

PGG WRIGHTSON SEEDS' RESPONSE TO COMMERCE COMMISSION LETTER OF ISSUES REGARDING DLF SEEDS' PROPOSED ACQUISITION OF PGW SEEDS, 3 DECEMBER 2018

- 1 In PGG Wrightson Seeds' (**PGW Seeds**) view, in summary:
 - 1.1 *Market definition:* The four ryegrass categories and tall fescue should be considered as a single national product market. That said, PGW Seeds does not consider splitting the market in any of the ways suggested by the Commerce Commission (**Commission**) would alter the ultimate analysis.
 - 1.2 *Production and supply of ryegrass seeds:* DLF Seeds (**DLF**) has been in the New Zealand market for approximately 14 years and has not been successful in developing novel ryegrass endophytes (see below) or high performing ryegrass cultivars for New Zealand conditions []. It is not likely to become successful in these areas in the absence of the proposed acquisition.
 - 1.3 *Endophyte research and development (R&D):*
 - (a) DLF does not have a competitive endophyte offering, and there is not a real chance it will produce such an offering in the foreseeable future absent the proposed acquisition. There are two large perennial ryegrass endophyte development programmes for the New Zealand market, one involving PGW Seeds and the other involving its main rival Barenbrug Agriseeds. These programmes are highly competitive. Seed Force is also involved in a current endophyte development programme and PGW Seeds considers if any player were to be considered a potential significant third player in the future it is Seed Force. Cropmark is also involved in a smaller endophyte programme. PGW Seeds does not consider DLF to have its own endophyte programme in any material way, []. As a result, the removal of DLF as an independent player in the market would have no material effect on competition, as far as the development of endophytes is concerned.
 - (b) It is not necessary to have an endophyte programme in order to compete successfully in New Zealand in the supply of perennial ryegrass. The AR1 endophyte remains competitive and popular, and is available to any New Zealand seed company. It continues to be inoculated into top-selling perennial ryegrass cultivars (e.g. []). The proposed acquisition would have no impact on this position. Similarly, licensing of successful endophytes occurs and the level of that activity would not be affected by the proposed acquisition.
 - 1.4 *Countervailing power of seed retailers, and entry and expansion:* Seed retailers have the ability and incentive to stand up for the interests of their farmer-customers, with whom they have important relationships of trust (and in the case of FarmSource and Farmlands, who own them). Seed retailers tend to switch supplier readily if they are not satisfied with their terms, and could quickly begin to bypass existing seed companies with a deal with a new entrant that introduced seed products progressively.

- 1.5 *Industry bodies:* The proposed acquisition would have no impact on voting power within key industry bodies capable of resulting in any lessening of competition.
 - 1.6 *Coordinated effects:* The supply of seeds is not conducive to coordination, and the proposed acquisition would not make coordination more likely, complete or sustainable; all of the points identified by the Commission in the LoI would be unaffected by the proposed acquisition.
- 2 More detail on each of these points follows.

Market definition – tall fescue and ryegrasses

- 3 PGW Seeds submits that the outcome of the wider analysis is not sensitive to the market definition split, including whether tall fescue is split from ryegrasses, and whether the four market categories of ryegrasses are separated into individual markets.¹ It is also not sensitive to whether a national geographic market or regional markets are adopted. Nevertheless, PGW Seeds submits it would be appropriate to consider a single, national market encompassing tall fescue and all categories of ryegrass.

Product dimension*Demand side factors²*

- 4 Tall fescue and each of the ryegrass categories have different characteristics and by the point of final decision a farmer will have identified a particular variety within a category to purchase. But prior to that, e.g. at the stage of planning pastures and rotations, tall fescue and ryegrasses perform a similar function and present as an overlapping continuum based on longevity. Most farmers, farming on land with variable soils or climate, will be considering all or many of the categories in the course of that process.
- 5 A key trade-off along the continuum of pasture longevity is between persistence and quality (including how quickly the seed will establish). Tall fescue is the most persistent, but is slower to establish at low soil temperatures, followed by perennial ryegrass, with annual ryegrass the highest quality and quickest to establish, but with low persistence.
- 6 The choice made in a particular instance will depend on climate (which has regional characteristics), soil type and fertility, the extent to which the desired pasture is on hill country or flat land, likely weather conditions, which other crops and pastures are also present and will be fed around the same time, the type of stock being grazed, price, animal safety and pest control characteristics, the presence of particular endophytes (see below), expert advice and personal preference.
- 7 The Commission has also indicated that the different endophyte that each variety is inoculated with may justify distinguishing them.³ However, choices regarding whether to use endophytes or which endophyte to use form a matrix with the other factors described above. Further, no one endophyte provides a perfect answer to animal safety and pest protection; different endophytes meet different needs and preferences. In some cases nil endophyte will also be considered in the mix of factors, but whether there are separate markets for products with and without endophytes is immaterial given only small volumes of the latter are sold (PGW Seeds estimates approximately []%). To consider the use of different endophytes sufficient to create separate markets is artificial.

Supply side factors

- 8 PGW Seeds submits that there is, from a supply perspective, a high degree of substitutability between forage seed varieties. This is because a supplier can, without large incentive, fairly readily and at a low cost, switch between supplying

¹ LoI at [12].

² LoI at [11]-[12].

³ LoI at [11].

different forage seed varieties.⁴ Furthermore, major suppliers currently participate in the supply of most or all of tall fescue and all varieties of ryegrass.

Geographic dimension

- 9 PGW Seeds considers the relevant seed markets are national in scope.⁵
- 10 As set out above, when selecting forage seed, a farmer will consider a range of factors; the geography (which in any event varies within regions) and climate of the region are only two of those. Therefore, while certain locations may tend to favour certain varieties more than others, all seed types are available, and purchased, in all regions. Furthermore, drought or other conditions can change the tendencies of a region in a particular season.
- 11 All the major seed companies operate nationally. [.] Seed companies in many cases deal with a single national retailer buyer, rather than selling by individual branch or region.

Competition assessment (unilateral effects – ryegrass seeds)

Production and supply of ryegrass seeds

- 12 DLF has been in the New Zealand market for approximately 14 years. As described in the following section, it has not been successful in developing novel ryegrass endophytes and is not likely to become so.⁶
- 13 DLF has not been particularly successful in developing high performing ryegrass cultivars for New Zealand conditions, such that it provides a material competitive constraint in the market.⁷ The trend in the market appears to be that DLF's competitiveness is diminishing rather than increasing. For example, DLF's ANSA AR1 cultivar was ranked four stars in the 2017/18 Dairy Forage Value Index,⁸ but [.]⁹ [.]
- 14 Accordingly, the proposed acquisition would not detrimentally affect competition for the production and supply of ryegrass seeds.

Endophyte R&D

- 15 The proposed acquisition would not have a material effect on competition among endophyte R&D programmes. That is because:
- 15.1 Contrary to the Commission's understanding, PGW Seeds understands DLF does not have an endophyte R&D programme of any materiality and there is

⁴ See *Pyne Gould Guinness Limited and Wrightson Limited* (2005) (Decision 556) at [172].

⁵ LoI at [15].

⁶ LoI at [21].

⁷ LoI at [21].

⁸ Refer https://www.dairynz.co.nz/media/5788933/dnz30-023-forage-value-index-handbook_2017-2018.pdf (accessed 12 December 2018) at 22-25.

⁹ [.]

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not a real chance this will change in the foreseeable future absent the proposed acquisition.¹⁰ Specifically, PGW Seeds understands:

(a) DLF did not develop its endophytes. Rather, PGW Seeds understands [

] and they do not provide evidence of DLF's current capacity to develop further endophytes.¹¹

(b) DLF does not have a material endophyte R&D programme in New Zealand, or anywhere else. This is not surprising. Climactic conditions in Northern Europe mean that (with certain exceptions – see paragraph 15.3 below in relation to France) endophytes are mostly far less effective there. They are also often prohibited, or considered "bio-pesticides" whose use is restricted. Lastly, understanding endophytes' animal effects is less important in areas such as Northern Europe where animals are largely fed via a "cut and carry" system (where animals are fed indoors, off the pasture) rather than by having the animals graze the pasture directly (meaning animal effects present more strongly because endophyte toxins are ingested in greater quantities when plants are grazed intensively).

(c) Specifically, PGW Seeds understands that DLF's "endophyte programme" is very small. PGW Seeds believes the AgResearch team developing endophytes is much larger: it comprises [] FTE engaged in [

], and another [] FTE engaged in []. PGW Seeds itself (as distinct from AgResearch) employs another [] FTE in endophyte research, and has a total of [] FTE engaged in R&D. Barenbrug Agriseeds has a comparable programme, described below at paragraph 15.2. As such, PGW Seeds does not consider it likely that DLF would develop successful endophytes in the absence of the proposed acquisition. And as the Commission notes,¹² there is a significant lead time from initiating endophyte R&D to commercialisation.

15.2 There is strong competition between PGW Seeds and Agriseeds in terms of R&D in relation to endophytes and the proposed acquisition will have no effect on that competition.¹³ As the Commission has noted, Barenbrug Agriseeds' owner Barenbrug (through Agriculture Victoria Services, **AVS**) has the strongest and most successful competing endophyte programme. Barenbrug Agriseeds and AVS co-invest through Co-operative Research Centres (**CRCs**), which are research partnerships between the Australian federal government and private partners. PGW Seeds understands the relationship began in the mid-2000s, and the funding mix has shifted over time and across several CRCs. Most relevantly the Dairy Futures CRC (2010-2016) identified a

¹⁰ LoI at [18], [21] and [29].

¹¹ LoI at [23] and [29].

¹² See LoI at [32].

¹³ LoI at [24]-[25].

number of novel endophytes that moved to commercial trials. The Dairy Futures CRC was succeeded by an entity called DairyBio. That initiative focusses on ryegrass breeding techniques to improve yield, persistence and quality. It involves collaboration by (among others) La Trobe University, Dairy Australia, Dairy NZ, the Victorian government, Barenbrug Agriseeds and Heritage Seeds (Barenbrug's Australian subsidiary).¹⁴ Furthermore, the research resources of its part-owner Dow give Barenbrug Agriseeds the potential to become even more competitive in the future.

15.3 In contrast to DLF, PGW Seeds considers that Seed Force may well become an important force in endophyte R&D in the foreseeable future.¹⁵ Seed Force entered the market slightly after DLF, in 2006, and is 40% owned by French company RAGT.¹⁶ This accords Seed Force the benefits of RAGT's sophisticated and well-resourced programme based at the University of Toulouse. Although as noted above endophytes are less important in Northern Europe, there are certain areas of Europe in which they could be beneficial, where the climate is similar to New Zealand and cattle are grazed outside. Conditions in these areas may well allow for endophytes to be translatable to the New Zealand market, and research centres in Southern Europe, including at the University of Toulouse, are taking an interest in endophyte research. PGW Seeds considers RAGT's programme could also explain the success of [

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16 Further, the proposed acquisition would not have any adverse effect on competition in the supply of perennial ryegrass that is inoculated with existing endophytes:¹⁸

16.1 DLF's current endophytes, specifically the Happe and Edge endophytes, should not be considered important current or potential competitors. PGW Seeds considers the Commission has overstated the success of DLF's commercialisation of its endophytes in New Zealand.¹⁹ [

¹⁴ Refer www.farmweekly.com.au/story/4014176/dairy-crc-leaves-legacy-of-improvement/ and <http://dairybio.com.au/wp-content/uploads/2017/09/DairyBio-brochure.pdf> (each accessed 11 December 2018).

¹⁵ LoI at [30].

¹⁶ See <https://www.seedforce.co.nz/our-story/> and <https://www.seedforce.co.nz/ragt-partnership/> (each accessed 13 December 2018).

¹⁷ [].

¹⁸ LoI at [21]-[22].

¹⁹ LoI at [29].

]. As the Commission is aware, the 2017/18 Dairy Forage Value Index ranked DLF's 24 Seven Edge cultivar in the top bracket;²⁰ [

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17 The proposed acquisition will not have any effect on suppliers' ability to access existing endophytes.²² Furthermore, access to an endophyte R&D programme is not required in order to compete effectively in ryegrass supply in New Zealand:

17.1 AR1 is available to any seed supplier to license, and this will continue to be the case regardless of the proposed acquisition. In this regard, it is worth noting that the Commission significantly under-states the importance of AR1 as an ongoing competitive constraint both now and into the foreseeable future:

- (a) A farmer's decision to use a particular endophyte involves a trade-off between agronomic robustness, pest control and the endophyte's effect on animals. No other endophyte is more effective on all of these fronts to the point of rendering AR1 obsolete (e.g. AR37 has some trade-offs such as potentially more animal health issues).
- (b) Each PGW Seeds cultivar that has been released with AR37 has continued also to be produced containing AR1, indicating that PGW Seeds considers there continue to be many instances in which AR1 is preferred. PGW Seeds' [

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- (c) The top end of the market contains cultivars inoculated with AR1. For example, [

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²⁰ LoI at [22].

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²² LoI at [26] and [28].

²³ Refer also <https://www.agricom.co.nz/Products/Ryegrass>, which indicates that all Agricom perennial and hybrid endophytes available with AR37 are also available with AR1.

²⁴ [

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- (d) While PGW Seeds can of course not speak for any other endophyte R&D programme, despite ongoing effort and investment, the [

]. As a result, in PGW Seeds' view, AR1 may well remain highly relevant in the market for a number of years to come.

- 17.2 The proposed acquisition will not affect the availability of the AR37 endophyte. As the Commission is aware, AR37 is currently licensed to Barenbrug Agriseeds. This position would not be affected by the proposed acquisition. To date, AR37 has not been licensed to other players. [

]. This dynamic, and existing and future access to AR37, will be wholly unaffected by the proposed acquisition.

- 17.3 Barenbrug Agriseeds has licensed its NEA2 endophyte to Cropmark. That endophyte is inoculated into a high-performing cultivar, Raider NEA2, which is [].²⁵ The proposed acquisition will of course have no effect on the availability of Barenbrug Agriseeds' endophytes to license.

Countervailing power

- 18 The countervailing power of seed retailers is material.²⁶ As noted in DLF's clearance application, the success of a seed depends heavily on the loyalty the retailer enjoys with the ultimate customer, the farmer.²⁷ Retailers occupy a value-add position in the New Zealand pastoral industry, assisting farmers both in-store and on-farm. Where there is a strong relationship with a farmer, retailers are able to influence farmer decisions, and (in order to maintain this relationship) are very responsive to farmer needs.
- 19 Retailers tend to switch between seed companies and this will continue to be the case following the proposed acquisition. The significance of the retailers as customers of the seed companies (given the volumes they purchase), their ability to switch and the importance to the retailers of their relationship with farmers mean retailers have both the ability and incentive to command competitive terms from seed companies. Furthermore, two of the largest retailers, FarmSource (owned by

²⁵ [].

²⁶ LoI at [33].

²⁷ Paragraph 230.

Fonterra) and Farmlands (also a farmer-owned co-operative), are ultimately farmer-owned, meaning they have an even closer connection with farmers' interests.

- 20 Retailers also have the ability, and would have the incentive, to obtain seed imports independently if prices became uncompetitive. PGW Seeds understands that FarmSource, owned by Fonterra, considered importing seed into New Zealand around 2009. PGW Seeds considers this to have been a credible threat, because while it did not take place PGW Seeds understands the upshot was a more satisfactory deal between FarmSource and its preferred supplier Barenbrug Agriseeds.
- 21 A seed retailer could also partner with a new entrant seed company to facilitate the seed company's entry into New Zealand and exert pressure on existing seed company competitors – see further below.

Entry and expansion²⁸

- 22 New entry as well as expansion by existing suppliers could readily constrain the merged entry following the proposed acquisition. For example, a would-be new entrant could partner initially with an existing seed retailer. The entrant could first establish a presence in products that can be brought to market quickly, in a matter of months (e.g. fodder beet, which is largely imported already, and annual ryegrasses). Given retailers tend to be customers for all seed types, this would immediately result in real price pressure on existing seed companies across products. A commercial perennial ryegrass inoculated with AR1 could follow last (and could be on the market within three years) at which point the seed retailer could bypass existing seed companies completely.
- 23 PGW Seeds' understanding is that [] has shown interest in entering the New Zealand market, and would be likely to respond positively if approached by a New Zealand retailer looking to exert leverage on (and potentially bypass) existing seed companies.

AgResearch and PGW Seeds' relationship

- 24 PGW Seeds has provided a separate note describing its relationship with AgResearch, specifically its subsidiary Grasslanz Technology Limited (**GTL**). The only impact of the proposed acquisition on this relationship would be [].²⁹

Industry bodies

- 25 The proposed acquisition would not result in any changes in decision-making power on industry bodies.³⁰ As such, the proposed acquisition would have no adverse effect on competition in this regard. There are two main industry bodies, the NZPBRA and the New Zealand Grain & Seed Trade Association Inc (**NZGSTA**). PGW Seeds encloses copies of the rules of each, as provided to PGW Seeds by the administrative office for both bodies.³¹

²⁸ LoI at [30] to [32].

²⁹ LoI at [34].

³⁰ LoI at [35]-[36].

³¹ The Seed Industry Council employs an executive officer and an administrator for both bodies.

NZPBRA

- 26 NZPBRA is a stakeholder body representing commercial seed companies. It aims (among other things) to develop and promote forage and arable sector research programmes, to advocate for the industry and its scientific advancement, and to ensure the regulatory environment is safe, fair and practical. It also focuses on seed company intellectual property, for example by scrutinising the Plant Variety Rights Act 1987 regime and ensuring careful management of various trialling programmes.
- 27 The NZPBRA meets annually: its president and vice-president are appointed every second year, and in alternate years the chairpersons of its technical committees are appointed.³² The Council holds quarterly meetings as the executive body, and is also able to call special meetings. The types of decision made by the Council include approving the programmes and recommendations of technical committees.
- 28 At meetings, members each have one vote, and decisions are carried by majority vote.³³ Members unable to attend a meeting may appoint a proxy to vote on their behalf. If votes are equal, the president (or, if the president is not there, whoever is elected chair of the meeting) has a casting vote.³⁴
- 29 Currently, PGW Seeds and DLF are two of the 10 members. They each pay a fee and have the right to appoint a representative to the governing body Council. The PGW Seeds subsidiary Agricom is a "subsidiary member", with the right to attend and speak at meetings, but no voting rights and no ability to appoint a Council member.³⁵ The key reasons for such a brand to have its own subsidiary membership are to ensure NZPBRA continues to be funded adequately and to be represented on technical committees (see further below at paragraph 31).
- 30 PGW Seeds' understanding is that following the proposed acquisition, the merged entity would pay one subscription as a full member. In other words, PGW Seeds' and DLF's current two votes will become one. While this is not specified in the rules, it is an established practice, and consistent with the position that followed each of the Pyne Gould Guinness/Agricom and Pyne Gould Guinness/Wrightson mergers in 2005. It may be that, as occurred for Agricom following the 2005 merger, the merged entity may continue to have representation for its DLF brand as a subsidiary member. However, as above (and see further below), subsidiary members have no voting rights at the executive level.
- 31 NZPBRA also runs several technical committees. The relevant two are:
- 31.1 *The Forage Technical Committee.* This committee administers forage trials in the National Forage Value Trial (**NFVT**) trialling system. It will organise a trial (in terms of co-ordinating where it is held, who wishes to enter a cultivar and who will run it day-to-day) and appoint committee members to monitor its progress. The committee's members are technical staff appointed by each Council member; unlike at Council level, subsidiary members are able to appoint a representative to a technical committee (as those brands also

³² These appointments take place based on a structured rotation (refer enclosed email from Thomas Chin, general manager for NZPBRA and NZGSTA).

³³ Rules of the New Zealand Plant Breeding and Research Association Incorporated (enclosed); refer Rules 13(d) and 20(a). There is one exception to majority decision-making: a decision to change the rules requires a special resolution of 75% of members (Rule 27).

³⁴ NZPBRA Rule 13(b).

³⁵ Refer <https://www.nzpbra.org/our-members/>.

identify cultivars they wish to enter into trials). The committee also provides expert advice on technical matters on forage and its utilisation, and advocates for forage improvements.

- 31.2 *The Endophyte Technical Committee* was more recently established, to ensure a single metric in the market for comparing different endophytes. It has a broadly similar function to the Forage Technical Committee, but focuses on evaluating the claims made in relation to endophytes. Members and subsidiary members may appoint a representative, which again tend to be technical rather than commercial staff. Its chair is a Dairy NZ representative. The committee meets to assess whether claims as to endophyte efficacy can be substantiated with replicated trial information.
- 32 Monitoring of a trial addresses both the trial's overall quality and the performance of each separate entry. While the members appointed by a committee are required to undertake monitoring, in practice any party with a cultivar in a trial can inspect progress and remain up-to-date with evaluations.
- 33 It is worth noting that the results of the NFVT trials are used in Dairy NZ's Dairy Forage Value Index. To calculate the index, Dairy NZ inputs forage trial result data into its own protocols, which then determine a performance ranking and put a dollar value on that ranking.³⁶ Dairy NZ's chairing of the Endophyte Technical Committee contributes to market confidence that the claims published in the endophyte table produced by the Endophyte Technical Committee have been subjected to a consistent level of scrutiny. While Beef and Lamb New Zealand does not have the same presence as Dairy NZ, it also takes a high level of interest, given the results are equally important to its own farmers.
- 34 On both technical committees, decisions are typically made by consensus. In practice, following a trial or inspection, the technical committee will write a recommendation to the Council in relation to the results. Any disagreements at committee level during or after the trial are escalated to the Council for resolution. This means the merged entity would be unable to remove a cultivar from a trial, or make a particular finding in relation to a cultivar or endophyte, without either unanimous agreement at committee level (which, clearly, it could not obtain by itself), or a majority decision of the Council (over which it would have no positive or negative control).
- 35 As such, the proposed acquisition would bring about no change to the NZPBRA that could result in any reduction in competition, such as would arise from blocking suppliers from access to trials, unfairly promoting the merged entity's products or distorting claims or trial results.
- New Zealand Grain & Seed Trade Association Inc. (NZGSTA)**
- 36 NZGSTA is a trade body that advocates on seed industry issues and works with domestic trade and research bodies, and its international counterparts, to grow trade in key markets and deals with trade rules as a member of the International Seed Federation.³⁷ The work carried out and decisions made by this body are very unlikely to have any potential to affect competition in any market in New Zealand.

³⁶ Refer to the Dairy Forage Value Index document (above n 21) for an explanation of how these "performance value" and "economic values" are calculated.

³⁷ Refer <https://www.nzgsta.co.nz/about-us/> (accessed 13 December 2018).

For example, two of its current key priorities are [].

- 37 NZGSTA has more than 80 members, whose activities span R&D, seed production, marketing, processing, distribution, and testing. Although subscription costs vary according to the size of the member (and PGW Seeds []), every member receives one vote.³⁸
- 38 Each member appoints a representative to vote on its behalf at meetings. There is an annual meeting to discuss constitutional matters, and to vote on the member representatives for the Executive Council (see below). Supplementary meetings may be called by the Executive Council or by any 10 members. Resolutions (other than those to change the rules) are passed by a simple majority of members, and the president has a casting vote if votes are equal.³⁹ Resolutions to change the rules require a two-thirds majority of allocated votes.⁴⁰
- 39 Both PGW Seeds and DLF are NZGSTA members. Following the proposed transaction, PGW Seeds understands that the merged entity will comprise one member, and have one vote. Regardless, the large number of members also means that PGW Seeds has no ability now, and would not have any ability following the proposed acquisition, to influence voting outcomes.
- 40 Decision-making power in relation to NZGSTA decisions rests with the Executive Council, which comprises the president, the immediate past president, the chair of each of three subcommittees (see below at paragraph 41), and three other member representatives (called General Councillors), who are nominated by members and elected by a majority of votes.⁴¹ The Executive Council makes decisions by simple majority. If PGW Seeds were to hold a majority on the Executive Council, this would only happen with the support of members, and PGW Seeds would have no power to secure that outcome, both now and following the proposed acquisition.
- 41 Three subcommittees (referred to in the NZGSTA rules as “business groups”) sit below the Executive Council, for forage and turf, vegetable seeds, and grains. The subcommittees act as focus groups within the organisation, whose priorities, needs and concerns are fed back to the Executive by the relevant subcommittee chairperson, who (as above) sits on the Executive. Subcommittee chairpersons are elected once every two years by members of the subcommittee (where each member gets one vote per subcommittee in which they have an interest, and decisions are made by simple majority)⁴². Following the proposed acquisition the merged entity would have one vote, not two, on all relevant sub-committees. The proposed acquisition will not result in the merged entity having any positive or negative control over the subcommittees, or any disproportionate influence (which is the same as the position ahead of the proposed acquisition).

³⁸ Refer email from Thomas Chin, above n 32.

³⁹ NZGSTA Rule 5(f)(vi) (refer also 5(f)(iii) and (iv), which allow for the appointment of a proxy).

⁴⁰ NZGSTA Rule 5(f)(v).

⁴¹ NZGSTA Rules 6(a) and 6(b).

⁴² NZGSTA Rule 6(b)(iii).

Coordinated effects⁴³

42 In terms of the factors in the Commission's mergers and acquisitions guidelines:

42.1 Seed supply in New Zealand is not vulnerable to coordination:

- (a) In New Zealand, seeds are highly differentiated products and farmers are very sophisticated buyers. The market is characterised by a high degree of innovation. Pricing is set by individual cultivar and tends to reflect innovation, and other quality characteristics unique to the cultivar. Where e.g. a new and improved cultivar enters the market the supplier tends to expect a premium, which tends to reflect the new features that are being brought to market. The supplier will attempt to command that premium for as long as possible. Further, even cultivars that have been on the market for a longer period will be priced individually to convey their relative value in terms of quality characteristics. In this context there is little scope (or incentive) to coordinate on price.
- (b) Demand is variable and difficult to predict, in particular, because it responds to climate and weather changes. PGW Seeds considers demand can move []% from year to year, depending on e.g. whether weather conditions result in the harvest being early or late. Even if the climate and weather changes are accurately predicted, individual farmers' decisions in response to those changes do not follow predictably.
- (c) Changes in demand affect different suppliers differently. Because of long production lag times, suppliers tend to make predictions about demand approximately [] out. Given the complex and unpredictable factors that affect demand, suppliers will inevitably make different predictions. Accordingly, when presented with the demand profile in any particular season, suppliers will have different incentives e.g. some suppliers might have predicted high demand for annual ryegrass but conditions favour perennial ryegrass, leaving those suppliers with surplus of the former and insufficient supply of the latter. Suppliers who have correctly predicted the demand profile will be in a position to supply without adverse impact on their inventory, and there is no incentive for them to coordinate.
- (d) Competitors are of different sizes and cost structures.
- (e) Firms are not interrelated through association or cross-partial ownership.
- (f) There are some interactions between competitors at industry bodies, and through some transactions (e.g. where they source cultivars from each other to make up seed mixes), but regardless for the reasons above there are not incentives to coordinate. Similarly, while retail price lists can be observed, given the incentives arising out of the high degree of innovation and demand variability this creates little risk (and

⁴³ LoI at [37].

of course has the upside of providing transparency to farmer customers).

42.2 The proposed acquisition would not change the conditions in seed markets so that coordination would be more likely, more complete or more sustainable:

- (a) None of the market structure factors noted in paragraph 38 of the LoI would be altered in any way by the proposed acquisition.⁴⁴
- (b) As is evident from its conduct and level of success in the market, DLF is not a particularly aggressive or destabilising competitor.
- (c) None of the factors described above at paragraph 42.1 would be affected by the proposed transaction. In particular, Barenbrug Agriseeds and PGW Seeds' incentive to coordinate would not increase, given those companies' differing positions in markets offshore, differing types and levels of R&D investment and the different predictions they will continue to make about future climate, weather and other demand conditions.

⁴⁴ LoI at [39].

SCHEDULE OF DOCUMENTS PROVIDED

- 1 []
- 2 [].
- 3 [].
- 4 []