

**NOTICE SEEKING CLEARANCE OF A BUSINESS ACQUISITION PURSUANT TO SECTION 66 OF  
THE COMMERCE ACT 1986**

10 February 2020

The Registrar  
Business Acquisitions and Authorisations  
Commerce Commission  
PO Box 2351  
WELLINGTON

Pursuant to s 66(1) of the Commerce Act 1986 notice is hereby given seeking **clearance** of a proposed business acquisition.

**EXECUTIVE SUMMARY**

- 1.1 Turners & Growers Fresh Limited ("**T&G**") seeks clearance to acquire, either directly or through a nominated related company, 100% of the shares in Freshmax NZ Limited ("**Freshmax**") (the "**Acquisition**") (together, the "**Parties**"). Freshmax is a wholly owned subsidiary of Freshmax NZ Group Limited ("**FNZG**") and is a member of the Freshmax Group of companies which comprises of Freshmax Group Pty Limited and all of its direct and indirect subsidiaries (the "**Freshmax Group**"). Freshmax represents the Freshmax Group's New Zealand domestic focused operations.
- 1.2 T&G grows, imports and wholesales fresh produce in New Zealand and exports locally grown fresh produce. It proposes to acquire Freshmax's business for importing and wholesaling fresh produce domestically, its supply of cool-chain distribution services to large retailers, and its supply of integrated produce procurement and packing services to meal-kit businesses.
- 1.3 Prior to a recent restructure of the wider Freshmax Group, Freshmax also separately grew produce in its own orchards and primarily exported that local produce. Freshmax's IP varietal rights business, export business (including packing, growing and grower arrangements) and head office functions are not part of the Acquisition - they have been transferred to other members in the Freshmax Group as part of an internal restructure, and will continue to operate independently to T&G post-Acquisition.
- 1.4 T&G's and Freshmax's businesses are complementary in many respects. [ ]. In this respect T&G's model is similar to its closest competitor [ ]. In contrast, [ ] of Freshmax's earnings are attributable to the wholesale supply of fresh produce.
- 1.5 The remainder of Freshmax's business is focussed on:
- (a) supplying integrated produce supply and value-add packing and distribution services to meal-kit delivery businesses (such as My Food Bag) ([ ]); and
  - (b) providing cool-chain distribution services, [ ]. In contrast, T&G's presence in this sector is minor, servicing just a [ ].
- 1.6 Accordingly, while there are some areas where T&G's and Freshmax's businesses overlap, the wider complementarity of the businesses, and the competitiveness of the markets in which the Parties operate, mean that the Acquisition will benefit both customers and suppliers. Ultimately, both Parties are effectively intermediaries, so if their services do not add value, customers and suppliers will simply bypass their services by using other providers or through direct contracting. T&G is therefore confident that the Acquisition will not give rise to any competition issues in New Zealand. This view is consistent with the general market reaction the Parties have received to the announcement of the Acquisition.
- 1.7 The parties will, to an extent, overlap in the market for the wholesale supply of fresh produce in New Zealand, but it is not material. Post-Acquisition, T&G would have a market share of just [ ], with the Acquisition giving rise to an increment of just [ ].<sup>1</sup> Even this overstates the presence of T&G as it includes fresh produce sold by T&G on a consignment basis as agent for growers. When these sales are excluded, post-Acquisition, T&G would have a market share of just [ ].<sup>2</sup> The Parties' combined market share in this non-concentrated market is well below the Commerce Commission's concentration indicators, due to the number of small and large competitors, and there is of course also strong countervailing power of the supermarkets and other large buyers in that market, which even smaller buyers benefit from.

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<sup>1</sup> Based on 2018 value.

<sup>2</sup> Based on 2018 value.

1.8 Fundamental to any analysis of this market is that fresh produce is a highly perishable product. That drives a dynamic and highly competitive market. Market participants, at all levels of the supply chain, make decisions on a day-to-day basis. Generally speaking, growers (both large and small) are not committed to supplying any given wholesaler and regularly shift volumes to those wholesalers who are prepared to offer them the best price. Retailers purchase fresh produce on a daily basis and are similarly not committed to purchasing from any given wholesaler. Retailers (both large and small) shop around every day and purchase from the wholesaler who offers the best quality produce for the best price.

1.9 Wholesalers are in this context effectively price takers, obliged by the forces of supply (controlled by growers) and demand (controlled by retailers as a proxy for final consumers) to buy and sell at the price that will clear the market. Any attempt to manipulate the market will immediately be unprofitable. Retailers (small and large) will react by purchasing volumes from other wholesalers and/or reducing the volume of that produce category purchased and reallocating shelf space at the retail level to other produce categories. Any wholesaler that attempted to increase prices will therefore be left with excess produce that will need to be shifted the following day at a lower price and/or growers will reallocate future volumes to other wholesalers who did sell the produce at a market clearing price.

1.10 Fundamentally, fresh produce wholesalers exist at the behest of growers and retailers. An inefficient wholesale level of the supply chain simply increases the incentives for growers and retailers to bypass wholesalers and contract directly with one another.

1.11 The Parties do not consider that there is any basis to define the market any narrower than the national wholesale market for all fresh produce. However, even if aggregation is assessed on a narrower basis, no competition concerns arise in the wholesale supply of fresh produce,<sup>3</sup> as:

(a) based on conservative estimates of total market size and the size of various produce categories, acknowledging that publicly available figures do not incorporate market data from dozens of smaller industry participants, there is no produce category in which T&G could realistically have more than approximately a [ ] share of supply post-Acquisition.<sup>4</sup> It will continue to be constrained by numerous other vigorous competitors, that sell their own grown or traded produce, including MG Marketing, Fresh Direct, Seeka Fresh, Primor Produce, Southern Produce, Morgan Laurenson, Chevalier Produce, Leaderbrand Produce, Latitude Produce, Total Produce, Vision Fresh Produce and numerous others;

- (b) [ ]:

  - (i) [ ];
  - (ii) [ ];
  - (iii) [ ] and
  - (iv) [ ].

Accordingly, customers and growers have zero switching costs (with volumes and prices set on a daily basis) and can and do switch between wholesalers in response to price and service quality. There are many examples of this occurring, as set out in this application;

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<sup>3</sup> Note that shares for individual produce categories are provided on a volume basis for 2018.  
<sup>4</sup> Taking into account only overlapping produce categories and where produce sold by T&G on a consignment basis is rightly excluded from T&G's market share.

- (c) the increment arising from Freshmax's supply (even using the conservative assumptions of total market size described in (a) above, [                    ]), is no more than 10% in all produce categories;<sup>5</sup>
- (d) there are no material barriers to entry or expansion in the market for the wholesale supply of fresh produce. As evidenced by the several new entrants who have commenced nationwide wholesale supply of fresh produce in recent years (including Seeka Fresh and Latitude Produce in 2019, Ridrey Produce in 2018, and Total Produce in 2016), wholesalers are easily able to procure goods from local and international growers, and the core facilities required for wholesaling are the same across virtually all produce categories;
- (e) in addition to the wide number and range of competitors in the market, T&G will also continue to be constrained by the strong countervailing power of its wholesale customers (including the major supermarket chains), who, when intermediaries fail to add sufficient value to the supply chain, can and do bypass T&G and its wholesale competitors, either by self-supply or procuring significant and increasing quantities of produce directly from growers or importers. In recent years several growers have chosen to supply produce directly to retailers, bypassing wholesalers altogether, including [                    ]. Wholesalers such as the Parties rely on a small number of large, sophisticated customers for a significant portion of their revenue. For example, [                    ] of T&G's wholesale revenue is attributable to [                    ]. Similarly, [                    ] of Freshmax's wholesale revenue is attributable to [                    ]. The ease with which these customers can procure directly, and growers can meet that demand, will keep T&G's offering competitive post-Acquisition;
- (f) smaller independent produce retailers also have options that will continue to constrain wholesalers, including T&G. Independent produce retailers show a low degree of brand loyalty to any of the wholesalers and regularly shop around to obtain the best value. Independent produce retailers understand the market dynamics and realise that wholesalers are under pressure to sell their stock before it goes off. Independent produce retailers use this dynamic, and the credible threat of buying elsewhere, to constrain wholesalers. In addition some independent produce retailers have started to form buying groups to allow them to obtain even more competitive offers from wholesalers;
- (g) growers (large and small) sometimes prefer to sell directly to retailers rather than selling via wholesalers, to ensure certainty of demand and avoid the margin charged by wholesalers. These growers can, and do, bypass wholesalers, selling directly to supermarkets and other retailers or to end-customers via local markets; and
- (h) fundamentally, fresh produce wholesalers ultimately operate as intermediaries between growers and retailers. Regardless of the size of the customer or supplier, wholesalers must continually work hard to deliver to both sides of the market and add value to the supply chain. Any attempt by wholesalers to try and increase their own margins or decrease service levels will merely exacerbate what is already a trend of growers and retailers bypassing wholesalers altogether. The opportunity presented by this Acquisition is to allow the combined business to deliver a higher quality of service using the Parties' combined capability, to mitigate that trend.

1.12 In the other markets where there is some overlap between the Parties, in particular:

- (a) the South Island market for contract ripening services; and
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<sup>5</sup> Where produce sold by T&G on a consignment basis is rightly excluded from T&G's market share.

(b) the national market for cool-chain distribution services,

the aggregation caused by the Acquisition will be immaterial, given [ ] in the South Island market for contract ripening services and [ ] for the supply of cool-chain distribution services. In any event, T&G will continue to be constrained in both markets post-Acquisition by several other existing competitors, low barriers to entry, the countervailing power of customers (e.g. Foodstuffs) who can and do self-supply cool-chain distribution services and significant excess capacity in the South Island contract ripening market.

1.13 T&G is therefore confident that the competitiveness of all the relevant markets will be unaffected by the Acquisition.

**PART A: TRANSACTION DETAILS****PARTY DETAILS****1. THE APPLICANT: TURNERS & GROWERS FRESH LIMITED**

- 1.1 This notice seeking clearance is given by Turners & Growers Fresh Limited ("**T&G**"). The contact details for T&G are:

Tim Clarkson/Andrew Keaney  
Director Strategy/Managing Director NZ Produce  
1 Clemow Drive  
Mt Wellington  
Auckland, 1060  
New Zealand

- 1.2 All correspondence and notices in respect of the application for T&G should be directed in the first instance to:

Nicolas Short  
Legal Counsel  
T&G Global Limited  
[            ]  
[            ]

and

Russell McVeagh  
PO Box 8  
Shortland Street, Auckland 1140  
Attention: Sarah Keene (Partner) / Bradley Aburn (Senior Associate)  
Telephone: 09 367 8133 / 09 367 8816  
Email: [sarah.keene@russellmcveagh.com](mailto:sarah.keene@russellmcveagh.com) / [bradley.aburn@russellmcveagh.com](mailto:bradley.aburn@russellmcveagh.com)

- 1.3 A corporate structure chart for T&G and its related companies is provided at **Appendix One**.
- 1.4 T&G grows, imports and wholesales fresh produce in New Zealand and exports locally grown fresh produce. It is a wholly owned subsidiary of T&G Global Limited, which is listed on the NZX<sup>6</sup> and employs 1500 people across 13 countries.<sup>7</sup>
- 1.5 T&G operates 12 trading floors across New Zealand.<sup>8</sup> T&G also operates a produce distribution network and has nine depots throughout New Zealand.<sup>9</sup> In addition to transporting T&G-owned produce, T&G provides transportation services for third-party customers & growers. T&G also undertakes a small amount of contract ripening for New Zealand customers.
- 1.6 More information about T&G is available at <https://tandg.global/>

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<sup>6</sup> <https://www.nzx.com/companies/TGG>

<sup>7</sup> <http://tandg.global/about/corporate-overview/>, at 5.

<sup>8</sup> T&G's trading floors are located in Whangarei, Auckland, Hamilton, Tauranga, Gisborne, Hastings, New Plymouth, Palmerston North, Wellington, Nelson, Christchurch and Dunedin.

<sup>9</sup> T&G's transport depots are located in Auckland, Christchurch, Hamilton, Hastings, Kerikeri, Nelson, Palmerston North, Pukekohe and Tauranga.

## 2. THE VENDOR: FRESHMAX NZ GROUP LIMITED

2.1 The contact details for Freshmax NZ Group Limited ("FNZG") are:

Andrew Common  
Chief Executive Officer, New Zealand  
Freshmax NZ Group Limited  
[ ]  
[ ]  
113a Carbine Road  
PO Box 132030  
Sylvia Park, Auckland 1644  
New Zealand

2.2 All correspondence and notices in respect of the application for FNZG should be directed in the first instance to:

Matthew Dunning QC  
PO Box 137026  
Parnell, Auckland 1151  
Telephone: 09 358 2212  
Email: [matthew@dunningqc.co.nz](mailto:matthew@dunningqc.co.nz)

and

Harmos Horton Lusk  
PO Box 28  
Shortland Street, Auckland 1140  
Attention: Greg Horton (Special Counsel) / Emma Barnett (Senior Associate)  
Telephone: 09 921 4302 / 09 921 4313  
Email: [greg.horton@hhl.co.nz](mailto:greg.horton@hhl.co.nz) / [emma.barnett@hhl.co.nz](mailto:emma.barnett@hhl.co.nz)

2.3 A corporate structure chart for Freshmax and its related companies is provided at **Appendix Two**.

2.4 Freshmax is a fresh produce wholesaler supplying produce to several national New Zealand retailers, supplying integrated produce procurement and packing services to My Food Bag, operating three distribution centres in Auckland, Palmerston North and Christchurch, ([ ]) and three trading floors in Auckland, Wellington and Christchurch. Freshmax also provides fumigation, packing, ripening, quality control and cool-store services.

2.5 Historically, and prior to a recent restructure of the wider Freshmax Group, Freshmax also operated a fresh produce export business and owned various subsidiaries that grow, harvest, pack and market stonefruit and pipfruit to domestic and export markets.

2.6 More information about the Freshmax Group is available at <https://www.freshmax.group/>

## THE PROPOSED TRANSACTION

### 3. Transaction details

#### Outline and structure of the transaction

3.1 T&G intends to acquire from FNZG, either directly or through a nominated related company, 100% of the shares in Freshmax NZ Limited (defined, as above, as "**Freshmax**") (the

"**Acquisition**"). In advance of the Acquisition, the Freshmax Group has undertaken an internal restructure of its New Zealand businesses and operations. The assets and obligations of Freshmax will comprise only those relating to the following New Zealand domestic operations after the restructure:

- (a) all contracts and arrangements for the sourcing of domestically grown fresh produce for domestic wholesale supply;
- (b) all contracts and arrangements for the importation of fresh produce for domestic wholesale supply;
- (c) the domestic sale of fresh produce, principally through Direct Category Supply and Market Trading transactions via phone, online, or on-site trading floors (as described at paragraph 6.4(a) below); and
- (d) the provision of cool-chain distribution and other value-add services (e.g. packing services), including to [ ].

3.2 For the avoidance of doubt, the following are not included as part of the Acquisition:

- (a) orchards owned and operated by other entities within the wider Freshmax Group; and
- (b) the assets or contracts relating to the export of fresh produce by FNZG and/or other entities in the wider Freshmax Group.

3.3 A corporate structure chart for T&G and its related companies post-Acquisition is provided at **Confidential Appendix Three**.

#### **Transaction documents**

3.4 A copy of the Sale and Purchase Agreement is provided at **Attachment 1**.<sup>10</sup>

3.5 Copies of T&G's internal business documents relating to the Transaction are provided at **Attachment 2**.

#### **Rationale for the merger**

3.6 The Parties have identified the Acquisition as an attractive opportunity to combine:

- (a) T&G's national growing, importation and distribution network for fresh produce; with
- (b) Freshmax's expertise in providing value-added services to customers (including integrated produce procurement and packing services to meal-kit delivery businesses and cool-chain distribution services to major retailers).

3.7 The Acquisition will deliver approximately [ ] per annum of operating cost saving synergies (including via [ ]) and, given the competitive nature of the New Zealand fresh produce industry as detailed at length below, these synergies will undoubtedly be passed on to the combined entity's customers and suppliers. In particular, the Acquisition will assist the combined entity in meeting increasing customer demand for the wholesale supply of fresh produce provided in conjunction with value-add ancillary services, which T&G [ ]. The Acquisition will therefore enable T&G to better meet customers' requirements.

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<sup>10</sup> [ ].

3.8 In addition, given the increasing focus on the export of fresh produce in New Zealand, the Parties' view is that the Acquisition (which solely relates to the domestic produce industry) will provide the economies of scale necessary, and therefore act as a catalyst for, much needed investment to drive innovation and in turn ensure the survival of the domestic wholesaling industry and also ensure that New Zealanders continue to be supplied with high quality produce. The feedback the Parties have received to date from customers on the announcement of this proposed Acquisition, supports this view.

**4. NOTIFICATION OF OTHER COMPETITION AGENCIES**

4.1 No other competition agencies are being notified regarding the Acquisition.

**PART B: COUNTERFACTUAL****5. COUNTERFACTUAL**

- 5.1 From T&G's perspective, if the Acquisition does not proceed, it is likely that [ ]. However, T&G notes that businesses in the wholesale segment of the New Zealand fresh produce industry face increasingly challenging conditions, particularly due to the growing trend of retailers and growers bypassing the wholesale level altogether and dealing directly with each other, together with rising business costs. [ ].
- 5.2 From Freshmax's perspective, if the Acquisition does not proceed, [ ].
- 5.3 Although the most likely counterfactual is [ ], given that no different competition issues are likely to arise, this application proceeds on the basis of the status quo as the relevant counterfactual, which is likely to be a conservative approach.

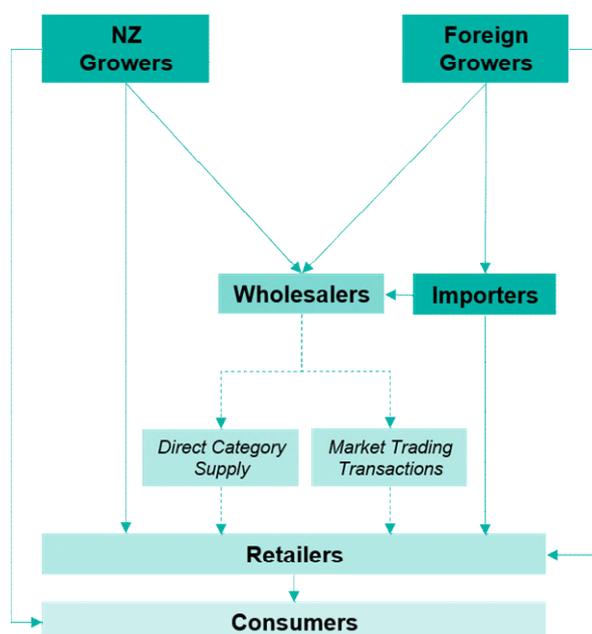
## PART C: THE INDUSTRY

## 6. BACKGROUND TO THE INDUSTRY

6.1 The New Zealand fresh produce industry is highly fragmented with many alternative routes connecting growers with the final consumers and numerous competitors at each level of the supply chain. Given the perishable nature of fresh produce, market participants must work quickly and efficiently to get the produce from the grower to final consumer whilst the product remains fresh. The fast-moving nature of these markets means that foregoing a sale today results in a deterioration of the quality of the product, making it harder to sell tomorrow. This dynamic acts as a natural constraint on the ability of growers, wholesalers and retailers to exercise any hypothetical notion of market power that may exist.

6.2 A diagram illustrating the fresh produce industry supply chain is set out below at Figure 1.

Figure 1 – Diagram of the New Zealand fresh produce supply chain



6.3 Fresh produce consumed in New Zealand is either:

- (a) grown in New Zealand; or
- (b) imported from overseas growers,

depending on the category of produce and season.

6.4 New Zealand-based growers and importers then sell to:

- (a) **wholesalers**. These wholesalers then either sell fresh produce to retail customers via:
  - (i) ongoing supply relationships with customers (major supermarkets, major restaurant chains, food service wholesalers, etc) ("**Direct Category Supply**"). While the Parties' Direct Category Supply relationships with

customers are ongoing, the quantity supplied to each customer is set daily (rather than at the commencement of the arrangement); and

- (ii) one-off purchases, which can occur either:
  - (aa) remotely, with retail customers making orders online or over the phone, and that produce being delivered to the customer; or
  - (bb) on wholesale trading floors. Trading floors are physical locations where registered purchasers are able to inspect produce, negotiate price and purchase on-site,

(together "**Market Trading Transactions**").

For the avoidance of doubt, while auctions were once used in the fresh produce industry, this practice ceased decades ago. Accordingly, physical trading floors are not analogous to the flower auctions that were the subject of the Commission's investigation in UFG / Floramax. Physical trading floors only play a material role in the wholesale competitive dynamic in the Auckland region, where customers frequently purchase produce by physically visiting a trading floor. Outside of Auckland, including in Christchurch and Wellington where the Parties both have on-site trading floors, Market Trading Transactions are primarily conducted online or by phone. Table 1 to Table 3 below provide the Parties' estimates of the split of their Market Trading Transactions based on sales method.

*Table 1  
Breakdown of Market Trading Transactions in Auckland by sales method*

	T&G			Freshmax
	2017	2018	2019	General estimate <sup>11</sup>
Phone	[ ]	[ ]	[ ]	[ ]
Online	[ ]	[ ]	[ ]	[ ]
Physical attendance	[ ]	[ ]	[ ]	[ ]

*Table 2  
Breakdown of Market Trading Transactions in Wellington by sales method*

	T&G			Freshmax
	2017	2018	2019	General estimate
Phone	[ ]	[ ]	[ ]	[ ]
Online	[ ]	[ ]	[ ]	[ ]
Physical attendance	[ ]	[ ]	[ ]	[ ]

*Table 3  
Breakdown of Market Trading Transactions in Christchurch by sales method*

	T&G			Freshmax
	2017	2018	2019	General estimate

<sup>11</sup> Note that Freshmax does not keep any records of the mode of transaction for Market Trading Transactions. Table 1 to Table 3 provide Freshmax's best estimate of the split of their transactions. For Freshmax sales by phone also includes sales by email.

<b>Phone</b>	[ ]	[ ]	[ ]	[ ]
<b>Online</b>	[ ]	[ ]	[ ]	[ ]
<b>Physical attendance</b>	[ ]	[ ]	[ ]	[ ]

- (b) **retailers**, including national supermarket chains, meal-kit delivery businesses, independent supermarkets, smaller fruit and vegetable shops, food service customers and restaurants. Growers or importers can and do sell directly to retailers, either by:
  - (i) dealing directly with the retailers; or
  - (ii) selling via wholesalers, with those wholesalers acting as agent to facilitate the sale between a grower / importer and a retailer. The wholesaler in these arrangements is compensated via commission on the sale price. [ ]].
- (c) **consumers**, via local markets for example.

6.5 There are several ancillary services that accompany this core supply chain, including:

- (a) **contract ripening services**, which involve using purpose-built ripening facilities, typically close to retailers' premises, to ripen produce that has been picked in an unripened state. These services are typically used for avocados and bananas, given that they:
  - (i) can be picked in an unripened state; and
  - (ii) are optimally transported in an unripened state, given they are fragile and easily damaged once ripe.

These services are primarily provided to larger retailers (such as [ ]) and grower-marketers. Freshmax only has a [ ] in the supply of contract ripening services in New Zealand. From a supply-side perspective there is significant excess capacity in the market (approximately [ ] of contract ripening facilities are currently unutilised), which means that suppliers compete aggressively to win contracts to maximise utilisation of their facilities;

- (b) **cool-chain distribution services**. This involves coordinating the consolidation, storage and distribution of fresh produce on behalf of major retailers. Woolworths NZ and Foodstuffs are the only customers that procure these services for fresh produce in New Zealand. T&G operates a single cool-chain distribution centre in Palmerston North on behalf of [ ], while Freshmax operates three distribution centres in Auckland, Palmerston North and Christchurch on behalf of [ ]; and
- (c) **packing services**, integrated with the supply of produce to meal-kit delivery businesses. Meal-kit delivery businesses such as My Food Bag and Hello Fresh generally procure:
  - (i) fresh produce from wholesalers, growers and importers; and
  - (ii) on occasion, packing services, which involves portioning produce into specified quantities, and packaging it so that can be placed in a box or bag to be delivered to the customer.

The integrated supply of these services is an emerging ancillary service in the fresh produce industry. [].

**Market conditions**

- 6.6 The New Zealand market for the supply of fresh produce is highly competitive, with a large number of different competitors with different business models – both in the wholesale supply of fresh produce, and in upstream (i.e. growers and importers) and downstream (i.e. retailers) levels of the supply chain. Further detail is provided at paragraph 8.11 below.
- 6.7 In addition, the perishable nature of the product means that wholesalers are effectively price-takers that are required by the forces of supply (i.e. growers) and demand (controlled by retailers as a proxy for end consumers) to buy and sell at the price that will clear the market. Any attempt to increase prices above the market-clearing level would result in reduced volumes being purchased and wholesalers would then be left with excess produce that needs to be moved at a lower price the following day, and/or growers choosing to supply other wholesalers or go direct to retailers.
- 6.8 [ ].
- 6.9 [ ].
- 6.10 [ ].
- 6.11 [ ].
- 6.12 [ ].

**PART D: COMPETITIVE ASSESSMENT****7. RELEVANT MARKETS**

7.1 For the reasons set out below, the impact of the Acquisition should be assessed in the following markets:

- (a) the wholesale supply of fresh produce in New Zealand;
- (b) the supply of cool-chain distribution services in New Zealand; and
- (c) the supply of contract ripening services in the South Island.

**Wholesale supply of fresh produce in New Zealand**

7.2 The relevant market is for the wholesale supply of fresh produce in New Zealand, including:

- (a) the wholesale supply of fresh produce to customers in different regions;
- (b) the wholesale supply of imported and locally grown fresh produce;
- (c) all types of fresh produce (citrus, root vegetables, tomatoes, etc); and
- (d) fresh produce purchased via different methods, including via Market Trading Transactions and Direct Category Supply.

*Wholesale supply in different regions is part of the same market*

7.3 There is a single market for all New Zealand wholesale produce supply, given that:

- (a) major customers such as Woolworths NZ, Foodstuffs and My Food Bag procure produce on a nationwide basis from centralised locations in Auckland, Wellington and Christchurch;
- (b) both Parties and most of their competitors supply customers throughout New Zealand. The locations of the on-site premises (trading floors or distribution centres) throughout the country do not dictate the reach of the supplier. For example, Freshmax services customers throughout New Zealand (including as far south as Dunedin and Central Otago and as far north as Whangarei) including from its on-site locations in Auckland, Palmerston North, Wellington and Christchurch; and
- (c) even for smaller customers who may be located only in a single region, produce supplied from supply regions or hubs throughout the country is substitutable for each other, such that a "small but significant non-transitory increase in price" (SSNIP) in produce supplied via one supply region or hub will lead to customers procuring from a different region. The cost of freight is not prohibitive in this regard, as demonstrated by the fact that consumers in the South Island have ready access to citrus products at similar prices to customers in the North Island, despite domestically grown commercial citrus only being grown in the North Island (primarily in Northland, the Bay of Plenty and Gisborne).

*Imports and locally grown produce are within the same market*

7.4 Consistent with Commission precedent which defines a single market including New Zealand-manufactured and imported products,<sup>12</sup> wholesaling New Zealand-grown produce and wholesaling imported produce fall within a single market. This remains correct because:

- (a) the key driver as to whether retailers purchase imports or domestically grown produce is seasonality (i.e. New Zealand-grown produce not being available during certain periods of the year), rather than price; but
- (b) for produce categories where locally-grown and imported produce are both available year-round, or have overlapping seasons, T&G's experience is that the price of imported produce is strongly correlated to the availability of locally grown produce with import prices decreasing as local production increases and vice-versa. Although consumers may prefer to purchase local produce,<sup>13</sup> consumers are highly receptive to prices in this market and will switch to purchasing imported products in response to changes in price.

*All categories of fresh produce are within the same market*

7.5 There is no distinction between the wholesale supply of different categories of fresh produce, as there is a high degree of demand- and supply-side substitutability between the wholesale supply of different types of fresh produce. This is consistent with Commission precedent, in which the Commission determined that it was inappropriate to segment the wholesale supply of similar food products into separate markets in circumstances where:<sup>14</sup>

- (a) there is demand-side substitution between the products within the identified wholesale market; and
- (b) there is a high degree of supply-side substitutability between different categories of the same product, such that the existing facilities of wholesale suppliers could be used to supply all of those different categories with little-to-no adjustment required.

7.6 The same factors are present in the fresh produce wholesale market:

- (a) New Zealand fresh produce retail customers have flexible procurement strategies, and regularly switch between purchasing different produce categories depending on the price and quality of that produce. For example, retailers will often cease purchasing seasonal fresh produce during certain periods of the year, in response to [ ] increases in price or reductions in quality; and
- (b) at the wholesale level of the supply chain, there are no material costs or challenges for wholesalers to switch between wholesaling different types of produce. The facilities, infrastructure and machinery used for storing, processing, transporting and selling fresh produce is virtually identical across all types of produce, as evidenced by a significant proportion of fresh produce wholesalers supplying a broad range of produce (rather than a single category). T&G's experience is that a [ ] price change in the wholesale margins available for a particular category of produce will almost inevitably result in a supplier switching to wholesaling a different fresh produce category. As set out above at paragraph 6.7, any attempt to increase prices

<sup>12</sup> *H.J. Heinz Company (New Zealand) Limited and Cerebos Gregg's Limited* (8 March 2018) at [51]; *Frucor Beverages and Simply Squeezed Holdings and/ or Brownlie Brothers* (25 August 2009) at [34].

<sup>13</sup> With the exception of citrus products where there is a commonly held belief that Australian citrus is of a higher quality.

<sup>14</sup> *Goodman Fielder New Zealand Limited and Lion – Dairy & Drinks (NZ) Limited* [2018] NZCC 12.

beyond the market-clearing level would result in wholesalers having an excess volume of produce, which would need to be sold at a lower price the following day.

- 7.7 It is also consistent with the European Commission precedent,<sup>15</sup> which defined a market for all fresh produce excluding bananas (citing, with respect to bananas, consumption patterns, particularly amongst toddlers and elderly persons). T&G notes that likewise, in the New Zealand market for fresh produce, there are different consumption patterns between different categories of fresh produce but there is sufficient substitutability between those categories especially at the wholesale level of the supply chain, that they comprise a single product market.

*All sale methods in a single functional market*

- 7.8 The two methods for wholesale supply, Direct Category Supply and Market Trading Transactions (as detailed at paragraph 6.4(a)), comprise a single product market. These two methods of supply are interchangeable from both a supply- and demand-side perspective, as:
- (a) the same range of fresh produce is available via both methods of sale;
  - (b) T&G, and virtually all of its competitors, sell to retail customers via both methods;
  - (c) the two methods are not mutually exclusive, with some customers purchasing some produce via Direct Category Supply and other produce via Market Trading Transactions. Retail customers may use one method for one wholesaler and the other method for another wholesaler; and
  - (d) even in those regions where T&G operates the only trading floor (e.g. in Whangarei), T&G remains constrained by the actions of other wholesalers who service the region remotely via:
    - (i) online and/or telephone orders; and/or
    - (ii) sales representatives who give that competitor an 'on-the-ground' presence, despite the competitor not operating a physical trading floor in that region.

As set out at paragraph 6.4(a)(ii)(bb) above, T&G's view is that physical trading floors only play a relevant role in the competitive dynamics in the Auckland region, given that the majority of Market Trading Transactions outside of Auckland happen remotely.

**Supply of cool-chain distribution services in New Zealand**

- 7.9 Cool-chain distribution is the temperature controlled storage and distribution of products using refrigerated equipment. It is used for chilled foods, including fresh produce.
- 7.10 Freshmax is the [ ] supplier of cool-chain distribution services to [ ]. T&G has a single cool-chain distribution contract in the North Island, operating a distribution centre in Palmerston North for [ ]. While Woolworths NZ and Foodstuffs are the Parties only two cool-chain distribution customers, several smaller independent retailers, and food service customers, also purchase these services from other providers, such as Bidfood.

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<sup>15</sup> [https://ec.europa.eu/competition/antitrust/cases/dec\\_docs/39188/39188\\_2291\\_2.pdf](https://ec.europa.eu/competition/antitrust/cases/dec_docs/39188/39188_2291_2.pdf)

7.11 The relevant market for the assessment of the Acquisition is the New Zealand supply of cool-chain distribution services, given that:

- (a) Woolworths [ ]; and
- (b) while Foodstuffs [ ].

7.12 Even if the Commission takes a narrower view of the relevant market (i.e. a market with a narrower geographic dimension limited to the North Island), the Acquisition will not give rise to competition concerns.

### **Supply of contract ripening services in the South Island**

7.13 This service involves using purpose-built ripening facilities, typically close to retailers' premises, to ripen produce on behalf of customers that has been picked/purchased in an unripened state. The market for contract ripening services:

- (a) includes ripening services for both bananas and avocados, given that the facilities and infrastructure required to ripen bananas are near-identical to those required for avocados; and
- (b) has a regional geographic dimension, given that customers procure these services on a regional basis.

## **8. OVERVIEW OF COMPETITIVE DYNAMICS**

8.1 T&G is confident that the Acquisition will not have the effect, or likely effect, of substantially lessening competition in any of the relevant markets set out at paragraph 7.1 above.

### **National market for the wholesale supply of fresh produce**

8.2 For the following reasons, the Acquisition will not substantially lessen competition in this market.

*The market share increment caused by the Acquisition will be insignificant*

8.3 T&G does not have visibility of the total size of the New Zealand fresh produce market given:

- (a) the numerous supply channels for fresh produce, as set out at paragraph 6.4;
- (b) the numerous competitors present in the market, including numerous competitors that industry bodies and the Parties do not collect market intelligence about; and
- (c) the lack of verifiable independent market share data, including about the volumes and revenues of other market participants.

8.4 The estimates of total market size provided are effectively an estimate of the minimum size of the New Zealand market. Accordingly, due to the market characteristics set out at paragraph 1.11(b) above, estimates of market share are necessarily likely to be overstated, and should be treated as the maximum market shares that the Parties could have.

8.5 Subject to the above observations, the Parties estimate that the total size of the wholesale market for fresh produce in New Zealand is approximately [ ].<sup>16</sup> In 2018, Freshmax generated approximately [ ] in revenue from its fresh produce wholesale operations, which would give Freshmax a market share of just [ ]. In 2018, T&G wholesaled [ ] worth of fresh produce, which would give T&G a market share of just [ ]. Accordingly, post-Acquisition, T&G would have a market share of [ ].<sup>17</sup>

8.6 However, even this would grossly overstate T&G's post-Acquisition economic position in the wholesale market because:

- (a) Where T&G sells the fresh produce of third parties, it does so under an agency model. Consistent with case law,<sup>18</sup> those sales would not be attributable to T&G as the relevant head in the market is not T&G but the underlying principal grower. The principal grower is free to sell its produce through T&G (on consignment) or through any other wholesaler or direct to retailers. The terms of trade between the grower and retailer are facilitated through negotiations by T&G and the grower accepts the indicative pricing before the supply is completed. [ ]. Approximately [ ] of T&G's wholesale sales of fresh produce (by value) are conducted as agent for a third party grower. On these sales, T&G earns a commission of between [ ]. A better proxy for assessing T&G's economic position in the fresh produce wholesale market is to focus on its traded sales volumes where it is the principal in the market; and
- (b) Freshmax's wholesale sales figures provided in this application and accompanying annexes include sales derived from the integrated produce and packing services Freshmax provides to My Food Bag. For the reasons set out in paragraphs 8.52 to 8.59, these revenues should be allocated to the market for the supply of integrated produce, procurement and packing services to meal-kit delivery businesses. The My Food Bag contract accounted for approximately [ ] of Freshmax's wholesale sales in 2018.

8.7 Table 4 below shows a breakdown of the fresh produce wholesale market in 2018.<sup>19</sup>

*Table 4 - Wholesale revenues and shares for all fresh produce (2018)<sup>20</sup>*

Competitor	Estimated Wholesale Sales via Direct Category Supply	Estimated Wholesale Sales via Market Trading Transactions	Estimated Wholesale Sales	% Share

<sup>16</sup> This represents the Parties' best efforts to estimate the total market size given the lack of verifiable and reliable third party data. The value of the total market has been calculated by taking the domestic production of each produce category and subtracting produce that is processed for other food production. To this, the Parties have used Statistics NZ data to subtract export volumes and add import volumes to derive an estimation of total domestic consumption, which is a reasonable proxy for the size of the wholesale market. Total sizes for each category have been adjusted to reflect the Parties' own knowledge of the market. To derive a value estimate, the Parties' average selling prices have been used for each product category.

<sup>17</sup> Based on 2018 value.

<sup>18</sup> *Australian Competition and Consumer Commission v Flight Centre Travel Group Limited* [2016] HCA 49.

<sup>19</sup> Confidential Appendix Four contains the Parties sales information and best estimates of third party sales for 2017-2019. The Parties are only able to provide a reliable total market size for 2018 as data for 2019 is not yet available. The Parties anticipate that the total market size for 2019 would be at least the same size as in 2018, if not larger.

<sup>21</sup> Note figures may not add up exactly due to the underlying figures having been rounded for presentational purposes.

T&G	<i>Traded sales</i>	[ ]	[ ]	[ ]	[ ]
	<i>Consignee sales<sup>21</sup></i>	[ ]	[ ]	[ ]	[ ]
	<b>Total</b>	[ ]	[ ]	[ ]	[ ]
Freshmax		[ ]	[ ]	[ ]	[ ]
MG Marketing		[ ]	[ ]	[ ]	[ ]
Fresh Direct		[ ]	[ ]	[ ]	[ ]
Seeka Fresh		[ ]	[ ]	[ ]	[ ]
Primor Produce		[ ]	[ ]	[ ]	[ ]
Southern Produce		[ ]	[ ]	[ ]	[ ]
Morgan Laurenson		[ ]	[ ]	[ ]	[ ]
Others		-	-	[ ]	[ ]
<b>Total</b>		-	-	[ ]	[ ]

8.8 Accordingly, the Acquisition will lead to an increment in T&G's market share of just [ ]. However, the real increment is likely to be somewhat lower given:

- (a) the total market size is likely to be larger than the conservative estimates provided by the Parties given:
  - (i) the numerous supply channels for fresh produce;
  - (ii) the practical difficulties that industry associations have in collecting reliable market data from a numerous and diverse set of competitors; and
  - (iii) the seasonal and year-to-year changes in domestic production and availability of fresh produce (due to weather conditions, for example).
- (b) [ ];
  - (i) [ ];
  - (ii) [ ];
  - (iii) [ ]; and
  - (iv) [ ].

8.9 As set out at paragraphs 8.28-8.33 below, even if the Commission is minded to consider the effects of the Acquisition on the wholesale supply of particular types of produce (which, in T&G's view as set out at paragraph 7.5, would be inappropriate), the maximum increment arising from the Acquisition will be no more than [ ] when T&G's consigned volumes are excluded.<sup>22</sup>

8.10 In any event, the Acquisition will not give rise to any material change in market concentration or dynamics.

<sup>21</sup> Consignee sales records the sales of the produce that T&G sold on a consignee basis. T&G only receives a commission on these sales, with the balance being remitted to the grower.

<sup>22</sup> Based on 2018 volume data.

*T&G will remain constrained by numerous existing competitors*

8.11 T&G will continue to be constrained by numerous wholesalers of fresh produce that supply a broad range of fresh produce, including:

- (a) **MG Marketing**, [ ]. MG Marketing is a "leading supplier" of fresh produce,<sup>23</sup> and has made significant "market share gains ... across a broad product range" in recent years,<sup>24</sup> and is now the "leading importer of fresh fruit and vegetables into New Zealand".<sup>25</sup> Key to MG Marketing's success has been its partnership with Dole bananas, the "leading brand across the tropical fruit range of bananas, pineapples and pawpaw";<sup>26</sup>
- (b) **Fresh Direct**,<sup>27</sup> "one of New Zealand's key produce distributors" which operates several "full scale 24 hour / 6.5 days a week grading, packing, prepacking, food processing and distribution facilities" throughout New Zealand.<sup>28</sup> [ ];
- (c) **Seeka Fresh**, a "fully integrated orchard-to-market service [that] is delivering premium produce to leading retailers" in New Zealand.<sup>29</sup> Seeka Fresh has undertaken significant expansion in recent times, establishing a full-service produce wholesale offering (including a trading floor) in Auckland in the last 12 months. [ ];
- (d) **Primor Produce**, a "significant player" in wholesaling domestic and imported produce, supplying "New Zealand's supermarket retailers and food services businesses".<sup>30</sup> Primor Produce imports a range of products from Australia and North America, including stonefruit, grapes, citrus and melon.<sup>31</sup> Headquartered in Auckland, the company has purpose-built distribution facilities in Mt Wellington and Pukekohe.<sup>32</sup>

Primor Produce's partners include:

- (i) **Apata**, for kiwifruit and avocados;
- (ii) **DJ Forry**, US-based exporters of fresh produce; and
- (iii) **Mission**,<sup>33</sup> another global supplier avocado brand;
- (e) **Southern Produce**,<sup>34</sup> a New Zealand-based supplier of fresh produce. Southern Produce adopted a "direct to retail strategy", resulting in their position as one of the "leading suppliers of avocados, blueberries and Kiwifruit" in Australasia;<sup>35</sup>

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<sup>23</sup> <https://www.mgmarketing.co.nz/about-mg/about-mg/>

<sup>24</sup> MG Marketing 2018 Annual Report, available [here](#), at 10.

<sup>25</sup> Ibid, at 13.

<sup>26</sup> Ibid, at 14.

<sup>27</sup> <https://www.freshdirect.co.nz/>

<sup>28</sup> <https://www.jpt.co.nz/The-Group/Fresh-Direct/>

<sup>29</sup> <https://www.seeka.co.nz/marketing>

<sup>30</sup> <https://primor.co.nz/what-we-do/#primor-domestic-supply>

<sup>31</sup> <https://primor.co.nz/produce/>

<sup>32</sup> <https://primor.co.nz/what-we-do/>

<sup>33</sup> <https://worldsfinestavocados.com/mission-global>

<sup>34</sup> <https://www.southernproduce.co.nz/company/>

<sup>35</sup> <https://www.southernproduce.co.nz/company/>

- (f) **Morgan Laurenson**,<sup>36</sup> "leaders in New Zealand's fresh vegetable supply, packaging and distribution industry". Morgan Laurenson's key customers include large restaurant chains and catering businesses. It is headquartered in Palmerston North;<sup>37</sup>
- (g) **Leaderbrand Produce**,<sup>38</sup> a grower and wholesaler of fresh produce, headquartered in Gisborne and Canterbury, and employing over 200 permanent staff.<sup>39</sup> The company grows, packs and ships buttercup squash, broccoli, lettuce, sweetcorn, and various other produce categories, for New Zealand customers and export. Leaderbrand Produce's products, including its Pure'n Ezy range, are available nationwide;
- (h) **The Produce Company**,<sup>40</sup> a wholesaler of fresh produce based in Auckland, primarily servicing the food service industry;
- (i) **The Fresh Produce Group**,<sup>41</sup> an importer and wholesaler of fresh produce based in Tauranga; and
- (j) numerous others.

*There are numerous competitors specialising in one or a smaller number of produce categories that will continue to constrain T&G post-Acquisition*

8.12 In addition to the scale wholesalers offering a wide variety of produce set out above, there are also numerous competitors that are particularly effective in their specialist areas. These include:

- (a) tomato wholesalers such as NZ Hot House,<sup>42</sup> and NZ Gourmet<sup>43</sup>;
- (b) citrus (including mandarins and oranges) wholesalers such as First Fresh,<sup>44</sup> Gizzy Tru, Kaiaponi,<sup>45</sup> Macks Citrus, and Zeafruit<sup>46</sup>;
- (c) stonefruit wholesalers such as Bayley Produce, Nigel Hinton,<sup>47</sup> Moffett Orchards,<sup>48</sup> PickMee<sup>49</sup> and Yummy<sup>50</sup>;
- (d) apple wholesalers such as Yummy Apples,<sup>51</sup> Luvya Apples,<sup>52</sup> PickMee, Moffett Orchards and First Fresh<sup>53</sup>;

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<sup>36</sup> [www.morganlaurenson.co.nz](http://www.morganlaurenson.co.nz)

<sup>37</sup> <http://www.morganlaurenson.co.nz/our-capabilities.html>

<sup>38</sup> <https://www.leaderbrand.co.nz>

<sup>39</sup> <https://www.leaderbrand.co.nz/about-us/>

<sup>40</sup> <https://www.produce.co.nz/seasonality-chart/>

<sup>41</sup> <https://www.freshproducegroup.co.nz/berry-fruit>

<sup>42</sup> <https://nzhothouse.co.nz>. This wholesaler also supplies cucumbers and capsicums.

<sup>43</sup> [www.nzgourmet.net](http://www.nzgourmet.net). This wholesaler also supplies blueberries, strawberries, cherries and capsicums.

<sup>44</sup> <http://www.firstfresh.co.nz/>

<sup>45</sup> <http://kaiaponi.co.nz/>

<sup>46</sup> <https://www.zeafruit.co.nz/>

<sup>47</sup> [https://www.nzherald.co.nz/the-country/news/article.cfm?c\\_id=16&objectid=12111546](https://www.nzherald.co.nz/the-country/news/article.cfm?c_id=16&objectid=12111546)

<sup>48</sup> <https://yellow.co.nz/y/moffett-orchards-fernhill>

<sup>49</sup> <https://www.pickmee.co.nz/>

<sup>50</sup> <https://www.yummyfruit.co.nz/our-fruit/stonefruit/>

<sup>51</sup> <https://www.yummyfruit.co.nz>

<sup>52</sup> [www.luvyaapples.co.nz](http://www.luvyaapples.co.nz)

<sup>53</sup> <http://www.firstfresh.co.nz/>

- (e) avocado wholesalers such as Harbour Edge Avocados<sup>54</sup>, Valic NZ<sup>55</sup> and Zeafruit<sup>56</sup>; and
- (f) root vegetable wholesalers such as AS Wilcox<sup>57</sup> and Balle Brothers.<sup>58</sup>

8.13 These competitors will continue to exercise significant constraint post-Acquisition:

- (a) in the supply of produce categories where they currently compete with the Parties. For example, NZ Hot House itself says it is the "market leader" in the supply of tomatoes.<sup>59</sup> It will continue to exercise significant competitive pressure on T&G's supply of tomatoes post-Acquisition; and
- (b) in the supply of produce categories where they do not currently have a presence, given that, as set out below at paragraph 8.14:
  - (i) wholesalers can easily secure supply of fresh produce from local and international growers; and
  - (ii) the core facilities required for wholesaling are the same across almost all produce categories,

such that they would not face any significant barriers in expanding, and providing a larger quantity and/or broader range of fresh produce in competition with T&G post-Acquisition.

*Barriers to entry and expansion in the wholesale supply of fresh produce are low, such that the threat of further new entry and/or the expansion of existing competitors will also constrain T&G post-Acquisition*

8.14 Fresh produce wholesalers do not face any material barriers in:

- (a) securing supply from domestic growers, overseas growers or importers. As set out above, growers are not tied into long-term supply contracts. So the growers determine their supply to retailers through T&G on a *daily* basis, and can switch to:
  - (i) supplying retailers via a different wholesaler (that, for example, is offering more competitive commission rates); or
  - (ii) supplying the retailer directly,
 with no switching costs;
- (b) establishing customer relationships. T&G's experience is that:
  - (i) customer brand loyalty to wholesalers is extremely low. Any brand loyalty that customers do have is, in T&G's experience, attached to the grower or importer (e.g. Dole bananas) rather than the wholesaler (that merely performs a consolidation role). Customers will, in response to any increase in price or reduction in quality:

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<sup>54</sup> [https://www.nzherald.co.nz/the-country/news/article.cfm?c\\_id=16&objectid=11846119](https://www.nzherald.co.nz/the-country/news/article.cfm?c_id=16&objectid=11846119)

<sup>55</sup> <https://www.valicnz.nz/king-avocado/>

<sup>56</sup> <https://www.zeafruit.co.nz/>

<sup>57</sup> <https://www.wilcoxgoodness.co.nz/>

<sup>58</sup> <http://www.ballebros.co.nz/>

<sup>59</sup> <https://nzhothouse.co.nz/>

- (aa) procure that produce from another wholesaler (the majority of customers already procure from more than one wholesaler); or
- (bb) purchase directly from that grower or importer; and
- (ii) as for growers, switching costs for retail customers are negligible, with those customers determining what quantities they wish to purchase from each wholesaler set on a daily basis.

8.15 These low barriers to entry have been evidenced by the entry of several wholesalers into this market in recent years, including:

- (a) Seeka Fresh, [ ];
- (b) Ridrey Produce, a broker that sells fresh produce to customers on a national basis, despite not operating any on-site trading floors. [ ];
- (c) Latitude Produce, a wholesaler based in Auckland;<sup>60</sup> and
- (d) Total Produce,<sup>61</sup> an online bulk produce supplier and delivery company operating in the upper North Island.

*Customers will continue to exercise significant countervailing power on T&G post-Acquisition*

8.16 T&G will also continue to be constrained by the countervailing power of customers post-Acquisition.

8.17 The Parties' primary customers are large New Zealand businesses with sophisticated procurement strategies, who will continue to exercise significant bargaining power in commercial negotiations. The size of these businesses, [ ] means that these businesses are uniquely well positioned to exercise countervailing power. These large and powerful customers, with sophisticated procurement strategies, will continue to exercise significant countervailing power by extracting competitive pricing and high quality service from T&G post-Acquisition, assisted by the low customer switching costs discussed at paragraph 8.14. [ ].

8.18 To the extent that customers remain dissatisfied with the value or quality proposition offered by T&G, those customers adopt all or any of the following responses:

- (a) immediately (i.e. the next day) turn to other competitors for more attractive commercial terms;
- (b) sponsor a new entrant to commence wholesale supply. [ ]; or
- (c) procure directly from growers and importers, bypassing wholesalers altogether. This has been an increasing trend in recent years. For example, T&G understands that [ ] is now only procuring [ ] of its produce via wholesalers,<sup>62</sup> with the remainder purchased directly from growers and importers. Much of this produce is sold under 'private label' brands, which comprise around [ ] of all fresh produce consumed domestically every year. For example:

<sup>60</sup> <https://app.companiesoffice.govt.nz/companies/app/ui/pages/companies/7495016/detail>

<sup>61</sup> <https://www.totalproduce.co.nz/>

<sup>62</sup> Note that as per paragraph 6.10, Freshmax understands that this figure is likely to be [ ] [ ].

- (i) nearly 250 items are listed on Countdown's website under its "Fresh Produce" private label brand;<sup>63</sup> and
- (ii) Foodstuff's private label fresh produce brand, Pam's, markets itself as "New Zealand's number one grocery brand".<sup>64</sup>

8.19 To the extent these large customers award contracts, Requests for Proposals tend to be issued on a seasonal basis but transactions are still conducted on the basis of a daily or weekly price. Proposals give an indicative price range and an ability to deliver the supply of fresh produce within that range. However, large customers who offer these contracts do not have any long-term commitment to purchase from the contracted wholesaler; purchasing decisions are made based on daily prices for produce requirements.

8.20 Smaller customers are able to take advantage of the countervailing buyer power of the larger customers. The major supermarkets downstream retail prices for fresh produce are publicly available. Smaller customers use these retail prices to form a view as to what the wholesale price should be, [ ]. This effect is particularly pronounced amongst smaller customers who compete directly with the major supermarkets downstream. These customers need to obtain fresh produce at a wholesale price that allows them to be competitive with the major supermarkets. [ ].

8.21 Smaller customers will also continue to exercise significant countervailing power post-Acquisition, given that they:

- (a) are not contractually bound to any wholesaler; and
- (b) already procure from more than one wholesaler as standard practice.

8.22 These customers can and do switch between wholesalers on a daily basis, to ensure that they get the best price, service and/or quality. Smaller customers are able to switch suppliers even more easily than major retailers, given their day-to-day requirements can typically be met by a multitude of different suppliers, as their volumes are smaller. This switching ability can be, and is regularly, exercised as frequently as daily or weekly. This dynamic will continue post-Acquisition given that numerous alternative options will remain in market to supply such customers.

8.23 The parties do not consider that it is appropriate to further segment the market by type of customer on the basis that:

- (a) all customers, irrespective of "customer type" have the same options available to them at the wholesale level; and
- (b) prices do not vary based on "customer type". Any price differential is a result of scale and not type of customer. Even smaller independent retailers can obtain such scale through the formation of buying groups. [ ].

*New Zealand growers and importers will continue to exercise significant countervailing power on T&G post-Acquisition*

8.24 T&G will also continue to be constrained in its upstream procurement of fresh produce by the countervailing power of growers and importers, who, in response to any hypothetical increase in price or reduction in quality, could:

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<sup>63</sup><https://shop.countdown.co.nz/shop/searchproducts?search=%22Fresh%20Produce%22&nextUI=true&page=11>

<sup>64</sup> <https://www.pams.co.nz/pams/>

- (a) switch to selling produce to/via a different wholesaler, given that growers and importers are not contractually bound to supply via a single wholesaler, and so can, and frequently do, switch their supply channel on a day-by-day basis; or
- (b) bypass wholesalers altogether, by selling directly to retailers (or end customers via local markets). This has become an increasing trend in recent years, with T&G observing several growers commencing, or increasing their, direct supply to retailers. As demonstrated by Table 5 below, even small growers are able to bypass wholesalers and sell direct to retailers.

Table 5 - T&G Growers that have recently commenced direct supply to retailers

Grower	Location	Estimated Annual Turnover
[ ]	Gisborne	[ ]
[ ]	Napier	[ ]
[ ]	Gisborne	[ ]
[ ]	Blenheim	[ ]
[ ]	Gisborne	[ ]
[ ]	Pukekohe	[ ]
[ ]	Hastings	[ ]
[ ]	Warkworth	[ ]

*Fresh produce is, by nature, perishable, and so the scope for T&G to artificially increase price or reduce quality post-Acquisition is next-to-none*

- 8.25 As set out above, the highly competitive and fragmented nature of the supply chain (both upstream and downstream) means that the price paid for produce is the market clearing price, determined by the demand for and supply of that produce in the New Zealand and overseas markets.<sup>65</sup> Growers regularly shift volumes to those wholesalers that are prepared to offer them the best price, and retailers, both large and small, shop around every day and purchase from the wholesaler offering the best quality produce for the best price. See further paragraph 1.11(b) above for recent examples of customer switching.
- 8.26 To the extent that a business deviates from that market clearing price, the perishable nature of produce means that the only alternative is to dump it. If T&G was to, hypothetically, artificially withhold supply (which, for the reasons stipulated above, it would not have the ability to do in any event), that produce would simply decay and have to be dumped. Accordingly, any hypothetical decision by T&G not to sell at a market clearing price would be unprofitable.

No competition concerns even if the Commission takes a narrower view of the relevant markets

- 8.27 Even if the Commission is minded to consider the Acquisition on a narrower basis, the Acquisition will not give rise to any competition issues in New Zealand. In particular, no issues will arise even if the Commission:
  - (a) defines separate markets for the wholesale supply of particular produce categories; or
  - (b) defines separate functional markets for Direct Category Supply and Market Trading Transactions.

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<sup>65</sup> For the avoidance of doubt, there is no official published "market clearing price". Rather, it is the interplay between supply (determined by growers) and demand (determined by retailers) that drives market expectation as to price. If the Parties do not meet market expectations, growers and retailers will go elsewhere.

*No competition concerns in the wholesale supply of particular produce categories*

- 8.28 For the reasons given at paragraph 7.5 above, there is no basis upon which to define the market any narrower than that for all fresh produce. However, to assist the Commission in its analysis of the Acquisition, the Parties have provided their best estimates of their category shares for individual produce categories for 2018 in **Confidential Appendix Four**. The Parties note that there is limited publicly available information regarding the sizes of individual produce categories particularly for less popular produce categories. Given the difficulty in estimating total individual product category sizes, the Parties' estimates are likely to understate the size of these sub-segments.<sup>66</sup>
- 8.29 Nonetheless, the Acquisition will not cause a substantial lessening of competition in any sub-segment for the wholesale supply of individual produce categories.
- 8.30 Table 6 below sets out estimated market shares (by volume) in certain fresh produce categories where the combined entities would have a non-minimal combined share in 2018.<sup>67</sup> For the avoidance of doubt, produce sold on a traded basis is sold where T&G has taken ownership of the produce. Produce sold on consignment is not owned by T&G, but is sold on an agency basis on behalf of the grower.

*Table 6 - Estimated Shares per Category Segment (by volume, 2018)<sup>68</sup>*

Product	Estimated Minimum Total Domestic Consumption (tonne)	T&G Wholesale Volume (tonne) sold on traded basis	Freshmax Wholesale Volume (tonne)	Estimated Maximum Post-merger share (Traded volumes only)	Volume sold by T&G on consignment for independent growers (tonne)	Estimated Maximum Post-merger share (Total volumes)
Apples	[ ]	[ ][ ]	[ ][ ]	[ ]	[ ][ ]	[ ]
Avocados	[ ]	[ ][ ]	[ ][ ]	[ ]	[ ][ ]	[ ]
Bananas	[ ]	[ ][ ]	[ ][ ]	[ ]	[ ][ ]	[ ]
Lettuce	[ ]	[ ][ ]	[ ][ ]	[ ]	[ ][ ]	[ ]
Mandarins	[ ]	[ ][ ]	[ ][ ]	[ ]	[ ][ ]	[ ]
Mangoes	[ ]	[ ][ ]	[ ][ ]	[ ]	[ ][ ]	[ ]
Mushrooms	[ ]	[ ][ ]	[ ][ ]	[ ]	[ ][ ]	[ ]
Oranges	[ ]	[ ][ ]	[ ][ ]	[ ]	[ ][ ]	[ ]
Other Citrus <sup>69</sup>	[ ]	[ ][ ]	[ ][ ]	[ ]	[ ][ ]	[ ]
Passionfruit	[ ]	[ ][ ]	[ ][ ]	[ ]	[ ][ ]	[ ]
Pears	[ ]	[ ][ ]	[ ][ ]	[ ]	[ ][ ]	[ ]
Persimmons	[ ]	[ ][ ]	[ ][ ]	[ ]	[ ][ ]	[ ]
Stonefruit <sup>70</sup>	[ ]	[ ][ ]	[ ][ ]	[ ]	[ ][ ]	[ ]

<sup>66</sup> The Parties do not have any reliable information as to their competitors' market shares at this granular level. Confidential Appendix Four contains an indication of what produce categories each of their main competitors are likely to sell.

<sup>67</sup> Information provided for all produce categories where the Parties combined share (including volumes sold by T&G on a consignment basis) exceeds [ ]. Note the issues in estimating total category sizes, as discussed at paragraph 8.8(a). The Parties are only able to provide reliable produce category size estimates for 2018. Confidential Appendix Four contains further information about the Parties' sales in 2017 and 2019.

<sup>68</sup> Note figures may not reconcile precisely the underlying figures having been rounded for presentational purposes.

<sup>69</sup> The Parties consider that there is a single produce category for all "other citrus". This category includes lemons, limes, grapefruit and tangelos.

<sup>70</sup> The Parties consider that all stonefruit (otherwise referred to as "summer fruit"), which includes apricots, cherries, nectarines, peaches and plums, should all be considered in the same produce category given the similarities between the products, how they are produced, wholesaled, and retailed.

Tomatoes	[ ]	[ ] [ ]	[ ] [ ]	[ ]	[ ] [ ]	[ ]
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8.31 With respect to Table 6, T&G notes that:

- (a) based on conservative estimates of total market size, and acknowledging that publicly available figures do not incorporate sales data from large numbers of smaller industry participants, there are no categories in which T&G could have materially more than approximately a [ ] share of supply<sup>71</sup> post-Acquisition;<sup>72</sup> and
- (b) the increment arising from Freshmax's supply (on conservative assumptions of total market size and that all supply is retained by T&G post-Acquisition),<sup>73</sup> is no more than approximately 10% in all produce categories.<sup>74</sup>

8.32 As with the wholesale supply of all fresh produce, there are a number of significant, aggressive competitors in each of these produce categories. See Table 7 below for an illustrative non-exhaustive list of such competitors.

Table 7 - Competitors active in certain produce categories

Produce Category	Examples of multi-category wholesalers that supply this produce category	Examples of specialist category wholesalers that supply this produce category
Apples	Fresh Direct MG Marketing Moffett Orchards Primor Produce Seeka Fresh Chevalier Produce The Produce Company Bidfood Service Foods Fresh Connection The Fresh Produce Group	Luvya Apples Mr Apple Pick Me Yummy
Avocados	Fresh Direct MG Marketing Primor Produce Seeka Fresh Southern Produce Chevalier Produce The Produce Company Bidfood Service Foods Fresh Connection	Harbour Edge Avocados Zeafruit King Avocado Just Avocados
Bananas	Fresh Direct MG Marketing Seeka Fresh Chevalier Produce The Produce Company Bidfood	

<sup>71</sup> Where produce sold by T&G on a consignment basis is rightly excluded from T&G's category share.  
<sup>72</sup> Note that the Parties do not consider the constituent individual produce items that comprise "Other Citrus", "Stonefruit" or "Pears" to be individual product categories.  
<sup>73</sup> Where produce sold by T&G on a consignment basis is rightly excluded from T&G's category share.  
<sup>74</sup> Where produce sold by T&G on a consignment basis is rightly excluded from T&G's category share.

Produce Category	Examples of multi-category wholesalers that supply this produce category	Examples of specialist category wholesalers that supply this produce category
	Service Foods Fresh Connection SKU Produce	
Lettuce	Chevalier Produce Bidfood Fresh Direct The Produce Company MG Marketing Primor Produce Bidfood Service Foods Fresh Connection	The Fresh Grower Southern Fresh Group Leaderbrand
Mandarins	Fresh Direct MG Marketing Primor Produce Seeka Fresh The Produce Company Bidfood Service Foods Fresh Connection	First Fresh Gizzy Tru Macks Citrus Zeafruit
Mangoes	Fresh Direct MG Marketing Chevalier Produce Bidfood The Produce Company Service Foods Fresh Connection SKU Produce	Healthy & Fresh
Mushrooms	MG Marketing Fresh Direct Chevalier Produce The Produce Company Bidfood Service Foods Fresh Connection	Meadow Mushrooms Mercer Mushrooms Neudorf Mushrooms Healthy & Fresh
Oranges	Fresh Direct MG Marketing Primor Produce Seeka Fresh The Produce Company Bidfood Service Foods Fresh Connection The Fresh Produce Group	Battle Hill Orchards First Fresh Gizzy Tru Kaiaponi Macks Citrus Zeafruit
Other Citrus	Fresh Direct MG Marketing Primor Produce Seeka Fresh The Produce Company Bidfood	Battle Hill Orchards First Fresh Gizzy Tru Kaiaponi Macks Citrus Zeafruit

Produce Category	Examples of multi-category wholesalers that supply this produce category	Examples of specialist category wholesalers that supply this produce category
	Service Foods Fresh Connection The Fresh Produce Group	
Passionfruit	MG Marketing Fresh Direct The Fresh Produce Group The Produce Company Bidfood Service Foods Fresh Connection	
Pears	MG Marketing Fresh Direct Seeka Fresh The Produce Company Bidfood Service Foods Fresh Connection	Yummy PickMee Ecodale Kono
Persimmons	Fresh Direct The Produce Company Bidfood Service Foods Fresh Connection The Fresh Produce Group MG Marketing	First Fresh NTL Horticulture
Stonefruit	Fresh Direct MG Marketing Seeka Fresh Primor Produce The Produce Company Bidfood Service Foods Fresh Connection The Fresh Produce Group	Bayley Produce Nigel Hinton Yummy
Tomatoes	Fresh Direct MG Marketing Seeka Fresh Chevalier Produce Primor Produce The Produce Company Bidfood Service Foods Fresh Connection The Fresh Produce Group	NZ Hot House NZ Gourmet

8.33 In addition to the numerous existing competitors in each category, T&G will also be constrained in each category by the wider competitive dynamics, including:

- (a) as set out at paragraph 8.14, barriers to expansion are low. It is easy for a wholesaler to expand their product range (e.g. a wholesaler of tomatoes could easily switch or expand to provide other fresh produce such as mandarins or bananas);

- (b) barriers to new entry are low. As demonstrated by the wholesalers focussing on only one produce category (see paragraph 8.12) and the entry of several new wholesalers in recent years (see paragraph 8.15), scale is not important for entry into supplying a new category of produce; and
- (c) the countervailing power of both buyers and suppliers (as set out at paragraphs 8.16 to 8.24 above) will also constrain T&G post-Acquisition within each of these produce categories. This countervailing power, and the risk of customers procuring directly from growers, is even more acute in this category-by-category analysis, given that it only involves a retailer liaising with a single grower, rather than a series of growers to purchase a suite of different produce categories.

*No competition concerns in wholesale supply via Direct Category Supply*

8.34 Competition issues will not arise with respect to wholesale supply via Direct Category Supply because, in addition to the reasons set out at paragraphs 8.2 to 8.26 above:

- (a) all wholesalers active in the market (i.e. those listed at paragraphs 8.11 and 8.12, and others) can and do sell produce via Direct Category Supply;
- (b) it is open to growers and wholesale suppliers of any size, including those that are focused on supplying one or a few categories of fresh produce, to supply via Direct Category Supply; and
- (c) produce sold via Direct Category Supply is mainly sold to large customers, who exercise strong countervailing buyer power, as set out from paragraph 8.16.

*No competition concerns in wholesale supply via Market Trading Transactions*

8.35 Similarly, competition issues are unlikely to arise with respect to wholesale supply via Market Trading Transactions because:

- (a) all of the Parties' major competitors also sell on a one-off basis, either remotely (over the internet or by phone) or via on-site trading floors;
- (b) there are no customers that have to purchase via on-site trading floors. Customers of all sizes, all over the country, are able to purchase produce on a one-off basis, regardless of size or location;
- (c) while both T&G and Freshmax operate on-site trading floors in Auckland, Wellington and Christchurch ("**Major Centres**"),<sup>75</sup> per Table 8 below, they will be constrained by several other existing competitors in both:
  - (i) Auckland, where physical trading floors do play a non-negligible role in the competitive landscape; and
  - (ii) Wellington and Christchurch, where physical trading floors play a negligible role in the competitive dynamics, given that the overwhelming majority of Market Trading Transactions in these regions happen remotely.

T&G is unable to provide precise market share estimates for each Major Centre for Market Trading Transactions given that customers do not have to attend a physical trading floor to purchase in this manner. Table 8 below provides T&G's best

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<sup>75</sup> T&G also has trading floors in Whangarei, Hamilton, Tauranga, Gisborne, Hastings, New Plymouth, Palmerston North, Nelson and Dunedin.

estimates of the sales of the three other major competitors (post-Acquisition) that have physical trading floors in the Main Centres. Post-Acquisition, MG Marketing would remain the largest competitor in each Major Centre with a share that is [ ] than T&G in Auckland, [ ] than T&G in Wellington, and [ ] than T&G in Christchurch.<sup>76</sup> Fresh Direct would also have a material presence in each Major Centre with a share of the Top 4 between [ ] and [ ].

Table 8 - Competitors with on-site trading floors (2018 Sales)<sup>77</sup>

	Auckland		Wellington		Christchurch	
	Sales	Share of Top 4	Sales	Share of Top 4	Sales	Share of Top 4
<b>T&amp;G</b>	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]
<b>Freshmax</b>	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]
<b>MG Marketing</b>	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]
<b>Fresh Direct</b>	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]
<b>Seeka Fresh</b>	[ ]	[ ]	-	[ ]	[ ]	[ ]

- (d) given that customers purchase produce via:
- (i) remote sales, online or via telephone; or
  - (ii) sales representatives who give a competitor an 'on-the-ground' presence, despite the competitor not operating a trading floor,

T&G will also continue to be constrained in each of the Major Centres post-Acquisition by numerous other wholesalers of fresh produce that compete with the Parties despite not operating physical trading floors, including Growpac,<sup>78</sup> Morgan Laurenson,<sup>79</sup> Primor Produce,<sup>80</sup> Southern Produce,<sup>81</sup> Chevalier Produce and others. These competitors will continue to face no material disadvantage in supplying customers in competition with T&G post-Acquisition;

- (e) T&G will also be constrained post-Acquisition by other wholesalers focused on supplying specific categories of produce, such as:
- (i) **Leaderbrand Produce**, in Auckland and Christchurch;
  - (ii) **Ceres Organics**<sup>82</sup> in Auckland; and
  - (iii) **Vision Fresh Produce**<sup>83</sup>, in Tauranga,

<sup>76</sup> Based on 2018 sales estimates.

<sup>77</sup> Data for 2018 has been provided to be consistent with the data provided in other tables. **Confidential Appendix Four** contains information for 2017 and 2019.

<sup>78</sup> <https://growpac.co.nz>

<sup>79</sup> [www.morganlaurenson.co.nz](http://www.morganlaurenson.co.nz)

<sup>80</sup> <https://primor.co.nz/>

<sup>81</sup> <https://www.southernproduce.co.nz/>

<sup>82</sup> <https://ceres.co.nz/products/grocery/ceres-organics/>

<sup>83</sup> <https://app.companiesoffice.govt.nz/companies/app/ui/pages/companies/6936633?backurl=H4slAAAAAAAAEWMsQ7CMAwF%2FyZLB2BgtBBLGehQiYrdSgyN1MTBdkD9e4ooYrt30r1NwTvpxnMqmONCSih%2BPDzGjVyblohHZteOFRPjrJFm4e5kMKx69Z9MbSgJ%2BFavjpmz1Ja4QQRdwwOQ1jO9F%2Bv4kzziyWAU0Mx2Loppmiw2zu9LTJ8yidmT6HHTBOYVHKJA8HPvwGsPpy6xgAAAA%3D%3D>

that sell produce on a one-off basis utilising systems that are functionally similar to the Parties' trading floors. These competitors would not face any significant barriers in expanding, and providing a larger quantity or broader range of fresh produce in competition with T&G; and

- (f) Seeka Fresh has been rapidly expanding its Market Trading Transaction capability (including via trading floor) in recent years:
- (i) Seeka Fresh opened a full scale trading floor in Auckland during 2019.<sup>84</sup> Seeka Fresh has, in the space of 12 months, gone from having almost no on-the-ground presence in Auckland to being [ ]; and
  - (ii) [ ].
- [ ].

### Supply of cool-chain distribution services in New Zealand

8.36 For the reasons set out below, the Acquisition will not substantially lessen competition in this market.

*The Acquisition does not give rise to any aggregation in the supply of cool-chain distribution services*

8.37 [ ].

*The Parties' customers will continue to exercise significant countervailing power on T&G in this market post-Acquisition*

8.38 There are only two supermarket customers (Foodstuffs and Woolworths NZ) that purchase cool-chain distribution services from the Parties. The market would also include other suppliers of cool-chain distribution services for customers in the fresh produce industry (e.g. food service customers), as well as other industries (e.g. for dairy and meat).

8.39 [ ].

8.40 [ ].

8.41 Accordingly, to the extent that these major customers become dissatisfied with the value or quality of T&G's offerings post-Acquisition, they will be able to:

- (a) use their significant countervailing power to extract more competitive pricing and/or higher quality from T&G; or
- (b) commence self-supply of these services with ease, as [ ] did in both the [ ], [ ]. The only infrastructure required to provide cool-chain distribution services is a distribution centre with chilled capability. Foodstuffs and Woolworths NZ have numerous distribution centres that could be used for this purpose and extensive in-house distribution capabilities. Although Freshmax is currently the [ ] for fresh produce cool-chain distribution services, T&G understands that the [ ] fresh produce is distributed using its own distribution centres.

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<sup>84</sup> <https://www.freshplaza.com/article/9148580/seekafresh-grand-opening-today-in-mt-wellington-nz/>

*There are several other existing competitors, as well as competitors that have the potential to expand*

- 8.42 There are numerous other competitors who the two customers could readily turn to for these services, including:
- (a) **MG Marketing**, which currently provides these services to [ ] in the Wellington region and would undoubtedly compete with T&G for any future contracts ([ ]);
  - (b) **Bidfood**, which operates "high quality temperature controlled distribution centres" in Auckland and Christchurch,<sup>85</sup> supplying picking, storing, packing and distribution services to "large scale food providers and the quick service restaurant (QSR) trade nationally".<sup>86</sup> Bidfood is understood to be a significant supplier of these services in NZ, including to other fresh produce retailers and food service providers;
  - (c) **Chevalier Produce**,<sup>87</sup> which also operates distribution centres in Auckland, Wellington and Christchurch;
  - (d) any other business active in the supply of fresh produce (e.g. Morgan Laurenson), given the low barriers to entry in this market (see paragraph 8.46 below); and
  - (e) numerous specialist refrigerated third party logistics providers such as Polarcold (Emergent Cold), Big Chill and Halls Transport.
- 8.43 The Parties do not have any reliable information on their market shares, or competitor market shares, in this market. The market would also incorporate other suppliers of cool-chain distribution services for other industries including dairy and meat. However, post-Acquisition, T&G's market share for cool-chain distributions services in New Zealand could not plausibly be any higher than [ ] on account of:
- (a) T&G estimates that fresh produce could not account for any more than [ ] of all cool-chain distribution services in New Zealand;<sup>88</sup> and
  - (b) as mentioned in paragraph 8.38 above, there are only two customers who purchase cool-chain distribution services from the Parties. Under T&G's arrangement with [ ]:
    - (i) [ ]; or
    - (ii) [ ].

[ ]
- 8.44 The Acquisition would therefore fall well within the Commission's concentration indicators, irrespective of whether the Commission considered the broader market to be concentrated or not.
- 8.45 The Parties set out their respective revenues, on a regional basis, earned from supply of cool-chain distribution services in Table 9 below.

<sup>85</sup> <http://www.bidfood.co.nz/fresh/>

<sup>86</sup> <http://www.bidfood.co.nz/logistics/>

<sup>87</sup> <https://www.chevalierproduce.co.nz/about>

<sup>88</sup> Estimate is based on T&G's understanding of the allocation of floor space at [ ].

Table 9 – Revenues from cool-chain distribution services

	2017		2018		2019	
	Freshmax	T&G	Freshmax	T&G	Freshmax	T&G
Upper North Island	[ ]		[ ]		[ ]	
Lower North Island	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]
South Island	[ ]		[ ]		[ ]	
<b>Total</b>	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]

Barriers to entry in the supply of cool-chain distribution services are low, such that the threat of further new entry will also constrain T&G post-Acquisition

- 8.46 The Parties do not have reliable information as to the exact cost or time to set up a cool-chain distribution centre. However, barriers to entry in this market are low, as:
- a potential entrant into this market would not face any material challenges in purchasing, building or leasing the necessary distribution centres (given the number of independently owned cool storage facilities throughout the country,<sup>89</sup> including in Palmerston North); and
  - an active participant in another part of the fresh or chilled produce or transport industry would not require any significant additional expertise or investment to commence the provision of these services.

#### Supply of contract ripening services in the South Island

- 8.47 T&G supplies contract ripening services for [ ] for [ ] in Christchurch. Freshmax supplies contract ripening services for [ ] for [ ] in Christchurch. [ ]. Table 10 below shows the revenues the Parties each earned from ripening services over the last years by region.

Table 10 – Revenues earned from ripening services

	2017		2018		2019	
	Freshmax	T&G	Freshmax	T&G	Freshmax	T&G
Upper North Island	[ ]	[ ]	[ ]			
Lower North Island	[ ]		[ ]		[ ] <sup>90</sup>	
South Island	[ ]		[ ]	[ ]	[ ]	[ ]

- 8.48 Table 11 below provides an overview of the ripening capacity that the Parties estimate each of the main providers of contract ripening services have in each of the three regional markets.<sup>91</sup>

Table 11 - Estimated Market Shares in Supply of Contract Ripening Services (by current capacity<sup>92</sup>)

Competitor	Upper North Island		Lower North Island		South Island	
	Capacity	Share	Capacity	Share	Capacity	Share

<sup>89</sup> <https://www.coldstoragenz.org.nz/find-a-cold.html>

<sup>90</sup> [ ]

<sup>91</sup> Note the estimates provided are based on T&G's best estimates of rival's capacities. Depending on the exact size, configuration and use of the room, the operational capacity of the room may vary.

<sup>92</sup> Capacity is measured by the number of pallets that can be stored in a ripening room multiplied by the number of ripening rooms.

T&G <sup>93</sup>	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]
Freshmax <sup>94</sup>	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]
MG Marketing	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]
SKU Produce	[ ]	[ ]	-	-	-	-
Fresh Direct	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]
Seeka Fresh	[ ]	[ ]	-	-	[ ]	[ ]
Primor Produce	[ ]	[ ]	-	-	-	-
Total	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]

- 8.49 With respect to Table 11, the Parties note that these shares by current capacity significantly overstate their market presence, due to the significant excess capacity in the market. For example, [ ] are currently used for contract ripening services. Furthermore, although Just Avocados claims to have the "largest ripening facilities outside of Auckland",<sup>95</sup> the Parties do not have reliable information regarding the capacity and location of Just Avocado's ripening facilities, and hence have not included those facilities in Table 11.
- 8.50 Retailers tend to approach all suppliers of ripening services to tender business with contracts ultimately negotiated bilaterally. Contracts generally do not have a set duration and parties are free to switch to alternative suppliers if they are offered preferable terms.
- 8.51 For the reasons set out below, the Acquisition will not substantially lessen competition in this market:
- (a) There are numerous suppliers of these services that customers can procure from, including:
- (i) **MG Marketing**,<sup>96</sup> which [ ];
  - (ii) **Fresh Direct**,<sup>97</sup> which has ripening facilities throughout the country;
  - (iii) **Seeka Fresh**, via its subsidiary Glassfields, which also has ripening facilities in both North and South Islands;<sup>98</sup>
  - (iv) **Primor Produce**, which "has the largest and most advanced avocado ripening system in New Zealand".<sup>99</sup> [ ];
  - (v) **SKU Produce**, which has "the best and most well-suited rooms"<sup>100</sup> for ripening bananas, located in Auckland; and
  - (vi) **Just Avocados**, which has the "largest ripening facilities outside of Auckland".<sup>101</sup>
- (b) Even in the South Island, the only region where the Parties both have ripening contracts, post-Acquisition T&G will remain constrained by:

<sup>93</sup> Note that T&G's ripening facilities in [ ] are currently not used for contract ripening services.

<sup>94</sup> Note that Freshmax's ripening facilities in [ ] are currently not used for contract ripening services.

<sup>95</sup> <https://justavocados.co.nz/services/>

<sup>96</sup> <https://www.mgmarketing.co.nz/contact-us/>

<sup>97</sup> <https://www.freshdirect.co.nz/services>

<sup>98</sup> <https://www.seeka.co.nz/latest-news/id/300>

<sup>99</sup> <https://primor.co.nz/>

<sup>100</sup> <http://www.poultergroup.co.nz/facility-updates/>

<sup>101</sup> <https://justavocados.co.nz/services/>

- (i) The presence of MG Marketing that accounts for [ ] of all South Island ripening capacity;
  - (ii) The fact that there is significant excess capacity in the supply of contract ripening services throughout New Zealand. T&G estimates that [ ] of domestic ripening facilities in New Zealand remain unused. In Christchurch alone, T&G understands that there are [ ] unused [ ] ripening rooms; and
  - (iii) The presence of Seeka Fresh that accounts for over [ ] of South Island ripening capacity and is understood to have [ ] unused [ ] ripening rooms.
- (c) retailers actively encourage new investment to increase market capacity and therefore competition. For example, [ ].

**No competition concerns in the supply of integrated produce and packing services to meal-kit delivery businesses**

8.52 As set out at paragraph 6.5(c), Freshmax currently supplies integrated produce and packing services to My Food Bag. Freshmax entered into an agreement with My Food Bag in 2015 to supply produce procurement and packing services, which are now supplied to My Food Bag in Auckland, Wellington and Christchurch. Under the agreement, [ ].

8.53 [ ].

8.54 To the extent that the Commission is minded to consider this supply in its analysis, the supply of integrated produce, procurement and packing services is distinct from the market for the wholesale supply of all other fresh produce (discussed at length above), given that:

- (a) the fresh produce sold by Freshmax to My Food Bag is sold on a bundled, integrated basis with procurement planning and packing services; and
- (b) packing services require specialised infrastructure and systems, and not all fresh produce wholesalers have the necessary capability to offer these services.

8.55 For the reasons set out below, the Acquisition will not substantially lessen competition in this market.

*There is no overlap between the Parties in the provision of these services, and other potential competitors are better placed to compete with Freshmax in this market than T&G*

8.56 While My Food Bag is currently supplied by Freshmax, there is no overlap between the Parties in the supply of packing services to meal-kit delivery businesses, [ ].

8.57 Furthermore, there are other potential competitors that are better placed to compete with Freshmax in this market segment than T&G. In particular, [ ]:

- (a) has historically provided packing services for [ ] (until it commenced self-supply in March 2019); and
- (b) is also understood to have competed for the My Food Bag contract.

[ ] would have existing infrastructure and expertise to commence supply immediately [ ].

8.58 Accordingly, the Acquisition will have no effect on the competitive landscape in this market.

*Customers can and do self-supply these services*

8.59 Meal-kit delivery businesses can and do self-supply packing services. For example, [ ], discontinued its procurement of packing services from [ ], and now self-supplies its own packing services. This threat of self-supply will be a further constraint on participants in this market ([ ]) post-Acquisition.

## 9. NO RISK OF COORDINATED EFFECTS

9.1 No coordinated effects are likely to arise within the fresh produce industry and, in particular, the wholesale supply of fresh produce. Specifically, there is no element of the Acquisition that will make it easier for remaining firms to:

- (a) tacitly reach and sustain an agreement on any key dimension of competition;
- (b) detect deviations from the agreement, so as to dissuade firms from deviating for fear of punishment; or
- (c) deter such deviations from coordination by means of more effective punishments.

9.2 T&G's view is based on the following reasons:

- (a) **A large number of competitors will remain:** irrespective of the Acquisition, as set out above (including at paragraphs 8.11 and 8.12) there will continue to be a large number of competitors in each of the relevant markets post-Acquisition.
- (b) **No evidence Freshmax represents a material constraint on T&G's prices:** In assessing the potential for coordinated effects to arise out of the Acquisition, the Commission needs to focus on whether Freshmax is playing a substantial role in constraining prices or destabilising any coordination between the other competitors. As set out above:
  - (i) [ ]; and
  - (ii) the other primary constraint on the Parties' prices is the significant and increasing trend of retailers procuring fresh produce directly from growers, bypassing T&G altogether.

As such, the removal of competition between T&G and Freshmax could not be regarded as likely to lead to increased potential for coordination in the factual when compared to the counterfactual.

- (c) **Highly dynamic industry:** The Commission has previously described markets with "little innovation" as susceptible to coordinated effects. The New Zealand fresh produce industry is not such an industry – it is a dynamic industry, with recent examples of entry and expansion. For example:
  - (i) **New entry / expansion:** As detailed at paragraphs 8.14 and 8.15, there has been significant new entry and expansion in the New Zealand fresh produce market in recent years.

- (ii) Significant supply shocks for wholesalers in recent years: This industry is commonly subject to supply shocks, including from:
- (aa) the growing trend of retailers bypassing wholesale suppliers and procuring produce either directly from growers / importers is causing disruption at the wholesale level for supply of fresh produce, with for example, [ ]; and
  - (bb) seasonal and year-by-year variations in produce availability, and therefore price. For example, Freshmax's experience is that avocados are a bi-annual crop, with [ ] swings in production from one year to the next. Similarly, Statistics NZ has previously noted that fresh produce "prices show regular sharp rises and falls", due to "seasonal changes in temperature, weather and availability."<sup>102</sup>

The highly dynamic nature of the fresh produce industry in New Zealand (including the vulnerability of the entire wholesale level of fresh produce supply) creates volatility in the relevant markets and would make any attempts at coordination between competitors post-Acquisition very difficult - including because this volatility would make it almost impossible for coordinating businesses to determine whether a reduction in their sales is due to another coordinating party deviating from any coordinated equilibrium, or a supply shock caused by an unanticipated period of wet or cold weather, for example. This will inevitably reduce the likelihood of coordination between suppliers post-Acquisition.

- (d) Different business models among primary competitors: The Commission has said that markets with "homogenous products" and "firms of similar size and cost structures" will be more susceptible to coordinated effects than markets with firms of different sizes, with different product offerings.<sup>103</sup> Post-Acquisition, there will continue to exist various different business models across various competitors, including:
- (i) Wholesalers as resellers or agents: while some wholesalers do not take ownership of produce they wholesale for third-party providers (including [ ]), instead selling to retailers as the agent of growers and importers, other competitors (including [ ]) do take title of the produce that they supply;
  - (ii) Nationwide supply networks or Major Centre focus: T&G [ ] both have a larger on-the-ground presence nationwide, with a focus on servicing smaller regional centres and rural areas throughout the country. By contrast, other competitors (including Freshmax), focus on establishing a physical presence in the Major Centres, and service regional parts of New Zealand remotely (rather than via an on-the-ground presence);
  - (iii) Vertically integrated providers or brokers: while the Parties and other competitors have growing operations in New Zealand (alongside their wholesale operations), several other competitors (Fresh Direct and Ridrey Produce, for example), act solely as a 'broker', procuring all produce that they wholesale from third-party growers or importers.

<sup>102</sup> [http://archive.stats.govt.nz/browse\\_for\\_stats/economic\\_indicators/prices\\_indexes/seasonal-fluctuations-in-fresh-fruit-and-vegetables.aspx](http://archive.stats.govt.nz/browse_for_stats/economic_indicators/prices_indexes/seasonal-fluctuations-in-fresh-fruit-and-vegetables.aspx)

<sup>103</sup> NZCC "Merger and Acquisition Guidelines" (July 2013) at 36.

There will therefore be no material increase in the symmetry of the Parties and their competitors' operations and cost structures post-Acquisition and, therefore, no material increase in any ability to reach a common assessment of the optimal industry price.

- (e) **Lack of price transparency:** The Commission considers that markets where firms can readily observe each other's prices are more susceptible to coordinated effects than markets where prices are less transparent. The fresh produce industry does not have transparent pricing:
- (i) Direct Category Supply agreements are invariably negotiated in private, with prices and volumes purchased under those agreements not publicly available;
  - (ii) while price lists for Market Trading Transactions are accessible for those that have an account to access that platform (online or via phone), these prices are still overwhelmingly subject to private negotiations between individual purchasers and the wholesalers. Prices (including discounts) and volumes are therefore not publicly visible between competitors. Furthermore, prices are dynamic and change on a daily basis making it incredibly difficult for wholesalers to monitor competitors' pricing; and
  - (iii) competition takes place across a multitude of parameters, including price, quality, the range of products available, continuity of supply, relationships with customers, quality of systems in place (for example ordering systems) and ease of picking / packing process. It would be very difficult to coordinate across these parameters.

9.3 Given the market characteristics described above, T&G is confident that there is no likelihood of any materially increased potential for coordinated effects in the fresh produce industry post-Acquisition.

## 10. NO RISK OF VERTICAL EFFECTS

10.1 T&G would not have any ability or incentive to:

- (a) foreclose its competitors in the upstream grower level of the supply chain from being able to sell produce to retail customers, by refusing to wholesale any produce not grown by T&G ("**customer foreclosure**"); or
- (b) foreclose its competitors in the wholesale market from the supply of T&G-grown fresh produce ("**input foreclosure**"), such that they cannot effectively compete with T&G at the wholesale level.

10.2 There is accordingly no risk of vertical effects arising out of the Acquisition.

### **No risk of customer foreclosure**

10.3 As set out at paragraph 3.2, Freshmax's growing assets do not form part of the Acquisition. Accordingly, there is no risk of horizontal effects arising in that upstream market as a result of the Acquisition. Furthermore, T&G would not have any incentive or ability to foreclose its grower / importing competitors, lessening competition in that upstream market, as:

- (a) it would have no incentive to do so, given that only [ ] of T&G's wholesale revenue is attributable to T&G-grown produce, such that only supplying T&G-grown produce via its wholesale function would not be profitable; and
- (b) in any event, the access to customers of upstream competitors will not be limited by the Acquisition. These growers and importers will be able to sell their produce via:
  - (i) the multitude of other wholesalers that will continue to compete with T&G post-Acquisition (as listed at paragraphs 8.11 and 8.12); and
  - (ii) directly to retailers, which is a significant and increasing trend (as set out at paragraph 8.18(c)).

#### **No risk of input foreclosure**

- 10.4 There is no increased prospect of input foreclosure, given that T&G-grown produce is only wholesaled via T&G (i.e. it is not supplied to third party wholesalers) and T&G has no intention to change this arrangement post-Acquisition. There are no wholesalers who are currently dependent on T&G grown produce for their business. Accordingly, when assessed against the counterfactual, where supply of T&G-grown produce to third party wholesalers will be zero, the Acquisition does not increase the prospects of foreclosure in the supply of fresh produce to wholesalers.

### **11. CONCLUSION**

- 11.1 The New Zealand fresh produce industry is highly competitive. There are numerous suppliers operating at each level of the supply chain and wholesalers like the Parties find themselves constrained by the actions of other wholesalers and the countervailing power of both upstream growers and downstream retailers. For these reasons, there is no credible prospect of the Acquisition substantially lessening competition in any relevant market.

**12. FURTHER DOCUMENTATION / INFORMATION****Each party's sales revenues and volumes**

12.1 See **Confidential Appendix Four**

**Names and contact details of key competitors**

12.2 See **Confidential Appendix Five.**

**Key customers**

12.3 See **Confidential Appendix 6A (T&G)** and **Confidential Appendix 6B (Freshmax)**, which includes information about:

- (a) Customer contact details; and
- (b) Revenue and margin information by customer type.

**Trade or industry associations**

12.4 See **Appendix Seven.**

**Copies of most recent financial statements***T&G*

12.5 T&G Annual Reports can be found at the following link:  
<https://tandg.global/links/investors/financial-reports/>

12.6 T&G's financial statements are available on the Companies Office website. For the Commission's convenience, links to the relevant accounts are as follows:

- [2018 Financial Statement \(contained within 2018 Annual Report from page 37\)](#)
- [2017 Financial Statement](#)
- [2016 Financial Statement \(contained within 2016 Annual Report from page 58\)](#)

12.7 T&G's management accounts for FY19 are attached at **Confidential Appendix Eight.**

*Freshmax*

12.8 Freshmax NZ Limited Annual Reports are available on the Companies Office website. For the Commission's convenience, links to the relevant accounts are as follows. Please note, these Reports include the financials of various businesses and operating subsidiaries no longer housed in or owned by Freshmax NZ Limited:

- [2018 Annual Report](#)
- [2017 Annual Report](#)
- [2016 Annual Report](#)

12.9 Freshmax's financial statements are available on the Companies Office website. For the Commission's convenience, links to the relevant accounts are as follows. Please note, these

Reports include the financials of various businesses and operating subsidiaries no longer housed in or owned by Freshmax NZ Limited:

- [2018 Financial Statement](#)
- [2017 Financial Statement](#)
- [2016 Financial Statement](#)

12.10 Freshmax's management accounts for the calendar year 2019 are attached at **Appendix Nine**.

**PART E: CONFIDENTIALITY****13. REASONS FOR SEEKING CONFIDENTIALITY**

- 13.1 Confidentiality is sought in respect of the information in this application that is contained in square brackets (with confidentiality indicated by the coloured highlighting). Confidentiality is sought for the purposes of s 9(2)(b) of the Official Information Act 1982 on the grounds that:
- (a) The information is commercially sensitive and valuable information which is confidential to the Parties; and
  - (b) Disclosure would be likely to unreasonably prejudice the commercial position of the Parties, as the entities providing the information.
- 13.2 The Parties request that they are notified of any request made to the Commission under the Official Information Act 1982 for release of the confidential information. The Parties also request that the Commission seek and consider Freshmax Group's or T&G's views, as the case may be, as to whether the information remains confidential and commercially sensitive at the time responses to such requests are being considered.
- 13.3 The foregoing equally applies in respect of any additional information provided to the Commission that is expressed to be confidential.

**PART F: DECLARATION**

I, Tim Clarkson, have prepared, or supervised the preparation, of this notice seeking clearance.

To the best of my knowledge, I confirm that:

- all the information specified by the Commission has been supplied;
- if the information has not been supplied, reasons have been included as to why the information has not been supplied;
- all information known to me that is relevant to the consideration of this notice has been supplied; and
- all information supplied is correct as at the date of this notice.

I undertake to advise the Commission immediately of any material change in circumstances relating to the notice.

I understand that it is an offence under the Commerce Act to attempt to deceive or knowingly mislead the Commission in respect of any matter before the Commission, including in these documents.

I am a director/officer of the company and am duly authorised to submit this notice.

---

**Tim Clarkson, Director (Strategy) of Turners & Growers Fresh Limited**

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**Signature**

**Date**

I, Andrew Common, have prepared, or supervised the preparation, of this notice seeking clearance.

To the best of my knowledge, I confirm that:

- all the information specified by the Commission has been supplied;
- if the information has not been supplied, reasons have been included as to why the information has not been supplied;
- all information known to me that is relevant to the consideration of this notice has been supplied; and
- all information supplied is correct as at the date of this notice.

I undertake to advise the Commission immediately of any material change in circumstances relating to the notice.

I understand that it is an offence under the Commerce Act to attempt to deceive or knowingly mislead the Commission in respect of any matter before the Commission, including in these documents.

I am a director/officer of the company and am duly authorised to submit this notice.

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**Andrew Common, Chief Executive Officer of Freshmax (NZ) Limited**

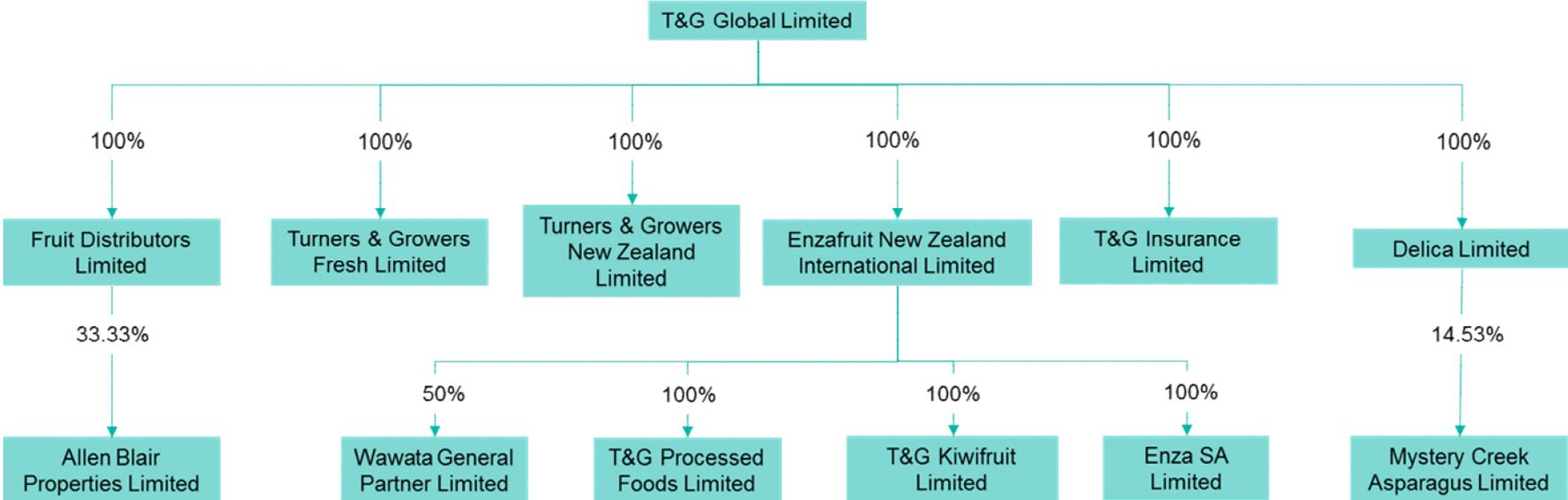
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**Signature**

**Date**

APPENDIX ONE

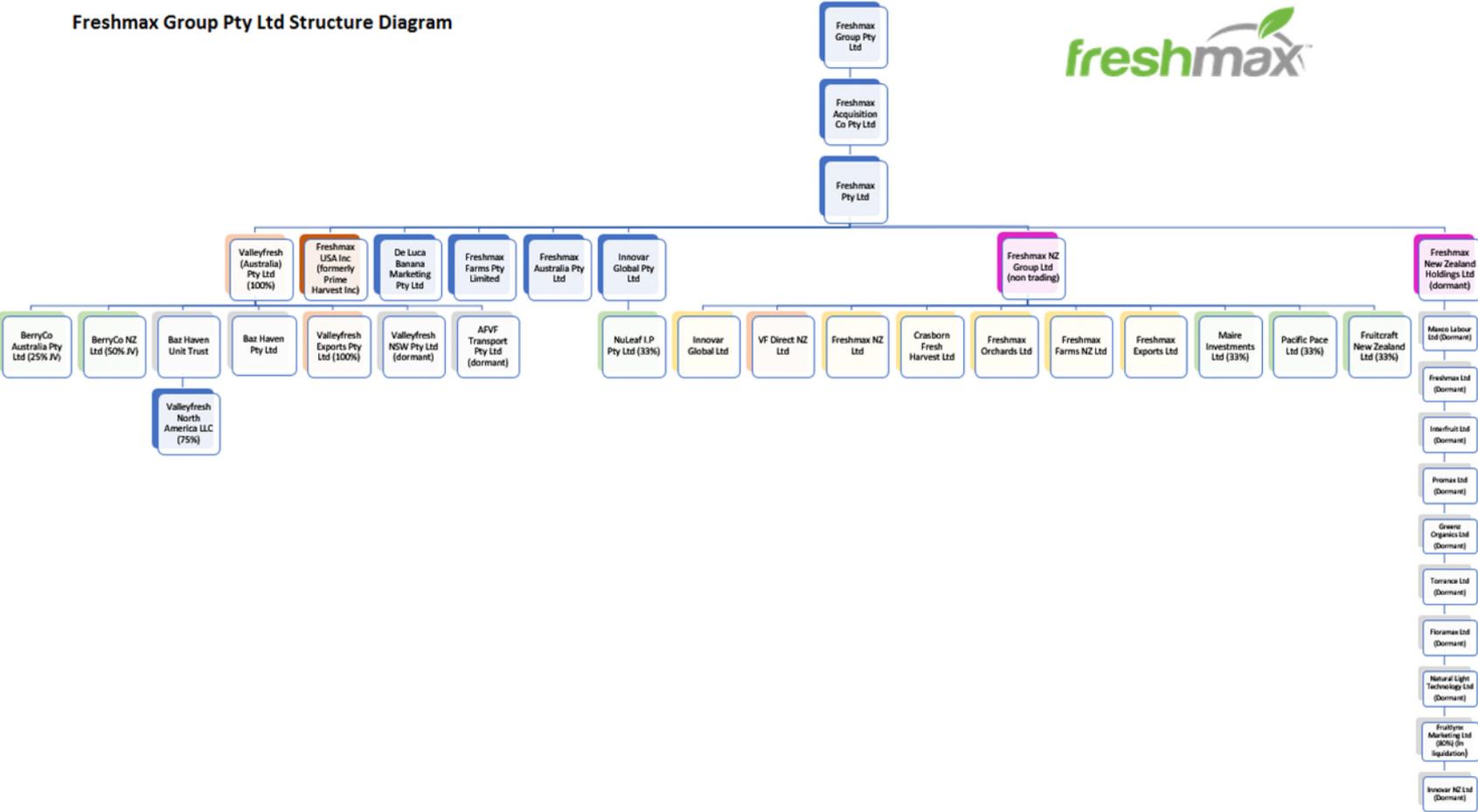
Corporate structure chart of T&G Global Limited



APPENDIX TWO

Corporate structure chart of Freshmax Group Pty Ltd

Freshmax Group Pty Ltd Structure Diagram



CONFIDENTIAL APPENDIX THREE

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