

Determination

Lineage Logistics New Zealand and Cold Storage Nelson Limited [2022] NZCC 23

- The Commission:** Anna Rawlings
Elisabeth Welson
Dr John Small
- Summary of application:** An application from Lineage Logistics New Zealand seeking clearance to acquire up to 100% of the shares in, or the assets of, Cold Storage Nelson Limited.
- Determination:** Under section 66(3)(a) of the Commerce Act 1986, the Commerce Commission gives clearance to the Proposed Acquisition.
- Date of determination:** 22 June 2022

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

The Proposed Acquisition

1. On 4 March 2022, we registered an application (the Application) for the proposed acquisition by Lineage Logistics New Zealand (Lineage) of 100% of the shares in, or the assets of, Cold Storage Nelson Limited (CSN) (the Proposed Acquisition).¹

Our decision

2. The Commission gives clearance to the Proposed Acquisition because it is satisfied that it will not have, or would not be likely to have, the effect of substantially lessening competition in a market in New Zealand.
3. Lineage and CSN (together, the Parties) provide cold storage services (including frozen and chilled storage as well as other ancillary services) in various locations across New Zealand. Customers such as exporters, importers and domestic manufacturers store goods in these facilities prior to export, or prior to distribution in New Zealand. Lineage and CSN each own facilities throughout the country but overlaps occur only in the Waikato/Bay of Plenty and Canterbury regions.
4. The main focus of our assessment was on horizontal unilateral effects for cold storage services in the Waikato/Bay of Plenty region. The Parties both operate facilities in the Waikato/Bay of Plenty region, although they are in different locations. However, Lineage is building a new facility in Tauriko, Tauranga which in the counterfactual would compete closely with CSN's Tauranga facilities.
5. Despite this, we consider that the merged entity would face a range of constraints sufficient to prevent a substantial lessening of competition.
 - 5.1 Although the merged entity would account for a large proportion of capacity in Tauranga, our investigation found that it would face competition from facilities in other parts of the Waikato/Bay of Plenty region. There were few customers we spoke with that considered it necessary to use storage exclusively in Tauranga, with almost all having other options in the broader Waikato/Bay of Plenty region.
 - 5.2 In the Waikato/Bay of Plenty region, the merged entity is likely to be constrained by the competitive threat of planned entry and the potential for further entry.
 - 5.2.1 Barriers to entry/expansion in the region for cold storage do not appear to be high given:
 - (a) there are two major cold storage facilities currently being built (by Big Chill and Maersk, both in Ruakura), both expected to open in 2023;

¹ A public version of the Application is available on our website at: <http://www.comcom.govt.nz/clearances-register/>.

- (b) market participants were of the view that even more entry is likely if the opportunity arose; and
- (c) cold storage operators in other regions expressed an interest in entering the market.

5.2.2 Some very large customers are likely able to exercise countervailing power via self-supply (or threats of such) or sponsoring entry.

6. We also consider that the Proposed Acquisition is unlikely to make any types of coordination significantly more likely, complete or sustainable in any market.

7. Early in our investigation, we also considered the following issues (which are not discussed further in these reasons).

7.1 The Proposed Acquisition does not raise concerns in the Canterbury region.

7.1.1 Lineage and CSN do not impose a strong competitive constraint on one another in the Canterbury region:

- (a) CSN only has a small facility so any increase in Lineage's market share resulting from the Proposed Acquisition is small. We estimate the merged entity's share of supply of total capacity in Christchurch would be around [], an increase of only [] on Lineage's current market share of around [].
- (b) The two parties' facilities focus on different types of customers, with Lineage's larger facilities focusing on large export customers and CSN's smaller facility focusing on local food distribution.

7.1.2 The merged entity will continue to face competition in Canterbury from competing suppliers of cold storage such as Coolpak and Americold.

7.2 The Proposed Acquisition does not raise competition concerns due to vertical effects in any markets.² The Proposed Acquisition will not result in increased vertical integration as the Parties compete at the same level of the supply chain and there is no evidence that the Parties, or other players within the industry, provide inputs to rivals.

² A merger between suppliers (or buyers) who are not competitors but who operate at different levels of the supply chain could cause a substantial lessening of competition due to vertical effects. This can occur where a merger gives the merged entity a greater ability or incentive to engage in conduct that prevents or hinders rivals from competing effectively, such as refusing to supply an input (which we refer to as "foreclosing rivals").

- 7.3 The Proposed Acquisition does not raise concerns due to conglomerate effects in any markets.³ The evidence does not suggest any rivals in the market supply a “must have” product, and suppliers all appear to provide the same general types of services in order to service all customer needs.

Our framework

8. 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).⁴

The substantial lessening of competition test

9. As required by the Act, we assess mergers and acquisitions using the substantial lessening of competition test.
10. 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).⁵
11. A lessening of competition is generally the same as an increase in market power. Market power is the ability to raise prices above the price that would exist in a competitive market (the ‘competitive price’),⁶ or reduce non-price factors such as quality or service below competitive levels.

When a lessening of competition is substantial

12. 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.⁷ Some courts have used the word ‘material’ to describe a lessening of competition that is substantial.⁸
13. 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.⁹
14. A lessening of competition or an increase in market power may manifest itself in different ways, including higher prices or reduced services.¹⁰

³ A merger between suppliers (or buyers) who are not competitors but who operate in related markets can result in a substantial lessening of competition due to conglomerate effects. This can occur where the merging parties have complementary products. The merging parties may bundle (ie, provide together at a discount) or tie (ie, only provide one product if purchased with another) those complementary products, so that competitors are unable to provide a competitive constraint on the merged entity.

⁴ Commerce Commission, *Mergers and Acquisitions Guidelines* (May 2022).

⁵ *Commerce Commission v Woolworths Limited* (2008) 12 TCLR 194 (CA) at [63].

⁶ Or below competitive levels in a merger between buyers.

⁷ *Woolworths & Ors v Commerce Commission* (2008) 8 NZBLC 102,128 (HC) at [127].

⁸ *Ibid* at [129].

⁹ *Mergers and Acquisitions Guidelines* above n4 at [2.23].

15. While we commonly assess competition effects over the short term (up to two years), the relevant timeframe for assessment depends on the circumstances. A longer timeframe will be appropriate if, on the evidence, competition effects are likely to arise in later years.¹¹

When a substantial lessening of competition is likely

16. 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.¹²

The clearance test

17. We must clear a merger if we are satisfied that the merger would not be likely to substantially lessen competition in any market.¹³ If we are not satisfied – including if we are left in doubt – we must decline to clear the merger.

Background to the industry

Cold storage services

18. ‘Cold storage’ refers to a range of different types of temperature-controlled storage services, as well as ancillary services commonly offered by cold storage service providers.

Frozen and chilled storage

19. The most common cold storage services are:¹⁴
- 19.1 frozen storage, which is the storage of frozen products in a very cold environment, commonly below minus 18 degrees Celsius; and
 - 19.2 chilled storage, which is the storage of cool or frozen products at a temperature below, but near, zero degrees Celsius. Chilled storage is sometimes referred to as ‘cool storage’ in the industry.
20. Most cold storage service providers’ facilities are divided into multiple ‘rooms’, each of which contains its own refrigeration equipment and insulation allowing the temperature and other conditions to be adjusted room-by-room. Generally, a room that can be used for frozen storage can also be used for chilled and ambient storage by simply increasing the temperature and returned to frozen storage by reducing the temperature. The reverse is not necessarily true: a room without sufficient

¹⁰ Ibid at [2.21].

¹¹ *Woolworths & Ors v Commerce Commission* (2008) 8 NZBLC 102,128 (HC) at [131].

¹² Ibid at [111].

¹³ Commerce Act 1986, s 66(3)(a).

¹⁴ Although not technically a ‘cold storage’ service, many cold storage service providers also offer ambient storage, which refers to the storage of products (including but not limited to food products) at a temperature above zero degrees Celsius, sometimes room temperature.

equipment and insulation cannot be used for frozen storage without further investment.

Blast freezing

21. Many, but not all, cold storage service providers offer blast freezing services, which is the process of freezing fresh product very quickly by ‘blasting’ freezing air through it.¹⁵ Blast freezing requires specific equipment in a facility. Not all customers require blast freezing and, of those that do, some have their own blast freezing capacities.

Ancillary services

22. Cold storage service providers also commonly offer ancillary services, such as:¹⁶
- 22.1 containerisation, ie, the packing and unpacking of shipping containers;
 - 22.2 wrapping and labelling, including the preparation of export documentation;
 - 22.3 picking and packing, ie, removing cartons from one pallet, preparing them for delivery or placing them on a different pallet;
 - 22.4 transport and handling; and
 - 22.5 other related services including electronic inventory management.
23. Some cold storage service providers have commented that the most space-intensive and labour-intensive of these ancillary services is picking and packing, which generally cannot be automated.¹⁷ Some cold storage facilities are set up for bulk storage of pallets (referred to as “pallet-in/pallet-out”) and so cannot easily provide pick and pack services. Some frozen storage facilities with ‘hypoxic’ (low oxygen) storage areas are not safe for manual labour and, accordingly, cannot readily be used for pick and pack services either.¹⁸

Cold storage customers

24. Frozen and chilled storage is generally required for food products, including meat, fish, dairy and processed food products, as well as fruits and vegetables. Cold storage services are typically purchased by producers, distributors and exporters/importers of these food products as a step in their supply chain management.¹⁹ Some examples of cold storage customer requirements include:
- 24.1 Storage of frozen and chilled products on pallets by exporters (such as dairy and meat producers) while waiting for them to be shipped overseas. Some customers may require blast freezing of fresh product (particularly seafood,

¹⁵ The Application at [10.6].

¹⁶ The Application at [10.7].

¹⁷ Commerce Commission interviews with [] and [].

¹⁸ Commerce Commission interview with [].

¹⁹ Generally, see the Application at [10.10]-[10.13].

which often comes directly from fishing vessels to the cold storage service provider).

- 24.2 Storage of frozen and chilled products on pallets while awaiting domestic distribution. This may apply to:
- 24.2.1 domestic manufacturers who need to store goods for longer periods before they are distributed (eg, seasonal products that need to be stored between harvest and the time they are distributed); or
- 24.2.2 imported goods that require storage prior to being distributed.
- 24.3 Storage of frozen or chilled products on pallets or in cartons before distribution by local distributors (eg, food service distributors). These goods may be stored for only a few hours before being “picked” for domestic distribution to supermarket distribution centres, food service distributors or quick-service restaurants.
25. Some cold storage facilities (particularly those offering containerisation services) send product from their facilities directly to a port for export. In such cases, the cold storage provider often requires an export licence or certification for the relevant destination. Although some licences can be relatively straightforward to obtain, market participants told the Commission that export licences for China have recently become more difficult to obtain than they were previously.²⁰
26. Some customers have their own cold stores and/or blast freezers. However, as food production peaks and troughs seasonally, many customers do not have sufficient capacity to hold all of their production at peak times and seek third party cold storage on an ‘overflow’ basis.

Market participants in the Waikato/Bay of Plenty region

The merging parties’ facilities in the Waikato/Bay of Plenty region

Lineage

27. Lineage operates one cold storage facility in Kerepehi, in the northern Waikato region. The facility is approximately 100km (90 minutes’ drive) from both Tauranga and Auckland, with road access but no rail access to their respective ports. This facility has [] pallets of frozen storage capacity and does not offer blast freezing or picking and packing services.
28. Lineage is planning to open a second facility in Tauriko, Tauranga, in approximately [].²¹ This facility will have approximately 10,000 pallets of frozen capacity

²⁰ Commerce Commission interviews with []; []

²¹ The Application at [16.11].

when it opens and will ramp up to a total capacity of 30,000 pallets.²² The facility will offer three blast freezing rooms [] and is approximately 20km (20 minutes' drive) from the Port of Tauranga. Lineage [] once it is complete.

CSN²³

29. CSN operates two cold storage facilities in Tauranga. The first is a facility at Sulphur Point (at the Port of Tauranga) which offers frozen and chilled storage and blast freezing. The facility has a total capacity of [].
30. The other is a site at Te Maire, just outside the Port of Tauranga, which has a frozen capacity of [] pallets and offers blast freezing services as well as ancillary services including transportation (but not pick and pack services). The Te Maire site services a range of import and export customers, primarily in the meat and seafood industries. []

Other suppliers of cold storage services in the Waikato/Bay of Plenty region

31. Aside from the Parties, other suppliers of cold storage services in Tauranga include a range of small- to medium-sized providers such as Port Pack, RealCool, and Maleme Cold Storage.
32. Other suppliers (including future suppliers) of cold storage services in the Waikato/Bay of Plenty region include:
 - 32.1 Big Chill, which has announced plans for a 16,000 pallet cold storage facility to be located at Ruakura Superhub.²⁴ The Ruakura Superhub is a location near Hamilton that is the planned site of a future inland port operated by the Port of Tauranga. Big Chill's facility is due to open in 2023;
 - 32.2 Maersk, an international shipping company, is also planning to open a 21,000 pallet capacity cold storage facility at Ruakura in 2023;²⁵ and

²² Lineage submitted that its Tauriko facility will ramp up from 10,000 pallets, [] to a total of 30,000 pallets, []: The Application at Appendix 2.

²³ Generally, see the Application at Part F and Appendices 9 and 13; Commerce Commission interview with []; [], provided by Duncan Cotterill to Commerce Commission (1 April 2022); [], provided by Duncan Cotterill to Commerce Commission (1 April 2022); [], provided by Duncan Cotterill to Commerce Commission (1 April 2022).

²⁴ "Ruakura Superhub gets first industrial precinct tenant: Big Chill Distribution" *NZ Herald* (online ed, 21 February 2022).

²⁵ Andrea Fox "Ruakura Superhub lures global logistics juggernaut Maersk" *NZ Herald* (online ed, 17 May 2022).

- 32.3 Icepak, owned by Hall's Transport (which in turn is owned by Talley's), which operates a 27,000 pallet capacity facility at Waharoa, near Matamata.²⁶

The relevant markets

33. We define markets in the way that we consider best isolates the key competition issues that arise from a merger. 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 that fall outside the market, but which would still impose some degree of competitive constraint on the merged entity.
34. When assessing relevant markets we consider:²⁷
- 34.1 whether customers could easily switch to alternative products in response to a price increase (known as 'demand side' substitution); and
- 34.2 whether suppliers could easily switch their manufacturing process to produce different products (known as 'supply side' substitution).

The Applicant's view

35. Lineage submitted that the relevant product market for the purposes of assessing the Proposed Acquisition is the supply of 'cold storage services'.²⁸ In Lineage's view, this market includes all types of customers and all services including frozen storage, chilled storage, blast freezing and other ancillary services.²⁹
36. Lineage submitted that the relevant geographic markets are regional, and that the regions relevant for the Commission's assessment of the Proposed Acquisition are:³⁰
- 36.1 Waikato/Bay of Plenty, having regard to the products stored ultimately transiting via the Port of Tauranga; and
- 36.2 Canterbury (including Timaru), having regard to the products stored ultimately transiting via Lyttleton Port and the Port of Timaru.
37. The Parties submitted that there are no separate customer markets that are geographically limited to Tauranga, due to:³¹
- 37.1 the nature of customer demand and statements of firms opening facilities in Ruakura; and

²⁶ Icepak "Icepak Waharoa" <www.icepak.co.nz/icepak-waharoa>.

²⁷ Commerce Commission, *Mergers and Acquisitions Guidelines* above n4.

²⁸ The Application at [14.1].

²⁹ The Application at [14.2].

³⁰ The Application at [14.3]-[14.4].

³¹ Lineage Logistics New Zealand and Cold Storage Nelson Limited "Joint Submission on Lineage and CSN Statement of Issues" (27 May 2022) at 2-4.

- 37.2 to the extent there are customers captive to Tauranga, the merged entity would not be able to identify them.

Our views

38. We consider that the relevant market is for cold storage services in the Waikato/Bay of Plenty region.³² This market includes all types of cold storage services and all customers who demand such services.

Product dimension

39. We assessed whether there existed separate markets for the following different types of services:
- 39.1 cold storage (frozen, chilled and/or ambient);
 - 39.2 blast freezing; and
 - 39.3 other ancillary services (see paragraph 22).
40. The information received by the Commission indicates that there is very limited (if any) demand-side substitution between different types of cold storage services listed above. For example, if a customer requires frozen storage for a food product, the customer cannot substitute chilled storage or blast freezing services for the frozen storage services they require.
41. The information received by the Commission indicates that only some supply-side substitution between different types of cold storage services is possible.
- 41.1 Suppliers may be able to viably switch supply from frozen to chilled storage, but not necessarily in the other direction. The information received indicates that:
 - 41.1.1 there is considerably more capital investment required to set up a frozen storage facility than a chilled or ambient storage facility;³³ and
 - 41.1.2 although rooms used for frozen storage can be used for chilled or ambient storage with relatively little time or cost involved by simply

³² We also considered that a product market for cold storage services was relevant to assess the effects of the Proposed Acquisition in Canterbury. We considered whether it was appropriate to define separate geographic markets for Christchurch and Timaru. However, we did not need to conclude on this point, since competition concerns did not arise regardless of the geographic market used.

³³ For example, market participants indicated that specific insulated flooring and more expensive refrigeration equipment is required for frozen storage rooms: Commerce Commission interviews with [] [] .

raising the temperature in the room,³⁴ the reverse is not true if a facility has only been built for chilled or ambient storage.³⁵

- 41.2 Blast freezing is a separate service to frozen and/or chilled storage, which generally requires specialised equipment and a separate space.³⁶
- 41.3 Customer requirements mean there are a range of ways in which products can be stored (for example on pallets, in individual cartons or in bins) and a range of ways a room can be set up to accommodate them (for example, different types of racking). There can be some cost and time involved in switching between different storage methods, although it may be desirable to switch if an opportunity arises³⁷ and many customers have standard requirements for pallet storage which means switching may not be commonly required.³⁸
- 41.4 The provision of picking and packing services requires both labour and a physical area at the correct temperature, which not all providers are able to offer.³⁹
42. Despite these limits on supply-side substitution, suppliers of cold storage services generally provide a range of temperature-controlled storage options and ancillary services requested by their customers and may commence providing additional services within a relatively short period of time without incurring significant additional cost if requested by a customer.⁴⁰ As such most suppliers can provide most services cold storage customers require. This may suggest there are economies of scope offering a range of services.
43. One exception seems to be pick and pack services which are only offered at some cold storage facilities. It is possible that pick and pack services could form a separate

³⁴ See for example Lineage Logistics New Zealand and Cold Storage Nelson Limited “Joint Submission on Lineage and CSN Statement of Issues” (27 May 2022) at 8.

³⁵ Market participants indicated that although switching storage capacity is possible, it is not particularly common, primarily because demand for frozen storage is much greater than for chilled or ambient storage and there is accordingly significantly larger capacity for frozen storage than for chilled or ambient storage: Commerce Commission interviews with [redacted].

³⁶ Commerce Commission interview with [redacted].

³⁷ Lineage submitted that switching between storage methods is possible in response to customer requests: [redacted]. On the other hand, [redacted] commented at interview that there are significant delays and costs involved in switching storage methods at present: Commerce Commission interview with [redacted].

³⁸ Lineage Logistics New Zealand and Cold Storage Nelson Limited “Joint Submission on Lineage and CSN Statement of Issues” (27 May 2022) at 8.

³⁹ For example [redacted] told us that it deals with pallet loads only, as its storage area was low-oxygen and so not suitable for labour: Commerce Commission interview with [redacted].

⁴⁰ Commerce Commission interviews with [redacted] [redacted]. For example, Lineage submitted that it recently [redacted] for a customer who requested this: [redacted]. Similarly, [redacted] told us that it “occasionally” provides pick and pack services when requested, even though its facility is not well set-up to do so: Commerce Commission interview with [redacted].

product market. However, the Parties do not offer these services in the Waikato/Bay of Plenty region and therefore we do not reach a conclusion on this issue.

44. Given the limited demand and supply side substitution between the different services in principle it may be possible to define separate markets for each service. However, given suppliers of cold services largely offer similar services (albeit with some differentiation), defining separate markets is not necessary to assess the Proposed Acquisition. Instead, for the purposes of our analysis we define the relevant product market as one that covers all cold storage services. We identify any differences between competitors in the competition analysis.

Customer dimension

45. We assessed whether there are markets for specific customer groups. We may define a customer market where:⁴¹
- 45.1 different customers have different supply alternatives;⁴²
 - 45.2 a supplier can identify customers with varying abilities to switch to alternative suppliers and charge different (higher) prices to customers based on their (more limited) ability to switch; and
 - 45.3 customers who would otherwise be charged a higher price cannot acquire the product from customers who paid a lower price (known as arbitrage).⁴³
46. Our investigation identified that there is a wide range of users of cold stores and their requirements vary (see paragraph 24). Given these differences we considered whether there may be any customer groups that should be defined within their own market.⁴⁴ Based on the location of the Parties' current and future facilities and other evidence we considered the customer groups for which the Parties most likely overlap in the Waikato/Bay of Plenty region are:⁴⁵
- 46.1 primary product exporters such as dairy and meat ("exporters"); and
 - 46.2 fast-moving consumer goods (FMCG) customers.
47. Ultimately, we did not consider the evidence supported a customer market for exporters or FMCG customers.

⁴¹ Commerce Commission, *Mergers and Acquisitions Guidelines* above n4 at [3.23].

⁴² This also requires that suppliers who currently provide services to one customer type cannot easily reconfigure their offer to provide services to another customer type without incurring significant costs (limited supply-side substitution between customer types).

⁴³ To define a customer market, it is not necessary to find existing evidence that such customers are paying a higher (quality-adjusted) price. These customers might be protected from price discrimination by competition between the merging firms but then face a higher price post-acquisition.

⁴⁴ Our analysis of why we considered this is set out in full in our Statement of Issues at [56]-[61].

⁴⁵ In principle, individual customers could meet the conditions for a customer market. For example, this might be the case where the location of the customer means it would be costly to transport goods. However, if only a few customers meet the conditions for a customer market, it is more likely that existing rivals will have sufficient capacity for those customers to switch.

- 47.1 We spoke to a wide range of exporters and FMCG customers, including those based in Tauranga and those [].⁴⁶
- 47.2 Almost all considered that, in addition to cold storage facilities in Tauranga, cold storage facilities in other locations in the region such as Hamilton or other locations in the 'Golden Triangle' (ie, the region encompassing the area between Auckland, Hamilton and Tauranga) may be acceptable. Rotorua may also provide an acceptable alternative. Ultimately, we have not identified any customer group that was captive to Tauranga or did not have any alternative options within the Waikato/Bay of Plenty region.
- 47.3 Based on these supply alternatives, we did not need to consider in depth whether cold storage customers could identify customers with differing needs and prevent arbitrage. However, based on the above evidence on the degree of substitutability for customers between different types of cold storage facilities, we consider it unlikely to occur.
48. Given exporters and FMCG customers do not have materially different supply alternatives we did not define separate customer markets.

Geographic dimensions

49. Our assessment of the relevant geographic market was closely related to the issue of whether it was necessary to define separate customer markets. This was because the primary driver for considering separate customer markets for exporters and/or FMCG customer groups was that the geographic area for which a cold storage facility was substitutable may be smaller than other types of customers (that is, exporters may seek proximity to the Port of Tauranga and FMCG customers may seek proximity to the Tauranga urban area).
50. As discussed above, customers, including exporters and FMCG customers, viewed other locations in the Waikato/Bay of Plenty region as alternatives, and the evidence did not support a finding that there is an identifiable group of customers captive to Tauranga.
51. This suggested to us that the relevant geographic scope of the market extends beyond Tauranga and that transportation costs are not prohibitive to customers using cold storage services outside Tauranga in the wider Waikato/Bay of Plenty region.

⁴⁶ Commerce Commission interviews with [

].

52. Nonetheless, we undertook additional analysis to assess whether the appropriate geographic market is wider than Tauranga.
- 52.1 Using the locations of the Parties' customers, we mapped drive times to major urban areas and locations of current and planned cold storage providers.
- 52.2 Many of the Parties' customers are not in fact located within a 60-minute drive time of Tauranga, but are within a 60-minute drive time of Hamilton.⁴⁷
- 52.3 Some customers transport their goods through Hamilton on the way to Tauranga. For these customers, storing goods in Hamilton and Tauranga may be equally possible without incurring additional transport costs.
- 52.4 Other customers may incur higher transport costs if they have to ship and store goods in Hamilton before sending them to Tauranga. However, we consider that many customers (including those that require access to a port) are proximate enough to Hamilton such that cold stores in Hamilton, including the Ruakura Superhub, would be a cost-effective option if prices of cold storage services in Tauranga were to increase by 5-10%.⁴⁸
53. We therefore considered it appropriate to define a geographic market that includes all suppliers in the Waikato/Bay of Plenty region.

With and without scenarios

54. Assessing whether a substantial lessening of competition is likely requires us to compare the likely state of competition if the Proposed Acquisition proceeds with the likely state of competition if it does not and to determine whether competition is likely to be substantially lessened by comparing those scenarios.
55. We consider that the most competitive likely scenario without the Proposed Acquisition is the status quo, including completing and commissioning Lineage's planned new facility in Tauriko [].

Horizontal unilateral effects in the Waikato/Bay of Plenty region

56. Horizontal unilateral effects arise when a firm merges with or acquires a competitor that would otherwise provide a significant competitive constraint (particularly relative to remaining competitors) such that a market participant can profitably

⁴⁷ Based on market feedback, we consider that the next closest alternative to Tauranga is likely to be Hamilton, including the Ruakura superhub. Other locations in the Waikato/Bay of Plenty region (eg, Te Puke) could also be within the relevant geographic market but including/excluding those areas did not materially affect this analysis.

⁴⁸ We did not obtain detailed estimates of transport costs in this case, although estimates provided by some customers indicate that the additional transport cost of storing product in Hamilton as opposed to Tauranga would be approximately []% of the cost of cold storage.

increase prices above the level that would prevail without the merger (and/or reduce quality).^{49 50}

57. To assess this, we considered:

57.1 how closely Lineage and CSN currently compete to supply cold storage services;

57.2 the strength of existing competitors;

57.3 the extent to which the merged entity would be constrained by future entry and expansion (including potential entry/expansion); and

57.4 the extent of countervailing power.

58. For the reasons we explain below, we are satisfied that the Proposed Acquisition would not have or be likely to have the effect of substantially lessening competition for the supply of cold storage services in the Waikato/Bay of Plenty region.

Closeness of competition between the Parties

Applicant's view

59. Lineage submitted that CSN does not currently provide a substantial competitive constraint on Lineage or other cold storage providers in the Waikato/Bay of Plenty region.⁵¹

Our view

60. The evidence we gathered indicates that Lineage and CSN already compete with their existing facilities in Kerepehi and Te Maire, respectively. The Parties will become closer competitors as a result of Lineage's planned Tauriko expansion [].

61. The evidence suggests the Parties already compete to an extent with their existing facilities in Kerepehi and Te Maire. Most comments received from market participants regarding the extent of competition between the Parties were in respect of Lineage's Kerepehi site and CSN's Tauranga sites. Kerepehi is in Waikato, around 90 minutes' drive from Tauranga. Despite this, some customers view Kerepehi as a competitor to CSN's Tauranga sites, in particular for products stored by exporters and FMCG customers.⁵²

⁴⁹ Harm from a substantial lessening of competition can manifest in different ways. Aside from an increase in prices or a decrease in quality or service, an adverse effect from the Proposed Acquisition could also be a delay or reduction in capacity expansion.

⁵⁰ When we refer to 'higher prices' in these reasons we also refer to a decrease in quality, service, ie, higher quality-adjusted prices.

⁵¹ The Application at [16.1]-[16.20].

⁵² For example, [] considered the Parties close competitors, although [], and both [] and [] considered that the Parties currently compete directly with one another: Commerce Commission interviews with []

62. Lineage’s planned facility in Tauriko will be much closer to CSN. The Tauriko expansion will be located near CSN’s Tauranga sites and therefore will likely compete for customers seeking access to the port. [

].

62.1 [

]

62.1.1 [

] ⁵³

62.1.2 [

] ⁵⁴ [
] ⁵⁵

62.2 [

]

62.2.1 [

] ⁵⁶

62.2.2 [

] ⁵⁷

62.3 Market participants’ comments in respect of Lineage’s planned Tauriko site were more limited, given the facility has not yet been built. However, two cold storage operators who were aware of Lineage’s plans to enter Tauriko identified that this would result in the Parties competing.⁵⁸ Most market participants were also unaware of [

]

[, a current CSN customer []. In contrast, [], did not consider Lineage Kerepehi as an alternative to CSN: Commerce Commission interview with []. [] did not perceive CSN as currently imposing a material competitive constraint in the Bay of Plenty: Commerce Commission interview with [].

⁵³ [].

⁵⁴ [].

⁵⁵ [].

⁵⁶ [].

⁵⁷ Commerce Commission interview with [].

⁵⁸ Commerce Commission interviews with [].

63. To conclude, we consider Lineage and CSN are close competitors in the Waikato/Bay of Plenty region, on account of existing facilities and planned expansion. The Proposed Acquisition will eliminate that competition. Nevertheless, we consider that the merged entity would face a range of constraints sufficient to prevent a substantial lessening of competition.

Constraint from existing competitors

Applicant's view

64. Lineage submitted that the merged entity would face strong competition from multiple existing competitors.⁵⁹

Our view

65. Table 1 below sets out the estimated market shares in the relevant market based on pallet capacities, which is the standard industry measure.⁶⁰ It reflects the market situation beyond 2023.⁶¹

⁵⁹ The Application at [16.13].

⁶⁰ The Application at [16.2]; Commerce Commission interview with [].

⁶¹ That is, [].

Table 1: Market shares of cold store facilities in Waikato/Bay of Plenty

Name	Total, cold (%)	Non-committed, total cold (%)⁶²	Total, frozen (%)	Non-committed, total frozen (%)
CSN Tauranga	[
CSN Te Maire]
Lineage Kerepehi	[
Lineage Tauriko]
<i>Merged entity</i>	[]
Icepak	[
Maersk				
Big Chill				
Aotearoa Park Cold Storage				
Maleme Coldstorage				
Marsh Transport				
Bay Coolstores				
Port Pack]
Total	100	100	100	100

Notes: (i) Total, cold: total capacity of cold store facilities. (ii) Non-committed, total cold: total capacity that is not committed to a long-term customer. (iii) Total, frozen: capacity of frozen storage (ie, excluding chilled storage). (iv) Non-committed, total frozen: capacity of frozen storage that is not committed to a long-term customer.

66. Under all scenarios, the merged entity would be the largest provider of cold storage services in the Waikato/Bay of Plenty region. The Parties' combined market shares will be relatively high, approximately []-[].
67. The geographically closest customers to the merged entity would be the other cold storage providers in Tauranga which are Port Pack, Real Cool and Maleme Cold Storage. However, these providers are small compared to the Parties. The larger providers [] are in other parts of the

⁶² We have excluded the major committed capacities that we are aware of. These are: []; []

] The following two qualifications apply to these estimated figures. First, the length and nature of the commitment varies. Our approach is based on our judgement of interviews conducted with the facilities' owners as to whether they could use the capacity to compete. Second, as the terms of the commitment are not publicly known, including the relevant committed volume, a provider's committed capacity may nevertheless impose a competitive constraint.

Waikato/Bay of Plenty region, [].⁶³ We note:

67.1 Icepak has a facility with approximately 27,000 pallets of frozen storage. [

].⁶⁴

67.2 Big Chill intends to open a frozen storage facility with capacity for 16,000 pallets in 2023. Big Chill [

]. Big Chill [].⁶⁵

67.3 Maersk intends to open a facility with 21,000 pallets of frozen storage capacity in 2023. [

].⁶⁶

68. The main competitive threat for the merged entity will be these larger cold storage facilities. Both the Parties and these competitors [

].

Accordingly, [

], the merged entity is likely to view those facilities as an example of the possibilities open to customers.

69. This threat (and further entry) is likely to impose a constraint on the merged entity. As we describe below, barriers to entry do not seem high as evidenced by the new facilities in the process of being built (including Big Chill, Maersk and Lineage) and the views of market participants on the potential for new entry.

Barriers to entry and expansion

Applicant's view

70. Lineage submitted that the merged entity will face competitive constraint from the threat of new entry.⁶⁷ Lineage submitted that barriers to entry and expansion in the Waikato/Bay of Plenty region are relatively low, because:⁶⁸

⁶³ In addition to these facilities, there are other smaller providers in the region, as well as storage used for fruit in the broader Bay of Plenty, that may be an alternative to storage near the Port of Tauranga for some customers.

⁶⁴ Commerce Commission interview with [].

⁶⁵ Commerce Commission interview with [].

⁶⁶ Commerce Commission interview with [].

⁶⁷ The Application at [16.15]-[16.20].

- 70.1 although entry/expansion requires capital expenditure, this can be decreased by leasing a facility, converting an existing facility or completing a facility in stages;
 - 70.2 it is not necessary for a new facility to have an ‘anchor’ customer to justify construction;
 - 70.3 demand for cold storage services is high and is not forecast to decrease;
 - 70.4 certifications do not present any barrier; and
 - 70.5 land availability does not present a barrier, particularly in the broader Waikato/Bay of Plenty region (outside of Tauranga city).
71. The Parties submitted there is land available in the greater Tauranga area. While some land will not be available for several years, the threat of entry would still constrain the merged entity.⁶⁹

Our view

72. We assess whether entry or expansion is likely to be sufficient to constrain the merged entity, by considering the barriers to such entry/expansion.⁷⁰ The evidence suggests the merged entity is likely to be constrained by the threat of such entry and expansion.
73. The main barriers appear to be:
- 73.1 *Capital cost of entry.* Multiple industry participants commented on the high capital cost of entry, in particular the costs of modern automated racking equipment and refrigeration and blast freezing equipment.⁷¹ However, in our assessment, capital may not be a significant barrier to entry/expansion if there is sufficient customer demand to recover these costs in a reasonable timeframe.
 - 73.2 *Obtaining sufficient customers.* Related to the capital cost of entry, a new entrant would need to gain sufficient customers to justify the risk involved to invest in a new facility. Several market participants we spoke with believed that demand for storage in the Waikato/Bay of Plenty region is high and is not forecast to decrease.⁷² Some customers may prefer to use a single supplier, so a new entrant would need to convince these customers to switch. Some

⁶⁸ The Application at [16.15]-[16.20]; [], Lineage Logistics New Zealand and Cold Storage Nelson Limited “Joint Submission on Lineage and CSN Statement of Issues” (27 May 2022) at 4-7.

⁶⁹ Lineage Logistics New Zealand and Cold Storage Nelson Limited “Joint Submission on Lineage and CSN Statement of Issues” (27 May 2022) at 4-6 [].

⁷⁰ Commerce Commission, *Mergers and Acquisitions Guidelines*, July 2019 at [3.91]-[3.112].

⁷¹ Commerce Commission interviews with [].

⁷² Commerce Commission interviews with [].

customers consider the costs of switching to be a barrier.⁷³ However, there are also examples of customers switching providers⁷⁴ and using multiple suppliers.⁷⁵

73.3 *Finding a suitable site.* New entrants must find a suitable location that has good transport connections to the Port of Tauranga. The evidence shows there are locations in Waikato/Bay of Plenty with suitable sites for cold storage facilities. For example, the Ruakura Superhub is connected to the Port of Tauranga via rail and is the location of the new facilities of Big Chill and Maersk. Port of Tauranga is planning to open an inland port in Ruakura in mid-2022, which it expects will “unlock efficiencies for importers and exporters”.⁷⁶

74. Recent entry and expansion shows that the barriers to entry in the Waikato/Bay of Plenty region are not insurmountable. Lineage, Big Chill and Maersk are all building new cold storage facilities []. Cold storage suppliers consider that there is potential for more new entrants in the broader Waikato/Bay of Plenty region.⁷⁷ There is some evidence to suggest other cold storage operators may consider expanding their operations to the Waikato/Bay of Plenty, although there are no firm plans of which the Commission is currently aware.

74.1 One cold storage operator commented that it was actively looking at opportunities in the Waikato/Bay of Plenty region but that any entry would take several years.⁷⁸

74.2 Another cold storage operator commented that if it were to enter another region, it would be Waikato/Bay of Plenty, although it had not actively considered this opportunity.⁷⁹ The operator also said it has the capital to expand if a sufficiently long-term proposal with credible clients presented itself.

75. One means we use to assess the threat from entry and expansion is to consider whether entry is likely, sufficient in extent and timely enough to pose a constraint (commonly known as the ‘LET test’). We consider this evidence shows the LET test is met:

⁷³ Commerce Commission interviews with [].

⁷⁴ Commerce Commission interviews with [].

⁷⁵ Commerce Commission interviews with [].

⁷⁶ Port of Tauranga “Tainui Group Holdings and Port of Tauranga team up to deliver Ruakura Inland Port” <www.port-tauranga.co.nz>.

⁷⁷ [] told the Commission that there are potential entrants with a sufficiently long-term investment approach and enough capital to enter (although did not name those potential entrants): Commerce Commission interview with []. [] agreed that there are players with a sizeable presence who could come in and compete, and that the region is underserved for cold storage, making entry more attractive: Commerce Commission interview with [].

⁷⁸ Commerce Commission interview with [].

⁷⁹ Commerce Commission interview with [].

- 75.1 entry is likely, given there are several examples of planned entry or expansion by cold storage providers (including Lineage, Big Chill and Maersk) into the relevant region and the evidence from other providers who have expressed an interest in entering;
- 75.2 entry would be sufficient in extent to constrain the merged entity, since all examples of planned entry in the region are large-scale cold storage facilities rather than smaller facilities. [

]; and

- 75.3 entry would be timely, since the long-term nature of the assets means the constraint from the threat of entry is likely immediate. Building cold storage can take several years, including planning, securing a site, building facilities, and organising customer contracts. However, cold storage facilities are long-term assets and generate returns through selling that capacity to customers over a long term. If the merged entity was to raise prices to customers, it may risk a rival starting the process of entry and create the potential to lose customers on a long-term basis. This constraint would be greatest in respect of large customers that can encourage entry through guaranteeing a new entrant its volumes. Rivals can compete for contracts that will become available in 2-3 years and build in order to service the volumes. Accordingly, the threat (and subsequent announcement) of entry would likely constrain the merged entity immediately.

76. To conclude, we consider the threat of entry and expansion is likely to impose a constraint on the merged entity.

Constraint from countervailing power

Applicant's view

77. Lineage submitted that customers could exercise countervailing power to thwart any attempted price increase by the merged entity.⁸⁰ The potential ways Lineage identified that this could be achieved included:
- 77.1 self-supplying some or all of their cold storage requirements;
- 77.2 sponsoring third-party entry/expansion;
- 77.3 bypassing third party cold storage partly or entirely, including by storing product offshore (for import/export customers) or in refrigerated containers; and/or
- 77.4 for customers who contract with the merged entity in a number of locations, constraining any attempted price increases by the merged entity in one

⁸⁰ The Application at [17.1]-[17.6].

location through credibly threatening to switch away from the merged entity in other locations.

78. Lineage also submitted that the Port of Tauranga, although not a cold storage customer, is highly incentivised to keep the supply chain competitive and cost efficient and would be incentivised to apply pressure to bring pricing down including through sponsoring entry or assisting customers to find alternatives to the merged entity.⁸¹
79. The Parties submitted that although larger customers will have a more credible threat of self-supply, there are a number of customers, including those with smaller volumes, that self-supply cold storage in Tauranga.⁸²

Our view

80. The evidence we obtained indicates that very large customers are likely able to exert countervailing power through the threat to self-supply or sponsor entry.⁸³ However, there may be limits to the extent of countervailing constraint imposed on the merged entity:

80.1 some customers will not exert countervailing power by threatening to self-supply or sponsor entry because either:

80.1.1 they are too small to have the required scale for a cold store;⁸⁴

80.1.2 have seasonal demand meaning it does not make economic sense to build cold storage capacity to cover their peak requirements when that storage will sit unused for much of the year;⁸⁵ or

80.1.3 would prefer to use their capital for other purposes;⁸⁶ and

⁸¹ The Application at [16.21]-[16.22].

⁸² Lineage Logistics New Zealand and Cold Storage Nelson Limited “Joint Submission on Lineage and CSN Statement of Issues” (27 May 2022) at [4.13].

⁸³ For example, [

_____]: Commerce Commission interview with [_____]. Some customers indicated that self-supply (either via expansion of an existing cold store or ‘greenfields’ entry) could be possible, although only one of these players had undertaken a feasibility analysis when considering the option: Commerce Commission interviews with [

_____]. One supplier told us that a large customer had previously used such threats to leverage lower prices: Commerce Commission interview with [_____].

⁸⁴ An ACCC ex-post review of a cold store merger in Australia found that the merger resulted in price increases for smaller customers but not larger ones. The ACCC believed this was because larger customers could more credibly threaten to self-supply or sponsor entry: ACCC, *Ex post review of ACCC merger decisions* (February 2022) at 16–17: <https://www.accc.gov.au/system/files/Ex%20post%20review%20of%20merger%20decisions.pdf>

⁸⁵ Commerce Commission interviews with [_____]. [_____] also indicated to the Commission that it understood this to be the case: Commerce Commission interview with [_____]. Further, [_____] told the Commission that cold storage providers know the seasonal nature of customers’ demand, which given the high costs of entry would make threats of self-supply less realistic: Commerce Commission interview with [_____].

- 80.2 any benefits that a larger customer gains from such a threat may not be market-wide (if the customer only uses the leverage to earn itself a lower price but does not induce entry).
81. We did not identify any evidence to support the claim that the Port of Tauranga would sponsor entry or exert influence in the manner that Lineage submitted. Market feedback received by the Commission indicates that ports have not done so in the past. Market participants we interviewed did not consider ports would be likely to do so, with the exception of one cold storage operator who speculated ports could potentially influence behaviour if they were also a cold storage provider's landlord.⁸⁷
82. Lineage suggested to the Commission that customers could bypass third party storage entirely, by storing product overseas or in refrigerated containers.⁸⁸ We did not receive any evidence from market participants that this would be a viable option for all customers to thwart any price increase by the merged entity.

Conclusion on horizontal effects

83. We consider that the Proposed Acquisition will not have or would not be likely to have the effect of substantially lessening competition in the Waikato/Bay of Plenty region due to horizontal unilateral effects.
84. Although the Parties would be close competitors in the counterfactual, we consider the merged entity will be constrained by:
- 84.1 existing competition;
- 84.2 the competitive threat posed by the new facilities being built and the threat of more facilities being built in the future; and
- 84.3 the countervailing power of some larger customers.

Coordinated effects in the Waikato/Bay of Plenty region

85. An acquisition can substantially lessen competition if it increases the potential for the merged entity and all, or some, of its remaining rivals to coordinate their behaviour and collectively exercise market power such that output reduces and/or prices increase across the market.

⁸⁶ Commerce Commission interviews with [

]. For example, [] told the Commission that it would prefer to purchase more strategic assets like [] than self-supply cold storage: Commerce Commission interview with [].

⁸⁷ Commerce Commission interviews with [].

⁸⁸ Another example of customer power may include where Lineage [] for a customer who requested this: [].

86. Unlike unilateral effects, which can arise from the merged entity acting on its own, coordinated effects require some or all of the firms in the market to be acting in a coordinated way.⁸⁹
87. As a result of the Proposed Acquisition, CSN will no longer be an independent competitor. We considered whether this might result in coordinated effects by investigating whether:
- 87.1 the relevant market may be vulnerable to coordination because the market might have the necessary features to sustain a coordinated effect (such as a metric to coordinate on, the ability to monitor and punish deviations from a tacit agreement or understanding and aligned incentives to coordinate); and
 - 87.2 the Proposed Acquisition will make coordination more likely, complete or sustainable to such a point that it causes a significant lessening of competition (for example, by removing an aggressive market participant or increasing symmetry among competitors).
88. Coordination can take place on different elements of competition. In this case we considered whether any markets might be vulnerable to firms coordinating to:
- 88.1 set the level of prices, quality or innovation in the market; and/or
 - 88.2 allocate customers between each other.

The Applicant's views

89. Lineage submitted that cold storage markets in New Zealand are not vulnerable to coordination and the Proposed Acquisition would not change those factors. Lineage submitted that:⁹⁰
- 89.1 Prices are not transparent. Arrangements are the subject of bilateral negotiations and as such there is no 'price list' to facilitate the coordination of, and the detection of any cheating on, a tacitly colluded price.
 - 89.2 The relevant markets consist of competitors of many different sizes, including global, regional and local players, with different cost basis and margin requirements.
 - 89.3 The Proposed Acquisition will not result in the removal of a maverick competitor.
 - 89.4 The relevant markets are characterised by strong customers with a substantial degree of countervailing power.

⁸⁹ Commerce Commission, *Mergers and Acquisitions Guidelines*, July 2019 at [3.84].

⁹⁰ The Application at [18.1]-[18.2].

Our views

90. We are satisfied that the Proposed Acquisition would not make any types of coordination significantly more likely, complete or sustainable.
91. It is unlikely that the Proposed Acquisition would make coordination on price, quality or innovation significantly more likely, complete or sustainable. This is mainly because prevailing market conditions would make it hard for the market participants to achieve and sustain coordination.
- 91.1 As the Applicant notes, prices are subject to bilateral negotiation which likely makes it hard to use prices as a metric for coordination. Similarly, service quality levels may be difficult to monitor since that would necessitate access to information about rivals' customer service levels – information which is not generally available.
- 91.2 There is differentiation between the market participants in terms of geographic location, customer focus and technology. For example, within each region, the cold stores are often in different locations, there are differences in their customer profiles and they range in age from being several decades old to newly built. This is likely to make it more difficult to identify price, quality and innovation points on which the market participants could coordinate.
92. It is unlikely that the Proposed Acquisition would make coordination through customer allocation significantly more likely, complete or sustainable. Such coordination might occur if the market participants reach an understanding to compete only for customers in certain industries or avoided competing for each other's customers. For example, market participants could reach an understanding that each focuses on a particular type of customer such as meat, dairy, fish or FMCG. We consider such coordination is unlikely because coordination could be disrupted through:
- 92.1 customers tending to enter into long term contracts with providers, which will incentivise providers to price sharply in order to win their business and make it harder to punish any cheating on a coordinated agreement; and
- 92.2 the likelihood of new entry, largely due to the lower barriers to entry, in the broader Waikato/Bay of Plenty region suggesting that any coordination may trigger entry making it unstable.

Overall conclusion – no likely substantial lessening of competition

93. We are satisfied that the Proposed Acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in any of the relevant markets.

Determination on notice of clearance

94. Pursuant to section 66(3)(a) of the Act, the Commission determines to give clearance to Lineage Logistics New Zealand to acquire up to 100% of the shares in, or the assets of, Cold Storage Nelson Limited.

Dated this 22nd day of June 2022

Anna Rawlings
Chair