

# Application for Provisional Authorisation of a Restrictive Trade Practice

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**THE NEW ZEALAND TEGEL GROWERS ASSOCIATION INCORPORATED  
ON BEHALF OF ITS CURRENT AND FUTURE MEMBERS  
AND THE CURRENT AND FUTURE MEMBERS OF THE AUCKLAND MEAT  
CHICKEN GROWERS ASSOCIATION INCORPORATED, THE CANTERBURY  
POULTRY MEAT PRODUCERS ASSOCIATION INCORPORATED, AND THE  
TARANAKI BROILER GROWERS ASSOCIATION INCOPROATED**

**PURSUANT TO SECTION 65AD OF THE COMMERCE ACT 1986**

**30 SEPTEMBER 2021**

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## 1. Executive Summary

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### Introduction

- 1.1 This is an application for provisional authorisation under section 65AD of the Commerce Act 1986 (**Commerce Act**) in respect of collective bargaining. The application is made by The New Zealand Tegel Growers Association Incorporated (**Applicant**) on behalf of itself, the Regional Associations and the current and future members of the Applicant and the Regional Associations.
- 1.2 The Applicant is an industry association, whose current members are the following three regional industry associations:
- (a) the Auckland Meat Chicken Growers Association Incorporated;
  - (b) the Canterbury Poultry Meat Producers Association Incorporated; and
  - (c) the Taranaki Broiler Growers Association Incorporated,
- (together, the **Regional Associations**).
- 1.3 The Regional Associations represent growers in the Auckland, Canterbury and Taranaki regions (**Growers**) who supply broiler chicken growing services to one of New Zealand's three major chicken processors, Tegel Foods Limited (**Tegel**).
- 1.4 The Applicant filed an application for authorisation under sections 65AA(2) and 65AA(3) (or alternatively sections 58(1) and 58(2)) of the Commerce Act on 16 September 2021 (**Authorisation Application**).

### Factual Background

- 1.5 The factual background to this application is the same as that set out in paragraphs 1.2 to 1.18 of the Authorisation Application.

### Scope and Duration of Provisional Authorisation Sought

- 1.6 The Applicant seeks for itself, the Regional Associations and the Growers, together with future members of the Applicant and the Regional Associations (**Future Growers**), provisional authorisation in respect of all of the conduct for which authorisation has been sought (see paragraphs 1.19 and 2.9 of the Authorisation Application), as outlined at paragraph 3.1 below.
- 1.7 Growers and Future Growers who choose not to negotiate collectively will be free to opt out of the collective process and negotiate with Tegel individually.
- 1.8 The Applicant seeks a provisional authorisation that remains in force until such time that the Commerce Commission (**Commission**) declines or grants the Authorisation Application.

### Benefits and Detriments of Provisional Authorisation

- 1.9 The Applicant submits that there are compelling public interest reasons that support a grant of provisional authorisation. Section 65AD(3) of the Commerce Act also makes it clear that when granting provisional authorisation, it is not necessary for the Commission to be satisfied that the conduct in respect of which provisional authorisation is sought will meet the public benefit test.<sup>1</sup>

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<sup>1</sup> See also Commerce Commission, *Guidelines on Approach to Authorisations under the COVID-19 Response (Further Management Measures) Legislation Act* at paragraph 49.

- 1.10 This application is supported by an independent report written by Emma Ihaia at Castalia Advisors (**Castalia Report 2**) attached as Appendix **A**. The Castalia Report 2 concludes that a grant of provisional authorisation would provide a number of benefits additional to those already identified in the Authorisation Application.

## 2. Details of Applicant and Other Parties

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### Applicant

- 2.1 This application is made by:

The New Zealand Tegel Growers Association Incorporated  
 C/- Bakertilly Staples Rodway  
 Level 2  
 329 Durham Street North  
 Christchurch 8440

**Attention:** John Hartnell  
 Secretary  
[john@hartnellnz.com](mailto:john@hartnellnz.com)  
 Mobile: 021 578 754

- 2.2 The Applicant requests that all correspondence in relation to this application is directed in the first instance to:

Lane Neave  
 141 Cambridge Terrace  
 Christchurch 8013

**Attention:** Anna Ryan  
 Partner  
[anna.ryan@laneneave.co.nz](mailto:anna.ryan@laneneave.co.nz)  
 DDI: 03 377 6395  
 Mobile: 021 117 4940

### Other Parties

- 2.3 The other parties to the proposed restrictive trade practices are:

- (a) the current members of the Applicant, being Regional Associations;
- (b) the future members of the Applicant;
- (c) the Growers;
- (d) Future Growers; and
- (e) Tegel.

- 2.4 The names and contact details of the Regional Associations and the Growers are set out in a table in Appendix **E** of the Authorisation Application.

- 2.5 All correspondence for Tegel in relation to this application should be directed in the first instance to:

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### 3. Scope and Duration of Provisional Authorisation

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#### Scope

- 3.1 The Applicant seeks for itself, the Regional Associations and the Growers, together with Future Growers, provisional authorisation to:
- (a) collectively discuss and negotiate with Tegel:
    - (i) growing fees and other terms and conditions of chicken growing contracts;
    - (ii) adjustment and review of growing fees and other matters arising from time to time under/or in relation to terms of chicken growing contracts; and
    - (iii) resolution of disputes which from time to time arise under chicken growing contracts or otherwise arise between Tegel and a grower or growers;
  - (b) discuss amongst themselves matters relating to growers' discussions and negotiations with Tegel (whether collective or otherwise) on the matters referred to in (a)(i)-(iii) above;
  - (c) without limiting subparagraph (b), exchange information between themselves concerning growers' discussions and negotiations with Tegel (whether collective or otherwise) on the matters referred to in (a)(i)-(iii) above, including offers or proposed offers made or to be made to Tegel by or on behalf of a grower or growers, offers made by Tegel to a grower or growers, and acceptances or proposed acceptances by any party of any such offers;
  - (d) enter into agreements collectively negotiated between Tegel and the Applicant (or a Regional Association) and/or negotiated between Tegel and the Growers containing common terms, relating to the matters described at subparagraph (a)(i) - (iii) above; and
  - (e) give effect to agreements collectively negotiated between Tegel and the Applicant (or a Regional Association) and/or negotiated between Tegel and the Growers containing common terms, relating to the matters described at subparagraph (a)(i)-(iii) above, including provisions:
    - (i) setting growing fees;
    - (ii) providing for the adjustment or review of growing fees; and
    - (iii) providing for payments to be made by Tegel to growers, or by growers to Tegel in connection with the resolution of disputes between Tegel and a grower or growers.
- 3.2 Growers and Future Growers who choose not to negotiate collectively will be free to opt out of the collective process and negotiate with Tegel individually.

3.3 The Applicant is seeking provisional authorisation in respect of all of the conduct for which authorisation has been sought<sup>2</sup>.

### Duration

3.4 The Applicant seeks a provisional authorisation that remains in force until such time that the Commission declines or grants the Authorisation Application (section 65AD(c) of the Commerce Act).

3.5 The Applicant submits that the duration of the provisional authorisation should not be linked to the current decision date of the Authorisation Application (25 March 2022). The Applicant is concerned that specifying a date could impact on the [ ] (see paragraphs 4.2 to 4.9). Whether real or perceived, deadlines can become a real focal/ pressure point in [ ]

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## 4. Reasons for the Application for Provisional Authorisation

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### Urgency

4.1 The Applicant submits that there is an urgent need to carry out the conduct for which provisional authorisation is sought for the reasons set out below<sup>3</sup>.

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4.3

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<sup>2</sup> See paragraphs 1.19 and 2.9 of the Authorisation Application.

<sup>3</sup> [ ]

<sup>4</sup> See paragraphs 8.34 and 8.36 of the Authorisation Application.

<sup>5</sup> See paragraph 8.38 of the Authorisation Application.

<sup>6</sup> A copy of the Farm Management Agreement is attached to the Authorisation Application as Appendix B.

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4.12 .

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[

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4.14

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### **Proposed benefits**

4.15 This application for provisional authorisation is supported by an independent report written by Emma Ihaia from Castalia Limited. The Castalia Report 2 concludes that a grant of provisional authorisation will result in a number of benefits that are additional to those identified in the Castalia Report accompanying the Authorisation Application.<sup>8</sup>

4.16 The key findings in the Castalia Report 2 are that:

(a) provisional authorisation will provide additional benefits by [

(i)

(ii)

(iii)

(iv)

(b) provisional authorisation would allow Growers to continue to negotiate collectively with Tegel to amend and improve the Farm Management Agreement so that both the Growers and Tegel have certainty over how that agreement would apply in future [ ]; and

(c)

]

[

4.17

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<sup>7</sup> See paragraph 8.51(f) of the Authorisation Application.

<sup>8</sup> See Appendix D of the Authorisation Application.

4.18

4.19

(a)

(b)

9

(c)

10

4.20

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#### *Wealth transfers*

4.21 Wealth transfer benefits resulting from authorisation are discussed at paragraphs 8.11 to 8.19 of the Authorisation Application. The Castalia Report accompanying the Authorisation Application<sup>11</sup> estimates that authorisation would result in a wealth transfer to Growers of up to [ ] per annum. Although described as a wealth transfer to Growers, in reality, it is the prevention of a wealth transfer from Growers to Tegel's foreign shareholders.

4.22 [

4.23

4.24

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<sup>9</sup> See paragraph 8.3(g) of the Authorisation Application.

<sup>10</sup> See paragraph 1.23 of the Authorisation Application.

<sup>11</sup> See Appendix D of the Authorisation Application.

4.25

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[

4.26 .

(a)

(b)

]

4.27 The Castalia Report 2 estimates that if a provisional authorisation were granted and [

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4.28 [

4.29

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#### *Animal welfare*

4.30 A grant of provisional authorisation may allow a further intangible public benefit to arise in that, the Applicant and the Growers will be able to resolve any “business as usual” animal welfare issues that arise. Animal welfare is valued by many New Zealanders and is a public benefit. As outlined in paragraphs 4.11 – 4.12 there is currently an unresolved animal welfare issue concerning the lighting in the chicken sheds. Absent provisional authorisation, the Applicant and Growers are reluctant to deal with Tegel on such matters.

### Possible Detriments

4.31 In paragraphs 8.23 to 8.31 of the Authorisation Application the Applicant submitted (supported by the Castalia Report at Appendix D) that authorisation would not lead to any losses in:

- (a) allocative efficiency, on the basis that:
  - (i) no change in the quantity of services/ number of chickens produced is expected when comparing the situation under collective negotiation with the position under the counterfactual; and
  - (ii) collective negotiations were unlikely to lead to higher consumer prices for chicken; or
- (b) productive efficiency; or
- (c) dynamic efficiency.

4.32 For similar reasons, the Applicant submits (supported by paragraphs 3.2, 3.4 and 3.5 of the Castalia Report 2) that a grant of provisional authorisation will not give rise to any allocative efficiency losses, nor is there any scope for productive efficiency losses or dynamic efficiency losses. In fact, the Castalia Report 2 concludes that both productive efficiency and dynamic efficiency is likely to be enhanced if provisional authorisation is granted:

- (a) [
- (b) .

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### Possible Harm to the Applicant

4.33 [

4.34

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### Possible Harm to Third Parties or the Public

4.35 Animal welfare may be impacted if provisional authorisation is not granted. This is because some “business as usual” matters arising in relation to the chickens are currently unable to be resolved as the Applicant and the Growers are reluctant to deal with Tegel on such matters (see paragraphs 4.11 – 4.12).

4.36 [

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### Other Public Interest Factors

4.37 The Applicant submits that there are no other public interest factors that are relevant to this provisional authorisation application.

## 5. Confidentiality

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5.1 Confidentiality is requested for the information in this application that is contained in square brackets and highlighted in either yellow or green, on the basis that:

- (a) the information is commercially sensitive and valuable information which is confidential to the Applicant and/or the Growers and the disclosure of which would be likely unreasonably to prejudice the commercial position of the Applicant and/or the Growers, or the person who is the subject to the information; or
- (b) to make the information public would be likely to result in its disclosure or use for improper gain or advantage.

5.2 The Applicant waives confidentiality in respect of the information highlighted in green, in respect of Tegel.

5.3 The Applicant requests that it be notified if a request is made to the Commission under the Official Information Act 1982 for the release of the information for which confidentiality has been claimed, and given a chance to provide submissions to the Commission on whether it should make disclosure prior to any such disclosure taking place.

5.4 This applies equally in respect of any additional information that is expressed to be confidential subsequently provided to the Commission during the course of its consideration of this application.

5.5 Confidential and public versions of this application have been provided to the Commission.

## Declaration

I, John Hartnell, have prepared, or supervised the preparation of, this notice seeking provisional authorisation.

To the best of my knowledge, I confirm that:

- all information specified by the Commission has been supplied
- if information has not been supplied, reasons have been included as to why the information has not been supplied
- all information known to the applicant 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 New Zealand Tegel Growers Association and am duly authorised to submit this notice.

Name and title of person authorised to sign:

John Graham Hartnell  
Secretary – New Zealand Tegel Growers Association

Sign: 

Date: 23 September 2021

## Appendix A – Castalia Report 2

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**Appendix B – [ ]**

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