org.nz>.

⁸ Commission estimates based on data from Zeagold and the Egg Producers Federation.

Zealand.⁹ Heyden and Rasmusen's are members of the IEP Co-op but both are leaving, irrespective of the Proposed Merger. With approximately [] million laying hens, the IEP Co-op currently accounts for around [] of total egg production in New Zealand.¹⁰

9. As the total number of egg farms indicate, there is a large number of medium and smaller egg producers in addition to the producers listed above. Together, these other medium and smaller producers account for approximately [] of the total egg production capacity in New Zealand.¹¹ Of these other producers, two of the more prominent medium sized producers in the North Island are:
 - 9.1 Otaika Valley Free Range Eggs Limited (Otaika Valley), which operates a free range site in Whangarei and has a free range joint venture with Craddock Farms Limited near Rotorua;¹² and
 - 9.2 Wholesome NZ Limited (Wholesome NZ), which is a group of egg farmers in the Whanganui region who produce and collectively market their eggs to customers across New Zealand.¹³

The changing egg production industry

10. There are four main methods used to produce shell eggs (also known as table eggs) in New Zealand. All methods of production must comply with the Government-mandated quality and animal welfare requirements set out in the Animal Welfare (Layer Hens) Code of Welfare 2012 (Code of Welfare).¹⁴ The four main types of egg production methods are:¹⁵
 - 10.1 cage eggs – produced by hens living in cages that do not have perches, nest boxes or scratching areas;
 - 10.2 colony cage eggs – produced by flocks of hens living in colony cages where they have greater space (including perches, nest boxes or scratching areas) but do not roam outside;
 - 10.3 barn eggs – produced by hens that are free to roam inside a barn with access to perches, nest boxes and scratching areas but do not roam outdoors; and

⁹ Its members currently include Heyden and Rasmusen's as well as Northern Eggs, The Great Coromandel Egg Company, Braemar Poultry Farm, Gizzy's Eggs, Drillers Poultry Farm, Hessels Poultry Farm, Ewing Poultry and Craig's Poultry.

¹⁰ Commission estimates based on data from the IEP Co-op and the Egg Producers Federation.

¹¹ Commission estimates based on data from industry participants and the Egg Producers Federation.

¹² With approximately [] laying hens, Otaika Valley currently accounts for around [] of total egg production in New Zealand.

¹³ With approximately [] laying hens, Wholesome NZ currently accounts for around [] of total egg production in New Zealand.

¹⁴ <https://www.mpi.govt.nz/dmsdocument/1438-layer-hens-animal-welfare-code-of-welfare>.

¹⁵ Clearance Application at [25]; Farming types, Egg Producers Federation of New Zealand <https://www.eggfarmers.org.nz> (1% of all eggs farmed are classified as organic).

- 10.4 free range eggs – produced by hens that are free to roam outside during the day and are brought into a barn at night.
11. Under the Code of Welfare, egg producers must stop producing cage eggs by 31 December 2022. Since the ban was announced in 2012, producers of cage eggs have been making significant changes to their operations to ensure they comply with the Code of Welfare. Historically, cage hens typically accounted for around 85% of total egg production in New Zealand but this proportion has been falling since the Code of Welfare was introduced. Currently, cage eggs account for approximately 40% of egg production in New Zealand and this proportion will fall to zero by the end of 2022.¹⁶
 12. In addition to the regulatory changes affecting production of cage eggs, the two major supermarket chains in New Zealand advised egg producers that, from mid to late this decade, they will no longer be purchasing eggs laid by hens in colony cages. In 2017, Woolworths New Zealand Limited (Woolworths NZ) announced a target of “100% cage free” eggs from 2024/2025 and both Foodstuffs North Island Limited and Foodstuffs South Island Limited announced they will do the same by the end of 2027.¹⁷ While the production of colony cage eggs is still allowed under the Code of Welfare, the supermarkets are major customers of egg producers. The announcements by the supermarkets has therefore prompted colony cage egg producers to reassess whether they will continue to produce eggs by this method in the long term.
 13. At the same time, over the past decade there has been an increase in the demand for free range and barn eggs. This change in consumer preference has prompted egg producers to increase production of barn laid and free range eggs.¹⁸
 14. The cumulative effect of these regulatory and demand changes is that many egg farmers are switching methods of production away from cage (and to some extent colony cage production) to barn and free range eggs. This trend is likely to continue until at least until 2027. This means that the nature of competition between egg producers is likely to change over this period from what it is today.

Market definition

15. 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.
16. The Applicants submitted that the relevant market is the national market for the production and wholesale supply of eggs, because they consider their farms compete

¹⁶ Egg Farming in NZ, Egg Producers Federation of New Zealand <https://www.eggfarmers.org.nz>.

¹⁷ Media release: Countdown commits to cage-free with support from egg farmers (28 March 2017); Media release: Foodstuffs announces move to cage free eggs by the end of 2027 (21 September 2017).

¹⁸ Egg Farming in NZ, Egg Producers Federation of New Zealand <https://www.eggfarmers.org.nz>; Commerce Commission interview with [] (29 August 2020); Media release: Countdown commits to cage-free with support from egg farmers (28 March 2017).

with all other egg farms across the country. However, the Applicants also acknowledged that it may be appropriate to assess narrower product markets based on the production method, which is the approach we preferred for the reasons set out below.¹⁹

17. We consider the most appropriate way to assess the Proposed Merger is to define separate North Island markets for the production and wholesale supply of:
 - 17.1 cage and colony cage eggs;
 - 17.2 barn eggs; and
 - 17.3 free range eggs.

18. We acknowledge that there is some degree of substitution between the different types of eggs produced, and the regions to which different producers supply their eggs, which may support defining broader product and geographic markets. However, we considered separate markets for the different types of eggs produced as this is more likely to highlight the existing and potential overlap between the merging parties. If there are no significant competitive issues when considering these more narrowly defined markets, there are unlikely to be competitive issues when considering more broadly defined markets.

19. We explain our reasoning for our approach to defining these markets further below including:
 - 19.1 the extent to which the requirements of different egg customers vary;
 - 19.2 the extent to which eggs produced by different production methods are substitutes; and
 - 19.3 the extent to which egg producers can supply different parts of the country.

20. As egg farmers produce and supply their eggs to retailers and other customers, the relevant functional dimension of any relevant market is the production and wholesale supply level.²⁰

Customer requirements are relatively similar

21. Customers of the different egg types are differentiated by size with supermarkets at one end of the spectrum and small cafes at the other. While this affects customers' respective supply options to some extent, we do not consider it is necessary to separate customers into any particular group as their requirements are relatively

¹⁹ Clearance Application at [33].

²⁰ We note that some producers purchase eggs from other suppliers for further distribution.

[]
 []; Commerce Commission interview with [] (25 August 2020); Commerce Commission interview with [] (12 August 2020).

similar, and we saw no evidence indicating that suppliers price discriminate between them.

22. The main customers of egg producers are supermarkets with about 60% of all eggs produced in New Zealand being purchased from a retail supermarket.²¹ The other main purchasers of eggs are customers in the food service industry.²² These customers can include commercial food manufacturers, restaurants, cafés, caterers and other commercial food suppliers.
23. Both supermarket and food service customers require regular deliveries of different egg types, although the quantities they purchase can vary significantly.
 - 23.1 Supermarkets require greater volumes of eggs across all egg types than other customers.²³
 - 23.2 Customers requiring a large volume of a particular egg type can buy directly from producers.²⁴
 - 23.3 Most large producers do not deliver directly to individual cafes or restaurants (they distribute via food service wholesalers or local distributors).²⁵
 - 23.4 Smaller customers, such as cafes, tend to be supplied by either a third party distributor or a local/regional egg producer.²⁶
24. To this extent, we assessed the competitive effects of the Proposed Merger in a single customer market albeit one that is differentiated by customer size.

Separate product markets for the different types of eggs

22. We consider the relevant product markets to be, respectively, cage and colony cage eggs, barn eggs and free range eggs.
25. From the demand side, many consumers consider different egg types to be distinct, with animal welfare being an important consideration for consumers when deciding which type of egg to purchase.

²¹ Clearance Application at [63].

²² Clearance Application at [63]-[72].

²³ Commerce Commission interview with [] (17 August 2020); Commerce Commission interview with [] (29 August 2020); Commerce Commission interview with [] (29 August 2020).

²⁴ Commerce Commission interview with [] (12 August 2020); Commerce Commission interview with [] (8 September 2020).

²⁵ Commerce Commission interview with [] (12 August 2020); Commerce Commission interview with [] (8 September 2020); Commerce Commission interview with [] (25 August 2020).

²⁶ Email from [] to the Commerce Commission (8 September 2020); Commerce Commission interview with [] (8 September 2020); Commerce Commission interview with [] (21 August 2020).

- 25.1 Some consumers seem to value the welfare of the laying hen and so will only purchase non-cage eggs, namely barn eggs or free range eggs regardless of price differentials with cage and colony eggs.
- 25.2 As cage eggs and colony cage eggs are both produced by hens living in a type of cage, many consumers do not see any significant distinction between a cage egg and a colony cage egg.²⁷ As noted above, cage eggs will no longer be produced in New Zealand after 2022, and the main supermarket groups are phasing out their purchases of colony cage eggs.
26. Other consumers purchase eggs based on price. There are different price points for the different types of eggs, with cage and colony cage eggs being significantly cheaper, followed by barn eggs and finally free-range eggs as the most expensive.²⁸
27. While some consumers do switch between different types of eggs, the level of switching varies.²⁹ Overall the evidence suggests eggs produced by the same, or similar, methods are likely to be close substitutes for consumers, whereas eggs produced by different methods are unlikely to be.
28. On the supply side, the different production methods appear to be quite discrete from one another and each method has significantly different costs of production.³⁰ In addition, production facilities cannot be quickly and easily converted to a different method of production.³¹ This also supports a product market definition based on different production methods.
29. While there is a degree of substitution between the eggs produced by each production method, it appears that a significant number of consumers view cage and colony cage eggs, barn eggs and free range eggs as three distinct products such that they do not readily switch between them in response to price changes. In light of this, cage and colony cage eggs are likely to be close substitutes for consumers whereas barn eggs are unlikely to be (and vice versa).³² As such, we have considered the production and wholesale supply of cage and colony cage eggs, barn eggs and free range eggs separately.

²⁷ Commerce Commission interview with [] (12 August 2020).

²⁸ Commerce Commission interview with [] (29 August 2020); Commerce Commission interview with [] (29 August 2020); Stuff article “We want free range eggs right up to the point of buying them” (16 July 2018).

²⁹ Commerce Commission interview with [] (29 August 2020); Email from [] to the Commerce Commission (7 September 2020); Commerce Commission interview with [] (29 August 2020).

³⁰ [], Clearance Application (24 July 2020); Commerce Commission interview with [] (12 August 2020); Commerce Commission interview with [] (12 August 2020).

³¹ Commerce Commission interview with [] (12 August 2020); Commerce Commission interview with [] (17 August 2020); Commerce Commission interview with [] (8 September 2020).

³² The same applies between cage and colony cage eggs and free range eggs, and between barn eggs and free range eggs respectively.

North Island markets for the supply of different types of eggs

30. For each product market, we consider that the relevant geographic market is the North Island. While there may be some regional differences, driven by smaller producers supplying local areas, it appears that wholesale customers in the North Island can effectively source eggs from across the North Island.³³
31. Given the perishable nature of eggs, customers require regular deliveries of eggs and producers are responsible for ensuring their eggs are delivered to their customers undamaged. This means that transportation costs are incorporated into the price that wholesale customers pay for their eggs.
32. As eggs are relatively low value products, transport costs affect the distance over which egg producers can economically supply their products. Heyden, Henergy and Rasmusen's have farms in different regions of the North Island and each of their farms vary in size. Each distribute eggs across the North Island, although the volume of eggs, and the type of customers they each supply, varies across the regions.³⁴ This is also the case for other egg producers, both large and small, located in different parts of the North Island.³⁵
33. As such, while per unit transport costs for larger egg producers that transport higher volumes are likely to be lower than for producers with smaller volumes,³⁶ transportation costs do not appear to significantly limit the ability of producers in the North Island to distribute their eggs across the North Island.³⁷
34. Most of the North Island producers we spoke to considered that transportation costs are only a significant impediment to them distributing their eggs outside of the North Island.³⁸ While the Applicants suggest that the geographic market is nation-wide, the additional costs to producers to transport their eggs across the Cook Strait means

³³ More specifically, we consider that in light of a SSNIP for cage and colony cage eggs, barn eggs and free-range eggs in a particular region, sufficient customers could switch away to suppliers located in other regions to make the SSNIP unprofitable.

³⁴ Clearance Application at [40].

³⁵ []; Commerce Commission interview with [] (12 August 2020); Commerce Commission interview with [] (12 August 2020).

³⁶ For example, transport costs to a particular location are largely fixed so the cost to transport one tray of eggs to a certain location is likely to be the same as delivering several hundred trays to the same location. As such, larger producers are able to spread such fixed costs over more eggs, reducing their per unit transport costs. This is consistent with our analysis of the []

³⁷ Commerce Commission interview with [] (12 August 2020); Commerce Commission interview with [] (25 August 2020); Commerce Commission interview with [] (8 September 2020).

³⁸ Commerce Commission interview with [] (25 August 2020); Commerce Commission interview with [] (8 September 2020).

that most producers do not regularly distribute their eggs from the North Island to the South Island, and vice versa.³⁹

35. Accordingly, we consider that the relevant geographic market for cage and colony cage eggs, barn eggs and free-range eggs is the North Island.

Conclusion on market definition

36. For the purposes of assessing the Proposed Merger, we have defined separate North Island wide markets for the production and wholesale supply of:

36.1 cage and colony cage eggs (the cage and colony cage market);

36.2 barn eggs (the barn market); and

36.3 free range eggs (the free range market).

With and without scenarios

37. To assess whether competition is likely to be substantially lessened in any market, we compare the likely state of competition with the Proposed Merger to the likely state of competition without the Proposed Merger.⁴⁰

38. With the Proposed Merger, Heyden, Henergy and Rasmusen's would merge their respective egg production businesses.

39. Without the Proposed Merger, Heyden, Henergy and Rasmusen's would each continue to produce and supply eggs. Both Heyden and Rasmusen's have advised the IEP Co-op that regardless of whether the Proposed Merger proceeds, they will exit the IEP Co-op.⁴¹

40. As explained above, the egg production industry is in a period of transition and there are a number of changes that will occur both with and without the Proposed Merger. These changes include:

40.1 the regulatory ban on traditional cage egg production from 31 December 2022; and

40.2 the supermarkets' decisions to cease selling colony cage eggs.⁴²

³⁹ Commerce Commission interview with [] (26 August 2020); Commerce Commission interview with [] (8 September 2020).

⁴⁰ *Mergers and Acquisitions Guidelines* above n1 at [2.29]; Commerce Commission v Woolworths Limited (2008) 12 TCLR 194 (CA) at [63].

⁴¹ Clearance Application at [2] and [10]; Commerce Commission interview with Heyden (26 August 2020); Commerce Commission interview with Rasmusen's (25 August 2020).

⁴² As noted above, Woolworths NZ has a target of being "100% cage free" eggs from 2024/2025 and both Foodstuffs North Island Limited and Foodstuffs South Island Limited intend to be the same by the end of 2027.

41. With these industry-wide changes, the state of competition without the Proposed Merger in the relevant markets is unlikely to be the status quo.
- 41.1 In the cage and colony cage market, cage egg production has decreased significantly as suppliers have been decommissioning their cage production facilities ahead of the mandated ban after the end of 2022. Consumer preferences are also moving away from cage and cage colony eggs towards barn eggs and free range eggs. Some farms have replaced, or intend to replace, their lost cage production by building new colony facilities.⁴³ Others have stopped, or intend to stop, producing cage and colony cage eggs altogether,⁴⁴ and others have not yet decided what they will do with their cage facilities beyond 31 December 2022.⁴⁵
- 41.2 In the barn market, Zeagold is in the process of building a new barn facility in Waikato. This facility, [], will [] the total production capacity in the barn market.⁴⁶
- 41.3 In the free range market, the increased demand for free range eggs has encouraged many existing egg producers to expand their free range production capabilities. As free range farming typically requires more land than the other methods, some farmers have greater ability to expand than others.⁴⁷
42. We have taken these changes, which are occurring both with and without the Proposed Merger, into account in assessing the impact of the Proposed Merger below.

Competition analysis

43. In this section, we consider whether the Proposed Merger could have the likely effect of substantially lessening competition due to unilateral or coordinated effects.
- 43.1 Unilateral effects may occur when a firm acquires a current or potential competitor that would otherwise provide a competitive constraint. The Proposed Merger would likely have the effect of substantially lessening competition if, by removing the existing competition between Heyden,

⁴³ Email from [] to the Commerce Commission (7 September 2020); [] to the Commerce Commission (10 August 2020). Email from [] to the Commerce Commission (11 September 2020).

⁴⁴ Email from [] to the Commerce Commission (7 September 2020); Commerce Commission interview with [] (12 August 2020); Commerce Commission interview with [] (8 September 2020).

⁴⁵ []. Email from [] to the Commerce Commission (8 September 2020).

⁴⁶ []

⁴⁷ Commerce Commission interview with [] (17 August 2020); Commerce Commission interview with [] (12 August 2020); Commerce Commission interview with [] (8 September 2020).

Henergy and Rasmusen's, the merged entity would be able to, by itself, profitably raise the price of its eggs to customers in any relevant market.⁴⁸

- 43.2 Coordinated effects can occur when a merger or acquisition makes it significantly more likely that the remaining firms in a market can collectively exercise market power to increase prices, restrict output or reduce quality. Our approach is to test whether any relevant market is vulnerable to coordination and then consider how the Proposed Merger might change the likelihood of coordination.

Would the merged entity be able to raise its egg prices?

44. In this section, we consider the potential unilateral effects of the Proposed Merger in each of the three egg production markets although much of the evidence we gathered is relevant to all three markets.
45. The Applicants consider that, for each type of egg production, the merged entity will continue to be constrained by a range of national and local competitors, such as Zeagold, the IEP Co-op, Wholesome NZ as well as a long tail of local egg producers.⁴⁹
46. In our view, the Proposed Merger is unlikely to substantially lessen competition in any relevant market due to unilateral effects. This is because, in each of the markets we identified, there would be several medium to large sized competitors, some of which are in the process of expanding their operations. These firms, taken together, are likely to provide sufficient constraint on the merged entity.
47. In reaching this view, we considered the competitive effects of the Proposed Merger by assessing, in each of the three markets:
- 47.1 the existing and likely future capacity of egg producers; and
- 47.2 the constraint that existing competitors would provide on the merged entity.
48. As regards capacity, to measure the relative size of each producer, we compared the different producers' capacity, with capacity based on the number of laying hens each producer's facilities can hold. This is because egg producers typically operate their sheds at, or close to, full capacity. Further, given the industry is in a period of transition, we assessed both current and future capacity of existing producers, with future capacity based on any changes that a producer is planning to complete in the foreseeable future.⁵⁰

⁴⁸ For ease of reference, we only refer to the ability of the merged entity to "raise prices". This should be taken to include the possibility that the merged entity could reduce quality or innovation, or worsen an element of service or any other element of competition, i.e. it could increase quality-adjusted prices.

⁴⁹ Clearance Application at [43]-[44].

⁵⁰ We consider the foreseeable future to include any changes that producers have scheduled, or are planning to complete, in the short-to-medium term. However, we noted that some producers are yet to decide on the future of their existing production facilities. For example,

49. As regards constraints from competitors, none of the main existing competitors and customers considered that the Proposed Merger would be likely to have an impact on the alternatives available to customers in any of the relevant markets, despite the transitional state of the industry.

49.1 A customer considers it is “spoilt for choice” when it comes to existing egg suppliers⁵¹ and this is reflected in the number of competing brands stocked in a typical supermarket.⁵²

49.2 Retailers and other industry participants considered the egg industry to be very fragmented with further consolidation expected in the industry, given the number of existing suppliers.⁵³

The cage and colony cage market

50. The Proposed Merger is unlikely to substantially lessen competition in the cage and colony cage market as the merged entity would be constrained by the presence of a number of competing egg producers.

51. Table 1 shows the current and future capacity of existing producers in the cage and colony cage market. The table shows that, taking into account likely changes to producers’ production capacities, the Proposed Merger would only result in incremental aggregation and there would be a number of competing egg producers. For example, in both the with and without scenarios, the estimated three firm concentration ratio is likely to be less than 70% and, based on both current and future capacity, the merged entity’s estimated market share is likely to be less than 30%. In addition, based on future capacity, there are likely to be at least two other market participants with shares of over 15% respectively.

[]

⁵¹ Commerce Commission interview with [] (29 August 2020).

⁵² Commerce Commission interview with [] (12 August 2020); Commerce Commission interview with [] (29 August 2020).

⁵³ Commerce Commission interview with [] (29 August 2020); Commerce Commission interview with [] (29 August 2020); Commerce Commission interview with [] (12 August 2020).

Table 1: Current and future capacity in the cage and colony cage market

Producer	Current capacity ('000)	Share (%)	Future capacity ('000)	Share (%)
Heyden	[]			
Henergy	[]			
Rasmusen's	[]			
<i>Merged entity</i>	[]			
Zeagold	[]			
IEP Co-op	[]			
Other	[]			
Total	[]	100	[]	100

Source: industry participants, Clearance Application, Commission estimates.

52. The Proposed Merger would result in a limited amount of overlap in the cage and colony market and the merging parties do not appear to be close competitors. In addition, we consider that existing competitors would likely provide a strong constraint on the merged entity in the cage and colony cage market. Even with the phasing out of cage eggs:

52.1 Zeagold and the IEP Co-op would each have a substantial presence in this market and would compete closely with the merged entity; and

52.2 wholesale customers and consumers would have a number of alternative producers to choose from.⁵⁴

The barn market

53. The Proposed Merger is unlikely to substantially lessen competition in the barn market as the merged entity would be constrained by the presence of a number of competing egg producers

54. Table 2 shows the current and future capacity of existing producers in the barn market. The table shows that, taking into account likely changes to producers' production capacities, the Proposed Merger would only result in incremental aggregation and there would be [] new entry by Zeagold.⁵⁵ For example, based on current capacity, there would only be one producer with a significant market share. However, based on future capacity, there would likely be at least two market participants with estimated market shares of over 30% respectively.

⁵⁴ Commerce Commission interview with [] (29 August 2020); Commerce Commission interview with [] (29 August 2020); Commerce Commission interview with [] (8 September 2020).

⁵⁵ Zeagold currently produces barn eggs in the South Island.

Table 2: Current and future capacity in the barn market

Producer	Current capacity ('000)	Share (%)	Future capacity ('000)	Share (%)
Heyden	[]			
Henergy	[]			
Rasmusen's	[]			
<i>Merged entity</i>	[]			
Zeagold	[]			
IEP Co-op	[]			
Wholesome NZ	[]			
Other	[]			
Total	[]	100	[]	100

Source: industry participants, clearance application, Commission estimates.

55. The Proposed Merger would result in a limited amount of overlap in the barn market and the merging parties do not appear to be close competitors. While Henergy produces [] barn eggs, Heyden []. Rasmusen's does not produce any barn eggs.⁵⁶
56. In addition, we consider that existing competitors would likely provide a strong constraint on the merged entity in the barn market.
- 56.1 Zeagold is in the process of entering this market with a new site in the Waikato. This entry, [], would see the capacity of the barn market increase [] and it is likely that this entry would see Zeagold compete closely with the merged entity.⁵⁷
- 56.2 Wholesome NZ and the IEP Co-op each have a substantial existing presence in this market and both producers would also compete closely with the merged entity.

The free range market

57. The Proposed Merger is unlikely to substantially lessen competition in the free range market as the merged entity would be constrained by a number of competing egg producers.
58. Table 3 shows the current and future capacity of existing producers in the free range market. The table shows that, taking into account likely changes to producers' production capacities, the Proposed Merger would only result in incremental aggregation and there would be a number of competing egg producers. For example, in both the with and without scenarios, the estimated three firm concentration ratio

⁵⁶ Commerce Commission interview with Heyden (26 August 2020); Commerce Commission interview with Henergy (25 August 2020); Commerce Commission interview with Rasmusens (25 August 2020).

⁵⁷ []

would likely be less than 70% and, based on both current and future capacity, the merged entity’s estimated market share would likely be less than 20%.

Table 3: Current and future capacity in the free range market

Producer	Current capacity ('000)	Share (%)	Future capacity ('000)	Share (%)
Heyden	[]			
Henergy	[]			
Rasmusen’s	[]			
<i>Merged entity</i>	[]			
Zeagold	[]			
IEP Co-op	[]			
Otaika	[]			
Wholesome NZ	[]			
Other producers	[]			
Total	[]	100	[]	100

Source: industry participants, Clearance Application, Commission estimates.

[]

59. Henergy does not produce any free range eggs but Rasmusen’s and Heyden both do and so the Proposed Merger would result in a limited amount of overlap in the free range market. []⁵⁸

60. However, other existing free range egg producers [] and we consider that existing competitors would likely provide a strong constraint on the merged entity in the free range market.

60.1 Based on future capacity, Zeagold would be the largest existing free range egg supplier by some magnitude []⁵⁹

60.2 There are several other large scale free range egg producers such as the IEP Co-op, Wholesome NZ and Otaika Valley that would compete closely with the merged entity. []⁶⁰

60.3 There are a number of smaller free range egg producers that would compete with the merged entity although, as these smaller producers tend to supply

⁵⁸ Commerce Commission interview with [] (26 August 2020).

⁵⁹ [] Commerce Commission interview with [] (29 August 2020); Commerce Commission interview with [] (29 August 2020).

⁶⁰

[]

more locally, the level of constraint that each of them would have on the merged entity would vary in different regions of the North Island. These producers include The Free Range Egg Company, Good Farms Holdings Limited, Wairarapa Eggs Limited and The Ultimate Egg & Poultry Company Limited.

The likelihood of entry in the three egg production markets

61. In light of the above, we consider that existing competitors in each market are likely to provide sufficient constraint on the merged entity. Some existing producers are in the process of expanding their operations but some producers have yet to make a decision on how they will respond to the changes in the industry. To this extent, we have also assessed the likelihood of new entry and/or expansion in each market.
62. New entry into the cage and colony cage market appears relatively unlikely. With the mandated phasing out of cage production, most cage producers have already shut down their cage production.⁶¹ To replace their lost cage volume, some existing producers are looking to either enter and/or expand in the barn and free range markets. Some of this expansion is already underway⁶² and it is likely that other producers will also expand.⁶³
63. As such, it appears likely that some existing producers, such as those that have yet to make a decision on how they will respond to the changes in the industry, will either enter into, or expand their existing presence in, either the barn market and/or the free range market and this is likely to provide an additional competitive constraint on the merged entity in these markets.

Conclusion on unilateral effects in the three egg production markets

64. In the cage and colony, barn and free range markets, we consider the Proposed Merger is unlikely to substantially lessen competition due to unilateral effects. This is because, in each of these markets, there would be several medium to large sized competitors, some of which are in the process of expanding their operations and who, together, are likely to provide sufficient constraint on the merged entity.

Would the merger enhance the ability of market participants to coordinate their behaviour?

65. In this section, we consider the potential for coordinated effects. Given the similarities in the markets, we have considered all three egg production markets together.

⁶¹ Transition Report from the Egg Producers Federation to the Minister of Agriculture (9 December 2019); Commerce Commission interview with [] (12 August 2020); Commerce Commission interview with [] (17 August 2020); Commerce Commission interview with [] (26 August 2020).

⁶² Email from [] to the Commerce Commission (11 September 2020).

⁶³ Email from [] to the Commerce Commission (14 September 2020); Commerce Commission interview with [] (8 September 2020); Commerce Commission interview with [] (12 August 2020).

66. We do not consider that the Proposed Merger would be likely to substantially lessen competition in a market due to coordinated effects as the Proposed Merger would not make coordination more likely, complete or stable.
67. There are some factors of the egg industry that suggest it might be vulnerable to coordination. For example, eggs within each production type are relatively homogenous, there is some visibility around retail pricing and, in one of the markets, de novo entry appears unlikely.⁶⁴
68. However, in each of the three relevant markets, we do not consider the Proposed Merger increases the potential for, or likely sustainability of, coordination. In particular, the Proposed Merger is not removing a particularly aggressive or destabilising competitor(s). In addition:
- 68.1 there is only incremental aggregation resulting from Proposed Merger in each of the egg production markets, taking expected future capacity into account;
- 68.2 the markets would be characterised by competitors of different sizes. While there are several large egg producers in the North Island, including Zeagold, Wholesome NZ and the IEP Co-op, there is also a long-tail of medium size competitors as well as smaller, local producers who compete directly with larger competitors in certain regions. This would likely make it difficult for competitors to coordinate their behaviour; and
- 68.3 there is a degree of disruption in the industry generally due to the transition away from cage egg production (and phasing out of colony cage eggs in supermarkets) and towards barn and free range eggs. The changing volumes of eggs being supplied may make it challenging to detect deviation from a coordinated agreement.

Overall conclusion – no likely substantial lessening of competition

69. The Commission assessed the potential impact of the Proposed Merger on competition in the North Island markets for the production and wholesale supply of cage and colony eggs, barn eggs and free range eggs.
70. The egg production industry in New Zealand is currently undergoing significant change due to changes in animal welfare regulations and changing consumer preferences. These changes mean that the Applicants and other egg producers are having to adapt their production methods and these changes are occurring in the industry irrespective of whether the Proposed Merger proceeds.

⁶⁴ Given egg producers must not produce cage eggs beyond 2022, a number of industry participants noted that de novo entry into the cage and colony market is unlikely. Commerce Commission interview with [] (12 August 2020); Commerce Commission interview with [] (17 August 2020); Commerce Commission interview with [] (26 August 2020).

71. However, factoring in the industry changes into its assessment of this application, the Commission is satisfied that the Proposed Merger is unlikely to substantially lessen competition in any of the relevant markets.
72. In each of the relevant markets, we consider there would be a number of competing egg producers including some that are expanding their operations, particularly in the production of barn and free range eggs. We consider these competitors are likely to constrain the ability of the merged entity to raise prices, reduce service quality, or coordinate their behaviour.
73. Accordingly, we are satisfied that the Proposed Merger will not have, or would not be likely to have, the effect of substantially lessen competition in any relevant market.

Determination on notice of clearance

74. Under section 66(3)(a) of the Commerce Act 1986, the Commerce Commission determines to give clearance to Heyden Farms Limited, Henergy Cage-Free Limited and Rasmusens Poultry Farms Limited to merge their egg production and wholesale operations.

Dated this 16th day of September 2020

Anna Rawlings
Chair