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COMMERCE COMMISSION

DECISION NO. 320

Determination pursuant to the Commerce Act 1986, in the matter of an application for clearance of a business acquisition involving:

YATES NEW ZEALAND LIMITED

and

**WATKINS NEW ZEALAND LIMITED (In Receivership) and
SMITHS HORTICULTURAL DISTRIBUTORS LIMITED (In
Receivership)**

The Commission: P C Allport (Chairman of Division)
K M Brown
E C A Harrison

Commission Staff: John Preston
Juliet Fletcher

**Summary of
Proposed Acquisition:** The purchase by Yates New Zealand Limited, or a wholly owned subsidiary, of the business and assets of Watkins New Zealand Limited (In Receivership) and Smiths Horticultural Distributors Limited (In Receivership)

Working Day 10: 20 March 1998

Determination: Pursuant to s 66(3)(a) of the Commerce Act 1986, the Commission determines to give a clearance for the proposed acquisition.

Date of Determination: 20 March 1998

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SQUARE BRACKETS**

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THE PROPOSAL

- 1 On 6 March 1998 the Commission registered a notice pursuant to s 66(1) of the Commerce Act 1986 (“the Act”) seeking clearance for the acquisition by Yates New Zealand Limited or a wholly owned subsidiary (“Yates”) of all or part of the business and assets of Watkins New Zealand Limited (In Receivership) (“Watkins”) and Smiths Horticultural Distributors Limited (In Receivership) (“Smiths”).
- 2 Smiths and Watkins are subsidiaries of Maine Investments Limited, and were placed in receivership in January 1998. Smiths was operated as a separate business until the 1994-1995 financial year when its activities were merged with those of Watkins. Unless specified otherwise, all references to Watkins in this report include Smiths.

THE PROCEDURES

- 3 Section 66(3) of the Act requires the Commission either to clear, or to decline to clear, a notice given under s 66(1) within 10 working days, unless the Commission and the person who gave the notice agree to a longer period. As such, a determination is required by 20 March 1998.
- 4 This report concludes that staff are satisfied that implementation of the proposal would not result, and would not be likely to result, in any person acquiring or strengthening a dominant position in any market. Accordingly, it is recommended that in terms of s 66(3)(a) of the Act, the Commission gives clearance for the proposal.

THE INVESTIGATION

- 5 Staff discussed the proposal with a range of parties including:
 - Existing competitors of Yates and Watkins including Amalgamated Hardware Merchants Ltd, Aorangi Bulb Nurseries Ltd, Carann Agencies Ltd, Corsons Grains Ltd, Daltons Ltd, Debco Ltd, Egmont Seed Company Ltd, Fiesta Bulb Marketing, Fruitfed Supplies Ltd, Horticom Services (NZ) Ltd, Kings Herbs Ltd, Kiwicare Corporation, Lefroy Seed Company NZ Ltd, Living Earth Company Ltd, Monsanto New Zealand Ltd, Nylex NZ Ltd, Pacific Growers Supplies Ltd, Prebbles Seeds Ltd, Ravensdown

Corporation, Riverside Products Ltd, Veg-gro Supplies Ltd, The Warehouse Group Ltd and Wrightsons Nutrition Ltd

- Gardening retailers including Athol McCully Garden Centres, California Home and Garden Centre, Garden Place NZ Ltd, Kings Plant Barn Ltd, Mitre 10 and Twigland
- Industry associations including The Flower Industry of New Zealand, The Nursery and Garden Industry Association of NZ (Inc), The NZ Vegetable and Potato Growers Federation Inc
- Pesticides Board (Ministry of Agriculture)
- Quarantine Service (Ministry of Agriculture)
- Bill Brett and Murray Richards (Industry consultants).

6 Additional information was also provided by the applicant.

THE PARTICIPANTS

Yates New Zealand Ltd

7 Yates is a wholly owned subsidiary of Arthur Yates & Co Ltd, a company incorporated in Australia. It was established in 1883.

8 Yates and its parent company manufacture and distribute garden products in Australia and New Zealand. Yates sells packet seed, lawn seed, bird food, commercial seed, bulbs, plant food, plant protection products, rodenticides, growing media and garden merchandise (plastics, hose fittings, irrigation equipment and garden tools).

Watkins New Zealand Ltd (In Receivership) and Smiths Horticultural Distributors Ltd (In Receivership)

9 Watkins and Smiths are both wholly owned subsidiaries of Maine Investments Limited, and were placed in receivership on 22 January 1998. Maine Investments Ltd earlier operated as Skellerup Group Ltd, which was a listed public company.

10 Watkins is involved in the manufacture and distribution of garden products in New Zealand such as packet seed, lawn seed, commercial seed, plant food, plant protection products, growing media, fertilisers and garden merchandise such as plastic pots and saucers, fibre pots, garden hardware, irrigation equipment and labels.

- 11 As mentioned above, Smiths operated as a separate business until 1995 when its activities were merged with those of Watkins.

THE RELEVANT MARKETS

Introduction

- 12 The purpose of defining markets is to provide a framework within which the competition implications of a business acquisition can be analysed. The relevant markets are those in which competition may be affected by the acquisition under consideration. Identification of the relevant markets enables the Commission to examine whether the acquisition would result, or would be likely to result, in the acquiring or strengthening of a dominant position in terms of s 47(1) of the Act in any of those markets.
- 13 Section 3(1A) of the Act provides that:
- ... the term ‘market’ is a reference to a market in New Zealand for goods and services as well as other goods and services that, as a matter of fact and commercial common sense, are substitutable for them.
- 14 Markets are defined in relation to product type, geographical extent, and functional level. With the first two dimensions, market boundaries are determined by testing for substitutability in terms of the response to a change in relative prices of the good or service in question, and possible substitute goods or services. A properly defined market will include products which are regarded by buyers as being not too different (‘product’ dimension), and not too far away (‘geographical’ dimension), and are thus products to which they could switch if a small yet significant and *non-transitory* increase in price (“*ssnip*”) of the product in question was to occur. It will also include those suppliers currently in production who are likely, in the event of such a *ssnip*, to shift promptly to offer a suitable alternative product.
- 15 In addition, markets are also defined in relation to functional level. Typically, the production, distribution, and sale of products proceeds through a series of functional levels, so the functional levels affected by the application have to be determined as part of the market definition. For example, that between manufacturers and wholesalers might be called the “manufacturing market”, while that between wholesalers and retailers is usually known as the “wholesaling market”.

Market Definition

16 The applicant submits that as a result of the proposed acquisition, there would be aggregation in a number of markets for the wholesale distribution of consumer garden products, including the markets for:

- Garden merchandise (including containers, irrigation equipment, pressure sprays, hose reels and tools)
- Bulbs
- Packet seed and seedlings
- Lawn seed
- Plant food
- Plant protection products
- Growing media.

The applicant also submits that there would be aggregation in a number of markets for the distribution of garden products to commercial users, such as:

- Vegetable seed
- Flower seed
- Plant food
- Plant protection products
- Growing media.

In addition, the applicant states that there may be aggregation in the market for the manufacture of raw material used in growing media product.

17 As indicated above, Yates and Watkins supply seed, plant food and plant protection products to both commercial growers and consumers. Most participants in these markets agreed with the applicant's submission that the consumer and commercial markets for seed, plant protection products and plant food are separate for a number of reasons.

18 [] and one of the largest horticultural seed companies in the world, considered that the commercial and consumer markets for seed are separate due to major differences in volume supplied, and the price charged to the buyer. For example a consumer would purchase a packet of seed for around \$2, whereas a commercial grower would purchase several kilograms of seed at a completely different price per gram, reflecting the volume purchased.

19 [

], noted that Yates and Watkins have separate marketing divisions for commercial and consumer seed, with sales representatives offering specific technical advice for each.

20 [], a company involved in the supply of plant protection products and plant food to commercial growers and farmers, stated that supply to a commercial grower often involved an ongoing relationship with that customer, the provision of technical advice, and may also include a contract for supply. For those reasons, [] considered the consumer and commercial markets for plant food and plant protection products to be separate.

21 Watkins and Yates also supply growing media to both consumers and commercial users. However, other suppliers of growing media such as [] and [] considered the commercial and consumer markets for growing media to be the same. [] commented that the product did not differ for either user, and that it is only the packaging that is different.

22 In order to analyse the likely effects of the proposed acquisition, it is considered appropriate that the markets for the wholesale distribution of plant food, plant protection products and seed be treated separately in terms of commercial users and consumers. The markets for the distribution of growing media to consumers and commercial growers as distinguished by the applicant will however be combined.

Garden merchandise – consumer market

23 This market involves the wholesale distribution of various garden products such as plant containers, irrigation equipment, pressure sprays, hose reels and tools for sale to retailers.

Bulbs/Packet seed/Seedlings – consumer market

24 The applicant considers the markets for the wholesale distribution of bulbs and packet seed to be separate. [], a partnership business involved in the marketing and sale of bulbs to retailers, and [], a supplier of

vegetable seed to commercial users, considered that bulbs have sufficient similarity to and substitutability for seeds to be combined in the same market. [], which is involved in the supply to commercial growers of flower and vegetable seed, was also of this view.

25 The applicant argues that packet seed is not a market in itself, and that seedlings and punnets are becoming increasingly popular with consumers as substitutes. According to the applicant, packet seed, seedlings, punnets and plugs are now usually sold in the same shop. Neither Yates or Watkins are involved in the distribution of seedlings or punnets to consumers.

26 [] and [], both retailers of packet seed and seedlings, did not consider these products to be substitutable, and noted that packet seed is usually purchased by home gardeners wanting to grow their own plants whereas seedlings are purchased by consumers wanting instant gardens. Therefore those customers who customarily buy seeds would not consider seedlings to be a substitute, and vice versa. Prices for packet seed and seedlings are also significantly different.

27 From the above information, staff conclude that packet seed and seedlings/punnets are substantially different products, and the market for the distribution of packet seed to consumers will be considered separately. Bulbs however will be included in the market for the distribution of packet seed.

Lawn seed – consumer market

28 The applicant states that lawn seed is not a market sector on its own as instant turf is now very popular. It is noted that Yates is not involved in the supply of instant turf.

29 Retailers of garden products including lawn seed, and [] which distributes the [] brand of lawn seed, did not agree that lawn seed is in the same market as instant turf however. A distinction was made between lawn seed and instant turf for the same reasons as the differentiation between packet seed and seedlings mentioned above. Instant turf is also considerably more expensive than lawn seed.

30 The market for the distribution of lawn seed to consumers with therefore exclude instant turf.

Plant protection and Plant food– consumer and commercial markets

- 31 Plant food includes fertilisers and plant nutrition. Plant protection includes products such as weedicides, fungicides, insecticides, sprays, slug and snail pellets. As indicated above, each of these markets will be considered separately in terms of supply to consumers and supply to commercial growers.
- 32 Accordingly, staff will analyse the likely effects of the proposal on the markets for the wholesale distribution of plant food and plant protection products to consumers, and the markets for the distribution of plant food and plant protection products to commercial users.

Growing media

- 33 Potting mixes are a widely used form of growing media, and Yates and Watkins also supply bark and peat to commercial growers to make their own mixes. There are numerous products which constitute the growing media market, including sphagnum moss peat, sedge peat, bark, top soil, spent mushroom compost and recycled green waste, all of which are available by bag, trailer load or truck load.
- 34 As indicated above, the consumer and commercial markets for growing media will be considered as one for the purposes of this report.

Vegetable seed and Flower seed – commercial markets

- 35 [], [] and [], an importer and distributor of vegetable seed, agreed with the applicant's view that the market for the supply of flower seed and vegetable seed to commercial users are separate, specialised markets involving different buyers and different suppliers.
- 36 The markets for the distribution of vegetable seed to commercial users and the distribution of flower seed to commercial users will be considered separately.

The manufacture of raw material used in growing media product

- 37 The applicant states that there may also be aggregation in this market as a result of implementation of the proposal. Watkins mines peat under a licence at one of two

of the North Island's only economic sphagnum moss peat mines. Yates also has a licence to mine peat, but supply from the mine is now exhausted although the licence has 1 year to run. Yates currently sources its peat requirements from the Gammans mine¹.

38 []

39 In terms of geographic market definition, the competitive effects of the proposed acquisition on the above markets will be analysed at a national level.

Conclusion on Market Definition

40 It is concluded that the relevant markets for the purpose of assessing the dominance implications of the proposal are as follows:

The markets for the wholesale distribution of the following consumer garden products:

- Garden merchandise
- Seeds and bulbs
- Lawn seed
- Plant food
- Plant protection products.

The markets for the distribution of the following garden products to commercial users:

- Vegetable seed
- Flower seed
- Plant food
- Plant protection products.

In addition, the markets below will also be analysed in terms of the likely effects of the proposed acquisition:

- The market for the manufacture of raw material used in growing media product
- The market for the distribution of growing media to consumers and commercial users.

ASSESSMENT OF DOMINANCE

41 Section 66(3) of the Act, when read in conjunction with s 47(1) of the Act, requires the Commission to give clearance for a proposed acquisition if it is satisfied that the proposed acquisition would not result, and would not be likely to result, in a person acquiring or strengthening a dominant position in a market. If the Commission is not so satisfied, clearance must be declined.

42 Section 3(9) of the Act states that a person is in a “dominant position” if:

... a person as a supplier or an acquirer of goods or services either alone or together with an interconnected or associated person is in a position to exercise a dominant influence over the production, acquisition, supply, or price of goods or services in that market ...

43 That section also states that a determination of dominance shall have regard to:

- market share, technical knowledge and access to materials or capital;
- the constraint exercised by competitors or potential competitors; and
- the constraint exercised by suppliers or acquirers.

44 In reaching a conclusion on whether a person is in a position to exercise a dominant influence in a market, the Commission considers the foregoing non-exhaustive factors and any other relevant matters that may be found in a particular case.

45 In *Port Nelson Ltd v Commerce Commission* [] 3 NZLR 554, the Court of Appeal approved the following dominance standard, adopted by McGechan J in the High Court:

...dominance involves more than “high” market power; more than mere ability to behave “largely” independently of competitors; and more than power to effect “appreciable” changes in terms of trading. It involves a high degree of market *control*.

46 In the Commission’s view, a dominant position in a market is generally unlikely to be created or strengthened where, after the proposed acquisition, either of the following situations exist² :

- the merged entity (including any interconnected or associated persons) has less than in the order of a 40% share of the relevant market;

- the merged entity (including any interconnected or associated persons) has less than in the order of a 60% share of the relevant market and faces competition from at least one other market participant having no less than in the order of a 15% market share.

47 Except in unusual circumstances, the Commission will not seek to intervene in business acquisitions which, given appropriate delineation of the relevant market(s) and measurement of market shares, fall within these “safe harbours”.

48 A dominance assessment for each of the markets defined above follows.

The Market for the Wholesale Distribution of Garden Merchandise to Consumers

49 Both Yates and Watkins are involved in the wholesale distribution of garden merchandise including tools, plant containers, pressure sprays, hose reels and irrigation equipment. The applicant estimates that market shares for existing competitors in this market are as follows:

Table 1: Estimated Market Shares for the Market for the Wholesale Distribution of Garden Merchandise to Consumers

Market Participant	Existing Market Shares
Yates	[]%
Watkins	[]%
Merged entity	[]%
Others	[]%
TOTAL	100%

50 Existing market participants were unable to provide market share estimates, however there appears to be substantial competition from existing competitors, and also from house brands such as Mitre 10 and The Warehouse.

51 Considering that the merged entity’s market share would appear to fall within one of the Commission’s “safe harbours”, having less than a 40% share of the relevant market, staff conclude that implementation of the proposed acquisition would not give rise to any competition concerns in relation to the market for the wholesale distribution of garden merchandise to consumers.

The Market for the Wholesale Distribution of Seeds and Bulbs to Consumers

- 52 As indicated above, the markets for the wholesale distribution of seeds and bulbs to consumers have been combined. Market shares as provided by the applicant are as follows:

Table 2: Estimated Market Shares for the Market for the Wholesale Distribution of Seeds and Bulbs to Consumers

Market Participant	Existing Market Shares
Yates	[]%
Watkins	[]%
Merged entity	[]%
Others	[]%
TOTAL	100%

- 53 It was noted by market participants that the merged entity would have a high market share in respect of packet seeds only (estimates of []% were given), however in a combined market, the share would be less. Retailers such as [] and [] commented that almost all packet seed sales were of *Yates* or *Watkins* brand. Bulbs account for around 30% of the total market. Staff conclude that the estimates shown above are probably lower than actual market shares.
- 54 Taking a conservative assessment of market concentration, implementation of the proposal would probably result in the combined entity's market share falling outside the Commission's "safe harbours". Other relevant factors must therefore be considered.
- 55 Whether a dominant position would exist in a market following implementation of a merger is not determined on the basis of market share analysis alone. As Tipping J stated in *New Zealand Magic Millions Ltd & Anor v Wrightson Bloodstock Ltd* (1990) 3 NZBLC 99-175:

... market share is not the sole determinant of the presence or absence of dominance or market power. The most that can be said is that dominance is frequently attended by a substantial market share but all other relevant factors must be brought into account. For example, a substantial market share without barriers to entry will seldom, if ever, be indicative of dominance.

56 Accordingly, the Commission considers a range of additional factors before reaching a conclusion about the acquisition or strengthening of a dominant position in a market, such as the constraint from potential competition, barriers to entry, and the constraint from buyers.

57 []
].

58 The applicant further submits that [] is expected to expand into the consumer market in the near future. [] currently supplies retailers such as []
].

59 In terms of barriers to entry into the market, Yates states that a new supplier would only require display stands, a few sales representatives and about 6 weeks lead time to import product from overseas. Nearly all seed and some bulbs are imported, and it was agreed by existing competitors that imports are easily obtained from overseas suppliers.

60 It is concluded that although implementation of the proposal would result in aggregation in the market for the wholesale distribution of packet seed and bulbs to consumers, the combined entity would be constrained by existing and potential competition.

The Market for the Wholesale Distribution of Lawn Seed to Consumers

61 As indicated above, staff do not consider lawn seed and instant turf to be in the same market. Yates and Watkins are not involved in the supply of instant turf, and Yates is not involved in the market for commercial turf seed.

62 The applicant's market share estimates below are considered to be accurate as they have been confirmed by other participants in the market. These estimates do not include instant turf.

Table 3: Estimated Market Shares for the Market for the Wholesale Distribution of Lawn Seed to Consumers

Market Participant	Existing Market Shares
Yates	[]%
Watkins	[]%
Merged entity	[]%
Others	[]%
TOTAL	100%

63 [], which distributes lawn seed under the [] brand to retail outlets, estimated that its share of the market would be []%. [

] supplies lawn seed to consumers and commercial users under the [] brand, and estimated that it would []% share of the consumer market.

64 As the merged entity’s market share would appear to fall within one of the Commission’s “safe harbours”, being less than in the order of a 60% share of the relevant market and facing competition from at least one other market participant having no less than in the order of a 15% market share, staff conclude that there are no dominance issues in respect of the wholesale distribution of lawn seed to consumers.

The Market for the Wholesale Distribution of Plant Food to Consumers

65 The applicant’s estimates of market shares (below) have been verified by other competitors in the market. Staff therefore consider the following figures to be accurate:

Table 4: Estimated Market Shares for the Market for the Wholesale Distribution of Plant Food to Consumers

Market Participant	Existing Market Shares
Yates	[]%
Watkins	[]%
Merged entity	[]%
Others	[]%
TOTAL	100%

- 66 According to these estimates, the combined entity's market share would fall outside both of the Commission's "safe harbours". While such a market share indicates potential for dominance concerns, other relevant factors may also be considered.
- 67 Yates states that although the combined entity's share in the market for the wholesale distribution of plant food to consumers would exceed the Commission's "safe harbours", the products making up this market are not products which are manufactured by Yates and Watkins. According to Yates, plant food products are distributed by Yates and Watkins under agency and distribution agreements, many of which are non-exclusive, and many of which are marketed under the manufacturers' brand.
- 68 Yates submits further that subsequent to implementation of the proposal, it is anticipated that a number of these manufacturers will not be willing to enter into distribution agreements with Yates. This is because manufacturers will not be willing to have Yates distributing competing products. Yates concludes that the combined entity's market share will not be equivalent to the total of the current market shares held by Yates and Watkins.
- 69 []
- 70 []
- 71 The applicant considers that this situation also exists in the markets for the distribution of plant food to commercial users, and the distribution of plant protection products to both consumers and commercial users. These markets are discussed below.
- 72 []
- 73 [] estimated that it would have a []% market share, and considered that it would have no difficulty competing with the merged entity. It was also noted by []

] that post acquisition, Yates would not be able to distribute competing plant food products such as []. This situation was well known within the industry.

74 [], has recently entered the market [] has been operating in New Zealand for two years). [] believes that []. [] sources all of its product from imports, and considered that imports can easily be accessed by existing competitors or potential new entrants. [] did not have any concerns in relation to the proposal.

75 [] is a supplier of horticultural products including plant food and plant protection in the commercial market. [], which are competing products to [].

76 Although the combined entity's market share falls outside the Commission's "safe harbours", staff note that this market share is likely to decrease after implementation of the proposal, and the merged entity would continue to face competition from a number of existing and potential competitors. It is therefore concluded that a dominant position is not likely to be acquired or strengthened in this market as a result of implementation of the proposal.

The Market for the Wholesale Distribution of Plant Protection Products to Consumers

77 Staff have verified the applicant's estimates for existing market shares in this market as follows:

Table 5: Estimated Market Shares for the Market for the Wholesale Distribution of Plant Protection Products to Consumers

Market Participant	Existing Market Shares
Yates	[]%
Watkins	[]%
Merged entity	[]%
Others	[]%
TOTAL	100%

78 Similar to the situation in the market for the wholesale distribution of plant food to consumers, the applicant argues that the merged entity's market share in respect of this market will be less than the combined total of the two parties current market shares. This is because it claims that [].

79 []

80 [] confirmed that chemical companies tend to hold registrations for plant protection products, rather than distributors such as Yates and Watkins. As a result, chemical companies have considerable influence in the market, and could grant distribution rights to another company if Yates and Watkins did not perform satisfactorily. Any change in distribution would incur minimal cost as it would require little more than printing new labels.

81 [] also stated that virtually no plant protection products are registered solely for home garden use; there is a commercial equivalent for each home garden product. Also, no products are exclusive to New Zealand, at least in respect of active ingredients. This is due to the high cost of developing new products and the relatively small size of New Zealand.

82 Yates further states that the agency agreements for the supply of products in New Zealand held by Watkins will be terminated on the grounds of Watkins receivership.

83 [] noted that as the New Zealand market is so small on an international

scale, overseas suppliers would not want one company distributing competing products. [] added that as a result of the proposed acquisition, distribution agencies and agreements may become available to other competitors in the market.

- 84 Some garden product retailers contacted by staff expressed concern regarding certain plant protection products supplied solely by Yates and Watkins. [] stated that although other brands were available and may be as effective, they were not regarded by customers as having the same brand recognition, packaging standards and technical back-up. It was claimed by one retailer, [] that overseas suppliers of equivalent products may face a wait of up to 2-3 years in obtaining the necessary approval for a new product under the Pesticides Act 1969.
- 85 The process of registering plant protection products is undertaken by the Pesticides Board in terms of the Pesticides Act 1969. The analysis and approval of products containing established active ingredients takes 3 to 6 months. Under the Pesticides (Fees) Regulations 1993/172, there is an application fee of \$3,150 for the registration of a pesticide. Innovative products containing new active ingredients may take 6 to 10 months for approval, and a fee of around \$10,000 is payable.
- 86 Some changes in the registration process will be introduced in regulations now being prepared in terms of new legislation. A representative for the Pesticides Board stated that regulations giving effect to two new Acts are scheduled to come into force on 1 October 1998. These are the Hazardous Substances and New Organisms Act 1996 and the Agricultural Compounds and Veterinary Medicines Act 1997. It was thought that in some cases present requirements may be more relaxed and in other cases they may become more onerous.
- 87 While implementation of the proposal would result in the combined entity's market share falling outside both of the Commission's "safe harbours", staff accept that this market share is likely to decrease for the reasons given by the applicant. The merged entity would also continue to face competition from existing competitors in the market, and there do not appear to be any significant barriers to entry. Staff therefore conclude that the proposal would not result, or be likely to result in a dominant position being acquired or strengthened.

The Market for the Distribution of Vegetable Seed to Commercial Users

88 Market share estimates for this market as provided by the applicant are as follows:

Table 6: Estimated Market Shares for the Market for the Distribution of Vegetable Seed to Commercial Users

Market Participant	Existing Market Shares
Yates	[]%
Watkins	[]%
Merged entity	[]%
Others	[]%
TOTAL	100%

89 Estimates of the combined entity's market share by other commercial suppliers of vegetable seed ranged from []% to []%. None of the market participants contacted by staff had any concerns regarding the proposed acquisition however, and considered that there was sufficient competition in the market to constrain the merged entity.

90 [] and [] have estimated market shares of []. Additional competition is provided by exporters of vegetables such as squash, who import their own seed.

91 There are certain Ministry of Agriculture (MAF) quarantine requirements to be met for the importation of seed, however it was noted by [] and [] that these requirements are straight forward, and would not provide any barrier to entry into the market. MAF has a list of "approved species", and if a product is on the list, it may be imported. Other products must go through an "Initial Risk Assessment" process which costs about \$160.

92 Most vegetable seed is imported. In terms of entry into the market, a regular seed importer may apply to the Quarantine Service at MAF for recognised importer status. The Quarantine Service inspects a sample consignment for contamination, and if inspection is passed, recognised importer status is conferred. Many firms hold the right to import seed from approved sources which include numerous countries.

- 93 All suppliers of vegetable seed contacted by staff agreed that imports are easily accessed from overseas suppliers.
- 94 Although the proposal would result in some aggregation of market share, the combined entity's market share falls within one of the Commission's "safe harbours", being a share less than in the order of 60% of the relevant market and facing competition from at least one other market participant having no less than in the order of a 15% market share. There appears to be sufficient existing competition and low barriers to entry into the market. Staff conclude that there are no dominance concerns in relation to this market.

The Market for the Distribution of Flower Seed to Commercial Users

- 95 The market share estimates provided by the applicant for this market have been confirmed by other market participants and therefore appear to be accurate:

Table 7: Estimated Market Shares for the Market for the Distribution of Flower Seed to Commercial Users

Market Participant	Existing Market Shares
Yates	[]%
Watkins	[]%
Merged entity	[]%
Others	[]%
TOTAL	100%

- 96 As the merged entity's market share falls within one of the Commission's "safe harbours", having less than in the order of a 40% share of the relevant market, staff conclude that implementation of the proposal would not result in any person acquiring or strengthening a dominant position in the market for the distribution of flower seed to commercial users.

The Market for the Distribution of Plant Food to Commercial Users

- 97 Yates estimates that the following market shares are held by existing competitors in this market:

Table 8: Estimated Market Shares for the Market for the Distribution of Plant Food to Commercial Users

Market Participant	Existing Market Shares
Yates	[]%
Watkins	[]%
Merged entity	[]%
Others	[]%
TOTAL	100%

- 98 As the market share of the combined entity falls within one of the Commission’s “safe harbours”, being less than in the order of a 40% share of the relevant market, it is concluded that a dominant position will not be acquired or strengthened as a result of the proposed acquisition.

The Market for the Distribution of Plant Protection Products to Commercial Users

- 99 The applicant has provided the estimates below for existing market shares in this market. Other competitors contacted by staff agreed that the combined entity would have a very small share of the market.

Table 9: Estimated Market Shares for the Market for the Distribution of Plant Protection Products to Commercial Users

Market Participant	Existing Market Shares
Yates	[]%
Watkins	[]%
Merged entity	[]%
Others	[]%
TOTAL	100%

- 100 As the market share of the combined entity falls within one of the Commission’s “safe harbours”, being less than in the order of a 40% share of the relevant market, staff conclude that a dominant position will not be acquired or strengthened as a result of the proposed acquisition.

The Market for the Manufacture of Raw Material used in Growing Media Product

- 101 The applicant states that its market share in this market would correlate to its estimated share in the market identified by the applicant for commercial growing media i.e. []%.
- 102 Watkins mines peat under a licence at one of two of the North Island's only economic sphagnum moss peat mining deposits at Ngatea. Yates understands that the peat mine has only about 3 or 4 years of life remaining. Yates also has a peat mine, however the deposit has now been exhausted. Yates is no longer harvesting raw material in the North Island for use in the growing media market, and relies on purchases of peat from the Gammans mine, also at Ngatea.
- 103 The applicant submits that although there are only two economic sphagnum moss peat mining deposits in the North Island (one of which is mined by Watkins, the other from which Yates sources its peat supply), other forms of peat can be harvested in other locations in the North Island. According to the applicant, there is a plentiful alternative type of peat in the Waikato (sedge peat), although it is not presently as popular as sphagnum moss peat. There are other products which make up the growing media market, such as bark, soil, spent mushroom compost and recycled green waste. The applicant considers that these are becoming increasingly popular as the industry develops alternative and cheaper sources of growing media.
- 104 Yates states that with the addition of certain chemicals to increase acidity and the addition of polymer water crystals, bark can provide similar properties to peat for the same or better price. According to Yates, Australia has no peat supplies and growers and consumers use numerous alternatives, including bark mixes, coir, and imported Canadian peat which is also available in New Zealand.
- 105 [] considered that peat is becoming less important in the manufacture of growing media, and noted that peat mining is not looked on favourably by environmentalists as it is a non renewable raw material. [] concluded that as bark is a major ingredient of growing media and can easily be obtained, and organic waste is also readily available, it had no concerns regarding the combined entity's access to limited peat supply. It was further suggested that the merged entity [].

106 [] had concerns regarding the future supply of peat, and thought that peat supply may be “shut down” as a result of the proposed acquisition. According to [], peat is preferred by the majority of growers, although it was conceded that there is a trend away from the use of peat, particularly as it is becoming more difficult to source. Bark fibre, recycled green waste and coir were not considered by [] to be viable substitutes, and [] was of the opinion that freight costs are prohibitive in sourcing peat from South Island suppliers.

107 [] exports dried and baled sphagnum moss, supplies sphagnum moss in bulk to commercial growers in New Zealand and sells bagged growing media to Watkins under the *Watkins* brand or house brands. [] considered sphagnum moss peat to be a superior ingredient for growing media due to its properties of thermal insulation, water retention and sterility. Bark and compost were however seen as possible substitutes for sphagnum moss peat.

108 [] noted that because North Island peat resources are associated with wetland areas, it would be difficult to obtain resource management consent to develop new mines. Approval could however be obtained in the South Island. [] has not supplied North Island buyers of peat in the past due to high freight costs in relation to the value of the product. []. It may be possible to obtain relatively low freight costs from Tranz Rail Ltd, due to trains with lighter freight volumes returning to the North Island.

109 A group of 12 growers (“the group”) have made a joint submission to the Commission regarding their views on the likely effect of the proposal on the growing media market (including raw material used). The group consider that sphagnum moss peat is a premium product used alone or in mixes by a large number of growers. While some products such as bark and pumice could be considered to be complementary, the group considered that they are not substitutable. Sedge peat, compost and soil were also thought to be lower quality products which cannot be used when a premium product is required.

110 It is further submitted by the group that although coir fibre, imported Canadian peat and South Island peat could be used as substitutes in the North Island for sphagnum moss peat, the freight costs are such that these alternatives are not viable for North

Island growers. Price differences were estimated as \$35-\$40 per cubic metre for sphagnum moss sourced from the North Island mines, and \$90-\$100 for coir, South Island peat and imported Canadian peat.

- 111 Essentially, the main concerns of the growers were limited availability, reduced quality and the ability of the combined entity to dictate prices for sphagnum moss peat.
- 112 An independent industry consultant contacted by staff agreed that sphagnum moss peat has different properties to bark, sedge peat, coir and other materials used in growing media, however he considered that these other materials could be substituted and cross-used. He confirmed that as a result of increasing environmental concerns regarding the mining of sphagnum moss peat, there has been a move in the last 4-5 years towards using other material such as bark for the manufacture of growing media.
- 113 According to this consultant, some growers such as mushroom and rose growers may prefer sphagnum moss peat, however this was only a matter of preference as substitutes are available. He considered that if the price of sphagnum moss peat increased significantly, growers could easily switch to using a bark fibre blend.
- 114 In terms of properties, bark does not hold as much water as sphagnum moss peat however it can be made in different particle sizes and still makes good growing media. Coir is more like peat in that coir holds moisture and distributes it evenly. The consultant considered that a blend of bark and coir would produce an effective growing media product of the same quality and characteristics as sphagnum moss peat. As coir is a relatively new product in the industry and has not been thoroughly researched, some growers may not yet be willing to use it.
- 115 Another industry consultant contacted by staff considered that some commercial growers are set up for using sphagnum moss peat, and although some could switch to alternative products if necessary, others may incur costs and would need to change production techniques should the price of sphagnum moss peat increase significantly or they were not able to use it. He thought however that a 5% price increase would not have much effect on the market, although an increase of more than 15% would.

- 116 It was mentioned by this consultant that although there is no complete substitute for sphagnum moss peat, growing media products are constantly being developed and []].
- 117 There are large reserves of sphagnum moss peat in the South Island of very good quality. One consultant considered that the problem of transport costs of this peat to the North Island could be overcome as it is possible to compress and bale peat. This effectively halves the bulk, and if done properly would not affect the quality. It was noted that transportation of peat from the South Island to the North Island has not had to be considered before, however it was considered that even if freight costs increased the price of the end product, growers would still be able to compete to some extent.
- 118 The applicant states that Australia has no peat supplies of its own and growers and consumers use numerous alternative products including bark mixes, coir and imported Canadian peat. Both consultants confirmed that some of the peat used in Australia is sourced from New Zealand. One added that the quality of plants supplied by Australian nurseries is better than those from New Zealand, which may indicate that sphagnum moss peat is not essential in terms of the end product. Due to the lack of peat supply, the Australians have developed a more technical approach to the manufacture of growing media.
- 119 Sphagnum moss peat is a non renewable raw material and one consultant estimated that the New Zealand supply would be exhausted in 50 years, although there are still significant reserves on the Chatham Islands. He concluded that as supply will run out eventually, New Zealand growers and manufacturers of growing media product need to develop the use of alternative raw materials.
- 120 While the proposed acquisition will result in aggregation in the market for the manufacture of raw material (sphagnum moss peat) used in growing media, it appears from the information provided that there are alternative materials which can be used as either complete substitutes or as part of a blend. It also appears that there is an increasing trend in the industry to use these alternative products for environmental reasons and because of limited supply. In addition, the combined entity could face potential competition from suppliers in the South Island and potential []].

121 Commission staff conclude that implementation of the proposal would not result, or would not be likely to result, in any person acquiring or strengthening a dominant position in the market for the manufacture of raw material used in growing media product.

The Market for the Distribution of Growing Media to Consumers and Commercial Users

122 As mentioned above, the markets for the distribution of growing media to commercial users and to consumers are considered to be the same, and have been combined in order to assess dominance implications of the proposed acquisition. The following market share estimates provided by Yates have been confirmed by other players in the market and are considered to be accurate:

Table 10: Estimated Market Shares for the Market for the Distribution of Growing Media to Consumers and Commercial Users

Market Participant	Existing Market Shares
Yates	[]%
Watkins	[]%
Merged entity	[]%
Others	[]%
TOTAL	100%

123 Yates and Watkins supply growing media, or “potting mix” to consumers and commercial users. Yates and Watkins also supply peat and bark for commercial growers to make up their own mixes.

124 Many potting mixes are made up of about 60% sphagnum moss peat. Some retailers of garden products and competitors of Yates and Watkins in this market expressed concern about the combined entity’s potential control over sphagnum moss peat supplies in the North Island. The market for the manufacture of raw material used in growing media is discussed above.

125 [], which converts garden waste into compost and potting mix, considered that peat is becoming less important in this market, and did not have any concerns about the proposed acquisition in the growing media market.

- 126 [], a manufacturer of potting mix and bark products for both the consumer and commercial markets, has greatly reduced its dependency on peat and now uses bark fibre. [] stated that some buyers still insist on a certain percentage of peat in growing media products. However, it was noted that there is an increasing trend towards using substitutes, as peat is becoming increasingly difficult to source. [] expressed some concern regarding the combined entity's ability to control the sphagnum moss peat supply in the North Island.
- 127 [] share in the market for the distribution of growing media was estimated by [] and existing competitors including the applicant as between []% to []%. Other competitors in the market include importers of Canadian sphagnum moss peat, and suppliers of sedge peat, coir (copra from coconut husks), bark and pumice.
- 128 The combined entity's share in the market for the distribution of growing media falls within one of the Commission's "safe harbours", being less than in the order of a 60% share of the relevant market, and facing competition from at least one other market participant having no less than in the order of a 15% market share. Accordingly, it is concluded that there would be sufficient constraint on the combined entity from existing competitors in the market. The issue of peat supply is considered separately above.

OVERALL CONCLUSION

- 129 Although implementation of the proposal would lead to some degree of aggregation in the various markets discussed in this report, particularly the markets for the wholesale distribution of plant food and plant protection products to consumers, and the market for the manufacture of raw material used in growing media product, staff consider that the proposal would not result, and would not be likely to result, in the merged entity acquiring or strengthening a dominant position in any of the relevant markets. There appears to be sufficient competitive constraints from existing competition, and in some markets potential competition, to eliminate concerns that the merged entity would acquire or strengthen a dominant position in any of these markets.
- 130 Having regard to the factors set out in s 3(9) of the Act and all other relevant factors, staff conclude that the proposal would not result, and would not be likely to result, in the merged entity acquiring or strengthening a dominant position in the following markets:

The markets for the wholesale distribution of the following consumer garden products:

- Garden merchandise
- Seeds and bulbs
- Lawn seed
- Plant food
- Plant protection products;

The markets for the distribution of the following garden products to commercial users:

- Vegetable seed
- Flower seed
- Plant food
- Plant protection products;

The market for the manufacture of raw material used in growing media product, and the market for the distribution of growing media to consumers and commercial users.

RECOMMENDATION

- 131 It is recommended that, in terms of s 66(3)(a) of the Act, the Commission give clearance for the proposed acquisition.

John Preston
Chief Investigator

Juliet Fletcher
Investigator

Jo Bransgrove
Manager

DETERMINATION ON NOTICE OF CLEARANCE

We agree/disagree with the recommendation.

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

Accordingly, pursuant to s 66(3)(a) of the Commerce Act 1986, we hereby give/decline to give clearance for the purchase by Yates New Zealand Ltd, or a wholly owned subsidiary, of all or part of the business and assets of Watkins New Zealand Ltd (In Receivership) and Smiths Horticultural Distributors Ltd (In Receivership).

Dated this 20th day of March 1998

P C Allport
Member

K M Brown
Member

E C A Harrison
Member

¹[

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² Refer Commerce Commission's Business Acquisitions Guidelines, 1996, p17.