

## Determination

### New Zealand Tegel Growers Association Incorporated [2021] NZCC 26

**The Commission:**

Sue Begg  
Dr Derek Johnston  
Vhari McWha

**Summary of application:**

The New Zealand Tegel Growers Association Incorporated has applied for provisional authorisation, on behalf its members, to collectively negotiate with Tegel Foods Limited until the Commission declines or grants its application for authorisation.

**Determination:**

The Commerce Commission has decided to grant a provisional authorisation until 25 March 2022 (subject to the operation of section 65AD(5) of the Commerce Act 1986), as it is satisfied that it is appropriate to do so.

**Date of determination:**

19 November 2021

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

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## Introduction

1. On 16 September 2021, the Commerce Commission (the Commission) received an application from New Zealand Tegel Growers Association (TGA) seeking authorisation on behalf of its members to collectively negotiate the terms and conditions of its members' supply of chicken growing services to Tegel Foods Limited (Tegel) for a ten-year period (the Full Authorisation). As New Zealand is in an 'epidemic period', TGA applied under section 65AA(2) and (3), and in the alternative section 58(1) and (2) of the Commerce Act 1986 (the Act).
2. On 30 September 2021, TGA applied to the Commission seeking provisional authorisation for the same collective negotiations outlined above, under section 65AD(2) of the Act, until the Commission declines or grants the full authorisation (the Provisional Authorisation). This determination only concerns TGA's provisional application.
3. TGA proposes to collectively discuss and negotiate with Tegel about the terms of, adjustments and reviews to, and resolution of disputes arising from, its chicken growing contracts and other associated issues.
4. This is the first provisional authorisation application that the Commission has considered.
5. The Commission aims to assess applications for provisional authorisation within 20 working days. However, some procedural complexities associated with this application (including with respect to confidentiality) resulted in the Commission exceeding that estimate in this case.

## Determination

6. The Commission's view is that it is appropriate to provisionally authorise the Proposed Arrangement (set out below) until the earlier of 25 March 2022 or the date determined by the operation of section 65AD(5) of the Act.
7. Our view is based on our assessment of the evidence available at this time. The Commission has taken into account the factors set out in the Commission's Guidelines on Approach to Authorisations under the COVID-19 Response (Further Management Measures) Legislation Act (COVID-19 Guidelines).<sup>1</sup>
8. In summary, the Commission considers provisional authorisation is appropriate because:
  - 8.1 on balance we consider the potential benefits are more likely than not to outweigh the potential detriments from provisional authorisation;

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<sup>1</sup> See Commerce Commission, [Guidelines on Approach to Authorisations under the COVID-19 Response \(Further Management Measures\) Legislation Act \(May 2020\)](#) for further information.

- 8.2 bringing forward the potential benefits is a sufficient basis to grant provisional authorisation while the Commission considers the application for Full Authorisation;
  - 8.3 provisional authorisation is unlikely to materially alter the market in a permanent way; and
  - 8.4 the balance of potential harm to any party as a result of granting or not granting provisional authorisation favours provisional authorisation.
9. The Commission's decision to grant a provisional authorisation should not be taken as an indication of what the Commission might decide in respect of the Full Authorisation.<sup>2</sup>

## Background

- 10. TGA is an industry association. Its membership consists of three regional industry associations (Regional Associations).<sup>3</sup> The Regional Associations represent growers in the greater Auckland, Taranaki and Canterbury regions who supply chicken growing services to Tegel. In this way, TGA currently represents approximately 75 growers who supply Tegel.
- 11. TGA describes that, since its incorporation in 2006, it has collectively negotiated the terms of its members' supply of chicken growing services with Tegel. Prior to this, each Regional Association collectively negotiated with Tegel (or its predecessor) on behalf of its member growers.
- 12. TGA's negotiations with Tegel resulted in individual contracts between Tegel and each grower. The contracts currently in place are known as the 'Farm Management Agreements' (FMAs).

## Proposed Arrangement

- 13. TGA seeks for itself, the Regional Associations, and the Growers, together with future Growers, provisional authorisation to:
  - 13.1 collectively discuss and negotiate with Tegel:
    - 13.1.1 growing fees and other terms and conditions of chicken growing contracts;
    - 13.1.2 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

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<sup>2</sup> COVID-19 Guidelines at [47].

<sup>3</sup> Namely, the Auckland Meat Chicken Growers Association, the Taranaki Broiler Growers Associations and the Canterbury Poultry Meat Producers Association.

- 13.1.3 resolution of disputes which from time to time arise under chicken growing contracts or otherwise arise between Tegel and a grower or growers;
- 13.2 discuss amongst themselves matters relating to growers' discussions and negotiations with Tegel (whether collective or otherwise) on the matters referred to above;
- 13.3 without limiting paragraph 13.2 above, exchange information between themselves concerning growers' discussions and negotiations with Tegel (whether collective or otherwise) on the matters referred to at paragraph 13.1 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;
- 13.4 enter into agreements collectively negotiated between Tegel and TGA (or a Regional Association) and/or negotiated between Tegel and the Growers containing common terms, relating to the matters described at paragraph 13.1 above; and
- 13.5 give effect to agreements collectively negotiated between Tegel and TGA (or a Regional Association) and/or negotiated between Tegel and the Growers containing common terms, relating to the matters described at paragraph 13.1 above, including provisions:
- 13.5.1 setting growing fees;
- 13.5.2 providing for the adjustment or review of growing fees; and
- 13.5.3 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.
14. Together, the Commission refers to the above behaviour as the Proposed Arrangement.
15. TGA states that chicken growers may choose not to participate in collective negotiations and will be free to negotiate with Tegel individually, and as such have not previously engaged in a collective boycott.<sup>4</sup>
16. The Commission is not authorising any persons to engage in a collective boycott. Collective boycott includes but is not limited to any collective refusal to supply (or acquire) goods or services from any person. In our view, collective boycott activity could occur even if some parties are free to opt out of any collective boycott. We

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<sup>4</sup> [ ]  
[ ]  
].

stress that TGA has not sought to engage in such activity, and we include our view only for the avoidance of any doubt.

### How we assess provisional authorisations

17. The Commission may grant provisional authorisation for an application made under section 65AA or section 58 during the epidemic period where it considers it is appropriate to do so:
  - 17.1 for the purpose of enabling due consideration to be given to the application; or
  - 17.2 for any other reason.<sup>5</sup>
18. The Commission does not need to be satisfied that the Proposed Arrangement would meet the ‘public benefit test’.<sup>6</sup> Instead, the Commission need only be satisfied that a grant of provisional authorisation would be appropriate.
19. Accordingly, the Commission has a greater discretion when considering whether to grant a provisional authorisation compared with full authorisation, and its COVID-19 Guidelines provide guidance on the factors the Commission will consider when deciding whether it is ‘appropriate’ to grant provisional authorisation.<sup>7</sup> We assess these factors below.

### Submissions received

20. In making this determination, we:
  - 20.1 reviewed the information and analysis in TGA’s applications dated 16 September 2021 (Full Authorisation) and 30 September 2021 (Provisional Authorisation), and cross-submission dated 26 October 2021;
  - 20.2 reviewed the information from Van Den Brink Poultry Limited’s (Brinks) combined submission on the Full Authorisation and Provisional Authorisation; and
  - 20.3 reviewed the information and analysis from Tegel’s submissions in response to the Provisional Authorisation application and, insofar as it contained information relevant to the Provisional Authorisation, Tegel’s submission in response to the Commission’s Statement of Preliminary Issues regarding the Full Authorisation dated 6 November 2021.
21. Tegel and Brinks both oppose the application for provisional authorisation.

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<sup>5</sup> Sections 65AD(1) and (2) of the Act.

<sup>6</sup> Section 65AD(3) of the Act.

<sup>7</sup> COVID-19 Guidelines at [50] and [51].

## Jurisdiction

22. To be able to grant a provisional authorisation under section 65AD(2), section 65AD(1) only requires that the Commission has received an application under section 58 or 65AA during the epidemic period. Section 65AD(3) expressly provides that the Commission is not required to comply with section 61(6) of the Act, which sets out the jurisdictional threshold for a full authorisation.<sup>8</sup> Having received such an application in the epidemic period, the Commission may proceed to consider whether granting provisional authorisation is appropriate.
23. However, Tegel submits that “[s]ection 65AD of the Act can be invoked *only* for an agreement that relates to or supports a response to Covid-19 or its effects” (emphasis ours). We disagree, and deal with Tegel’s arguments in turn below.
- 23.1 First, we agree with the various authorities submitted by Tegel and TGA that legislation must be interpreted from its text in light of its purpose and context.<sup>9</sup> However, we consider weight must be placed on the plain text of section 65AD which provides it will be appropriate for the Commission to grant provisional authorisation “for any other reason”. An interpretation of “any other reason” to mean only “to provide a quick response to the effects of COVID-19”<sup>10</sup> is inconsistent with the plain meaning of “any other reason”.
- 23.2 Further, because the plain wording of section 65AD does include a jurisdictional threshold, being whether an application was made during the epidemic period, we consider Parliament did turn its mind to when section 65AD may be invoked. The lack of any reference to COVID-19 in section 65AD can be contrasted with amendments to other legislation also enacted by the COVID-19 Response (Further Management Measures) Legislation Act 2020, where Parliament has made clear that the ability to rely on the amendments requires a link with the effects of COVID-19.<sup>11</sup>
- 23.3 Second, Tegel submits that the purpose of the amending legislation is paramount in interpreting section 65AD. However, section 30(2) of the Legislation Act 2019 provides that amending legislation must be construed

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<sup>8</sup> For either conduct likely to lessen competition (section 65(6)) or cartel conduct (section 65(6) as modified by section 65AB(3)).

<sup>9</sup> See most recently [Borrowdale v Director-General of Health and Anor. \[2021\] NZCA 520](#) at [134], with reference to *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36; [2007] 3 NZLR 767 at [22].

<sup>10</sup> Tegel Foods Limited, Submission in response to TGA’s provisional authorisation application (12 October 2021) at [3.9].

<sup>11</sup> For example, Schedule 4 of the COVID-19 Response (Further Management Measures) Legislation Act 2020 introduced new safe harbour provisions to the Companies Act 1993 relating to the duties of directors of companies facing significant liquidity problems because of the effects of the outbreak of COVID-19. The availability of the safe harbours is expressly limited to circumstances where “the liquidity problems are, or will be, a result of the effects of COVID-19 on the company, its debtors, or its creditors” (clauses 6(2) and 7(2) of Schedule 12 of the Companies Act).

with the legislation that it amends. Hence why our guidelines refer to the relevant purpose as being that of the Act, not the amending legislation.<sup>12</sup>

- 23.4 Third, there are good reasons for the exercise of powers enacted as part of New Zealand’s general response to COVID-19 to not be causally tied to COVID-19. One example would be to prevent arguments as to whether the need for provisional authorisation was sufficiently caused by COVID-19 slowing the expeditious exercise of the power. A well-known example of a scheme that, in the interests of efficiency, similarly does not require applicants to establish a link with the effects of COVID-19 is the COVID-19 Resurgence Support Payments Scheme.<sup>13</sup>
24. We note that none of the foregoing suggests that promoting New Zealand’s response to COVID-19 could not be a relevant factor to take into account, or of benefit to New Zealand, in deciding whether to grant a provisional authorisation. It merely indicates that a link to New Zealand’s response to COVID-19 is not a necessary factor to establish jurisdiction or for the Commission to be able to decide whether to grant provisional authorisation.
25. We have not placed any weight on submissions in relation to the potential enactment of the Commerce Amendment Bill 2021 and the introduction of s 65AAA, “Interim Authorisations”. We do not consider it is appropriate to use an unenacted bill to interpret existing provisions in the legislation.

## Relevant markets

### *TGA’s submissions*

26. TGA submits that the relevant markets are:
- 26.1 Regional markets for broiler chicken growing services in the greater Auckland, Canterbury, and Taranaki regions. In support of this definition, TGA cites animal welfare considerations for the transport of chickens,<sup>14</sup> the Waikato – Bay of Plenty Authorisation<sup>15</sup> and the Tegel Foods Authorisation<sup>16</sup> in which the Commission has defined regional markets, and the specialised capital investment required to provide chicken growing services.

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<sup>12</sup> Tegel also refers to the Commission’s COVID-19 Guidelines in support of this point. However, the sections cited are of a general nature at the beginning of the COVID-19 Guidelines, which deal with a variety of COVID-19 related matters. That the Commission has indicated that it will “determine any COVID-19 related application as quickly as possible” does not mean the Commission will not make determinations in relation to non-COVID-19 matters. Responding to COVID-19 is not a standalone factor in the COVID-19 guidelines in relation to determining whether to grant provisional authorisation under section 65AD.

<sup>13</sup> This has had multiple iterations, but see, for example, the [February 2021 Order in Council](#). See also the empowering legislation: [s 7AAB Tax Administration Act 1994](#). The scheme only requires that a business suffer a drop in revenue within an alert level escalation period, and the drop to result from that escalation. There is no express requirement that the drop be causally connected to the effects of COVID-19.

<sup>14</sup> See Code of Welfare: Transport within New Zealand at section 4.1.

<sup>15</sup> *Waikato-Bay of Plenty Chicken Growers Association Incorporated* [2017] NZCC [37].

<sup>16</sup> *Tegel Foods Limited; Brinks Group of companies* [22/10/2008] Decision No: 658.

- 26.2 One or more markets for the wholesale supply of primary and secondary processed chicken products. In support of this definition, TGA references the Commission’s conclusions in the Tegel Foods Authorisation about downstream chicken markets.

*Our assessment*

27. Our preliminary assessment is that the relevant markets are the regional markets for both free-range and barn-raised chicken growing services to each of the greater Auckland, Canterbury, and Taranaki regions:
- 27.1 Due to animal welfare considerations, and the locations of TGA members’ farms, we are satisfied that the relevant market should be regional in scope. While some growers’ farms are located such that they could switch to supply Waikato-based Inghams, we assess that switching during a provisional period is unlikely because [ ].
- 27.2 In the Waikato - Bay of Plenty Authorisation determination, the Commission determined that specialised shedding and equipment for chicken growing services places it in a discrete market from other forms of farming. The determination further identified that free-range and barn-raised chickens are suitably similar to include in the same market.
- 27.3 Tegel does not appear to oppose TGA’s proposed market definition.
- 27.4 We do not deem it necessary to define downstream markets as these markets only provide a useful context for the demand for chicken growing services.

## **With and without the Proposed Arrangement**

### **Overview**

28. We have considered the submissions we received on the likely scenarios with and without provisional authorisation being granted for the Proposed Arrangement.

### **The situation with the Proposed Arrangement**

#### *TGA’s submissions*

29. TGA submits a provisional authorisation would enable growers to collectively negotiate sooner [ ],<sup>17</sup> [ ].
30. [ ].

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<sup>17</sup>

[ ].

31. [ ]:

31.1 [ ]<sup>18</sup> [ ];

31.2 [ ];

31.3 [ ]; and

31.4 [ ].

32. [ ],<sup>19</sup>  
[ ]  
].

*Tegel's submissions*

33. Tegel disputes TGA's submissions concerning the situation with the Proposed Arrangement.  
[ ].

34. Instead, Tegel notes, the growers have taken steps that suggest the opposite. [ ]  
. Therefore, Tegel submits, a grant of provisional authorisation would override this position and be inconsistent with the FMAs.

**The situation without the Proposed Arrangement**

*TGA's submissions*

35. Without a grant of provisional authorisation, TGA submits some growers may individually negotiate [ ].

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<sup>18</sup>

[ ].

<sup>19</sup> [ ].

*Tegel's submissions*

36. Tegel submits that growers – [ ] – might engage in individual negotiations [ ] as a feasible alternative to the Proposed Arrangement.  
[ ]  
[ ].<sup>20</sup> Tegel also points out that the growers have different characteristics and circumstances and more tailored arrangements for individual growers could be achieved through individual negotiations.  
[ ]  
[ ].<sup>21</sup>

**Our assessment**

37. We consider the submissions before us suggest, on balance, it is likely negotiations [ ] would commence on a collective basis with the Proposed Arrangement, or via individual negotiations without the Proposed Arrangement. We have not identified any other likely situations with or without the Proposed Arrangement in reaching this view.
38. In the situation with the Proposed Arrangement, we consider both parties have incentives to commence collective negotiations given:<sup>22</sup>
- 38.1 [ ]  
[ ].
- 38.2 [ ]  
[ ].

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<sup>20</sup> According to Tegel:  
[ ]

[ ] (at [5.16] of Tegel's submission in response to TGA's Provisional Authorisation dated 18 October 2021). We note in its submission on the Commission's Statement of Preliminary issues dated 5 November 2021, Tegel submits  
[ ]  
[ ].

<sup>21</sup>

[ ]

].

<sup>22</sup> We note there is a range of possible outcomes. It is not, however, necessary for the Commission to determine precisely which outcomes are most likely, because we are satisfied the benefits arising from collective (or individual) negotiations outweigh any likely detriments from the Proposed Arrangement – as discussed more fully below.

38.3 The parties are in a somewhat symbiotic relationship: the growers are vested in Tegel's financial wellbeing and vice versa.  
[ ]].

38.4 [ ]].

38.5 And more generally, the FMAs play an important role in the parties' operations. [ ]]. In the absence of cooperation, their (vertical) relationship will not work optimally.

39. On the other hand, in the without the Proposed Arrangement situation:

39.1 Growers who seek to negotiate will only be able to negotiate on an individual basis;

39.2 We consider that some of the growers are likely to individually negotiate [ ] with Tegel;

39.3 [ ]].

39.4 [ ]].

## **Our assessment of 'appropriateness'**

### **Potential benefits**

40. When assessing a provisional authorisation, it is not necessary for the Commission to reach a view on whether the test to grant full authorisation has been met. Accordingly, our assessment of the provisional authorisation application does not analyse the benefits and detriments of the Proposed Arrangement in detail; we will assess them further in our consideration of the Full Authorisation.

### *TGA's submissions*

41. [ ]].

42. TGA submits that the benefits of provisional authorisation include:

42.1 Transaction cost savings from the collective procurement of professional services (legal, financial, etc) when negotiating [ ] with Tegel.<sup>23</sup>

42.2 [ ].<sup>24</sup>

42.3 [ ].<sup>25</sup>

42.4 The bringing forward of some benefits of full authorisation including [ ], collectively discussing “business as usual” matters with Tegel, the avoidance of legal costs to determine whether TGA’s conduct constitutes cartel activity, and wealth transfers from higher returns to growers.

*Tegel’s submissions*

43. Tegel disputes the above claimed benefits, submitting that:

43.1 [ ].

43.2 Provisional authorisation would override a freely negotiated contractual agreement that was collectively negotiated, and so must already contain TGA’s claimed efficiencies.

43.3 Collective bargaining is not efficient because the growers are too diverse for a ‘one size fits all’ solution.

43.4 [ ]<sup>26</sup>  
[ ].<sup>27</sup>

43.5 Any transfers from Tegel to growers would not constitute a benefit as its current financial position does not support the existence of a ‘functionless monopoly rent’. Instead, these funds are necessary for Tegel’s sustainability.

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<sup>23</sup> This cost saving is estimated at [ ]. See [3.1.3.] of Castalia, “Public Benefits and Detriments of a Provisional Authorisation for Collective Activity” 23 September 2021; and TGA Provisional Authorisation Application (30 September 2021) at [4.16(a)(i)].

<sup>24</sup> [ ]. See TGA Provisional Authorisation Application (30 September 2021) at [4.26].

<sup>25</sup> [ ] - see TGA’s Authorisation Application (16 September 2021) at [5.12].

<sup>26</sup> [ ].

<sup>27</sup> [ ].

43.6 Any legal costs TGA incurs to obtain advice regarding potential cartel conduct is a normal cost of any business in this situation.

*Our assessment*

44. Based on our assessment of the submissions and the evidence available at this time, our view is that there is a real chance of several distinct benefits from provisional authorisation, although the likelihood of these benefits arising varies.
45. We consider it likely that provisional authorisation would reduce transaction costs associated with negotiating [ ].<sup>28</sup>
46. While we cannot be sure whether [ ] in the factual, we consider that provisionally authorising collective bargaining increases the likelihood that [ ]. We consider that collective bargaining could allow the growers to reach a more sophisticated and better-informed position that Tegel is more likely to find attractive.
47. In contrast, without provisional authorisation, we consider that [ ] would be less likely to be achieved through bilateral negotiations, and it is unlikely that Tegel would be able to reach individual agreements with all such growers that would achieve [ ]. There does remain a real chance that [ ] even if provisional authorisation is granted. Consequently, we consider the estimated benefits arising from [ ] are best reflected in a range from zero to approximately [ ].<sup>29</sup>
48. Based on the information before us, and consistent with the decision in *Godfrey Hirst*,<sup>30</sup> we are not inclined to consider any transfers from Tegel to growers resulting from collective bargaining as a benefit simply because Tegel is foreign owned. The degree of competition in downstream markets for chicken products, along with the financial losses that Tegel has recently incurred,<sup>31</sup> do not suggest that any reduction of returns to growers arising in the scenario without provisional authorisation would give rise to ‘functionless monopoly rents’ or ‘supra competitive returns’ to Tegel. Consequently, at this time, we consider any wealth transfers to growers would likely constitute a neutral wealth transfer, although we will further investigate this during our evaluation of the Full Authorisation.

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<sup>28</sup> We have not been able to test the validity of Castalia’s underlying assumptions to calculate the [ ] figure for this benefit. See [3.1.3.] of Castalia, “Public Benefits and Detriments of a Provisional Authorisation for Collective Activity” (23 September 2021).

<sup>29</sup> We have not been able to test the validity of Castalia’s underlying assumptions to calculate the [ ] estimate.

<sup>30</sup> *Godfrey Hirst v Commerce Commission* [2016] NZCA 560, citing *Telecom Corporation of New Zealand Ltd v Commerce Commission (1991) 4 TCLR 473* (HC) [“AMPS-A”].

<sup>31</sup> As a result of various factors, including [ ], falling retail prices, and exclusion from a key export market, in the eight months to 31 December 2018, and in the 2019 and 2020 financial years, Tegel made operating losses of \$12.5 million, \$29.2 million, and \$17.1 million respectively, see [2.11] to [2.15] of Tegel Foods Limited, Submission in response to TGA provisional authorisation application (with redactions) (12 October 2021).

## Potential detriments

### *Submissions*

49. TGA submits that no detriments will arise from provisional authorisation because:
- 49.1 there will be no allocative efficiency loss because any price increase would be sufficiently small such that it would not materially increase retail prices nor would Tegel materially reduce the quantity of chicken products they sell; and
  - 49.2 a collectively negotiated agreement would include [ ] and would be more sophisticated, increasing productive and dynamic efficiency.
50. Tegel (as set out in its submissions in response to the Provisional Authorisation and the Commission's Statement of Preliminary Issues) and Brinks dispute TGA's claim that there would be no detriments:
- 50.1 In Tegel's view, collective bargaining is not appropriate or effective given the diversity across growers.  
[ ].<sup>32</sup>
  - 50.2 Tegel also submitted that provisional authorisation would override the terms of freely negotiated contracts and erode the confidence of future negotiating parties (in all markets), with negative implications for dynamic efficiency.<sup>33</sup>
  - 50.3 Brinks' view is that authorising collective bargaining would ultimately result in higher retail chicken prices.<sup>34</sup>

### *Our assessment*

51. We consider that there are two scenarios where Tegel could face higher grower costs because of provisional authorisation. One is if more growers would likely enter into individually negotiated agreements without provisional authorisation. If provisional authorisation of collective bargaining were to prevent at least some of these growers from entering into individual agreements with Tegel during the period of provisional authorisation, Tegel may face higher costs in relation to these growers.
52. The other scenario is if a collectively bargained agreement is reached between all growers and Tegel during the provisional authorisation period. Tegel could face higher grower costs if the agreement resulted in returns to growers that were higher than would result without collective bargaining.
53. We do not consider that the available evidence suggests that any higher costs that Tegel would face in either of these scenarios would be of sufficient magnitude such

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<sup>32</sup> See [5.15] of the letter from MinterEllisonRuddWatts (on behalf of Tegel) dated 18 October 2021; and see Tegel – Submission in response to NZTGA Statement of Preliminary Issues (5 November 2021 at [10.5].

<sup>33</sup> See NERA memo (11 October 2021) at [13].

<sup>34</sup> Letter from Van Den Brink Poultry Limited (7 October 2021).

that, if passed through into downstream retail prices, it would create a substantial allocative efficiency detriment.

54. First, grower costs are a relatively small proportion of Tegel's poultry revenues.<sup>35</sup> Second, available evidence regarding the potential magnitude of any increased returns to growers, submitted by TGA, suggests that any cost increase to Tegel from collective bargaining would be relatively small.<sup>36</sup> Third, estimates we have obtained of the responsiveness of demand for poultry products in response to price changes (the elasticity of demand) do not suggest that demand is unusually elastic.<sup>37</sup> This means that any pass through of increased growing costs into downstream retail prices is unlikely to lead to significant changes in the amount of poultry products purchased. Consequently, we expect that if any allocative efficiency detriments were to arise from provisional authorisation, they would be no more than minor.
55. Any collectively bargained agreement between growers and Tegel, as a result of provisional authorisation, could result in productive or dynamic efficiency detriments. However, we consider the likelihood of these detriments arising to a great extent is low, as Tegel has a strong incentive to maximise the productive and dynamic efficiency of growers' operations, so as to minimise its costs. We consider it is only likely to enter into an agreement during the provisional authorisation period that generated such inefficiencies if there are other offsetting benefits, [ ].
56. We disagree with Tegel's submission that provisional authorisation would override a freely negotiated contractual relationship. As a general rule, any contract must be entered into with the consent of the parties, and any contract can be altered by the consent of the parties. In this case, provisional authorisation only allows for the parties to freely negotiate a new or amended contract. If agreement is not reached otherwise, the provisional authorisation has no effect on existing contractual obligations.

### **Weighing of potential benefits and detriments**

57. Based on the information currently available to the Commission, we consider the potential benefits are more likely than not to outweigh the potential detriments from provisional authorisation because it would enable TGA to avoid the duplication of some negotiating expenses across growers. This saving would materialise under a provisional authorisation irrespective of whether [ ].

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<sup>35</sup> Tegel estimates that grower costs account for around [ ] of its poultry revenues, which are in the order of [ ], see [2.13] of Tegel Foods Limited, Submission in response to TGA provisional authorisation application (with redactions), 12 October 2021. We note that 16% of Tegel's sales relate to exports (see NZTGA Authorisation Application – 16 September 2021 at [4.17 (c) (iv)]). While we are not necessarily concerned with any resulting price increases to offshore consumers, to the extent that Tegel is not able to pass through these price increases to offshore consumers, it may be harmed by higher grower costs in the form of lost export sales

<sup>36</sup> Castalia estimates that any price increase would be less than [ ], see Castalia Report 2 at section [3.4]

<sup>37</sup> See *Tegel Foods Limited; Brinks Group of companies* [22/10/2008] Decision No: 658 at [62] to [76].

58. We also consider that there is a real chance that provisional authorisation would generate much larger benefits as, although collective bargaining does not guarantee [ ], it would increase the likelihood [ ]. However, if collective bargaining were not enabled until after full authorisation was granted, [ ].
59. In contrast, we consider that provisional authorisation is less likely to generate relatively large detriments. Furthermore, many of the potential benefits and detriments of provisional authorisation are causally linked. Efficiency detriments would most likely arise if a collectively bargained agreement resulted in materially higher returns to growers. However, this outcome would require Tegel's agreement, [ ] which would simultaneously produce the largest potential benefits.
60. Given this causal link, based on the information currently available, we consider that the potential benefits of granting provisional authorisation are more likely than not to outweigh the potential detriments. The potential benefits could be greater if the [ ]; however, even if [ ], transaction cost savings alone are likely to provide a sufficient benefit. We also consider that collective negotiations are more likely to enable Tegel to negotiate a solution to its [ ] sooner than would occur otherwise.

### **Permanent market changes**

61. As set out in our COVID-19 Guidelines, provisional authorisation is more likely to be granted if it is unlikely to materially alter the competitive dynamics of the market, either permanently or for a substantial period, if the application for full authorisation is later declined.<sup>38</sup>
62. As the provisional authorisation relates to collective bargaining and information sharing amongst different growers, we consider it would not result in any permanent structural changes to the market in terms of asset ownership. Growers would continue to be separate commercial entities facing their own individual incentives and there would not be material changes in market concentration.
63. We have also considered the long-term effect on the market of growers sharing information between themselves pursuant to a provisional authorisation. In addition, we have considered that a provisional authorisation may facilitate Tegel and (some or all) growers reaching new contractual agreements or agreeing amendments to their existing agreements, in the event that full authorisation is not granted. These effects are considered further in the below section "Possible harm to TGA and other parties."

### **Purpose of the Act**

64. In this case, we do not consider that granting provisional authorisation would be inconsistent with the purpose of the Act, which includes granting authorisation to agreements which are efficiency enhancing or of a benefit to New Zealand as a

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<sup>38</sup> See COVID-19 Guidelines at [50.4] and [51].

whole. Granting provisional authorisation to allow collective bargaining may help balance the bargaining power of Tegel and individual growers, and thereby help promote workable or effective competition. However, we have placed limited weight on this factor.

### **Urgency of application**

65. TGA claims its applications are urgent for a variety of reasons. Tegel disputes this, essentially arguing the situation is of TGA's own making, it has delayed applying for authorisation, and TGA should not derive any benefit from that.
66. The Commission has not inquired into when the applicant should have sought authorisation earlier, as we do not consider it necessary to reach a view on that matter to decide the application for provisional authorisation.
67. Instead, we consider urgency in the following way:
  - 67.1 Because the Act empowers the Commission to grant provisional authorisation "for the purpose of enabling due consideration to be given to the application or for any other reason", we consider there must be some minimum basis to grant provisional authorisation while the application for full authorisation is being duly considered. However, the satisfaction of this minimum element will usually be treated as neutral in the overall assessment, to avoid the 'double counting' of a benefit.
  - 67.2 Nonetheless, the need to avoid an imminent and substantial detriment in the period that the Commission requires to give due consideration to the full authorisation application is a factor that could weigh in favour of provisional authorisation being granted. This is particularly the case where the detriment would affect the wider industry, public, or consumers as well as the applicant.
  - 67.3 Similarly, the potential to realise a substantial benefit, particularly to the wider public, that could be unavailable if the applicant could not engage in the conduct until the Commission has given due consideration to the full authorisation application, could also weigh in favour of provisional authorisation being granted.
68. We note that the later an applicant leaves applying for authorisation, the smaller the size of the benefit that may result from provisional authorisation may be.
69. Applying the above to this case, we accept that at the time of provisional authorisation being sought, there are benefits that may accrue to the parties from a provisional authorisation prior to any grant of full authorisation and the magnitude of these potential benefits is diminishing over time.
70. However, in this case there are no imminent or substantial benefits or detriments of the type referred to at 67.2 and 67.3 above.
71. Accordingly, while we consider there is a basis to grant provisional authorisation while the application for full authorisation is being duly considered, because we have

already taken into account these benefits in our net benefit assessment, we consider urgency to be a neutral factor and have not placed weight on it in this case.

### **Possible harm to TGA and other parties**

72. Because the purpose of a provisional authorisation is to allow parties to engage in conduct on an interim basis, before the Commission has had the opportunity to carry out more fulsome analysis, it is appropriate to take into account whether greater harm would arise if provisional authorisation is or is not granted, particularly if the Commission subsequently makes a different decision regarding the full authorisation application.
73. If the Provisional Authorisation is not granted but the Full Authorisation subsequently is granted, there are likely and substantial benefits that would not flow to TGA and Tegel if TGA and its members are unable to engage in the Proposed Arrangement until the Full Authorisation is granted.  
[ ].
74. If the Provisional Authorisation is granted but the Full Authorisation is not, there is potential for harm to Tegel resulting from the growers' increased bargaining power over the period covered by the Provisional Authorisation:
- 74.1 if the parties reach an agreement in respect of [ ].  
However, we consider any such harm would be limited given Tegel would need to agree [ ]; or
- 74.2 by discussing their respective positions with each other. This is potentially harmful to Tegel even where no collective agreement is entered into, for instance if some growers would have otherwise entered into individual agreements with Tegel absent the Provisional Authorisation.
75. The maximum potential harm to Tegel estimated by Castalia for the Full Authorisation is [ ].<sup>39</sup> However, the true extent of harm arising from the Provisional Authorisation is more likely to be less than the Full Authorisation. This is because we expect Tegel would be less likely to enter into a collectively bargained agreement with growers during the Provisional Authorisation period if the terms were not sufficiently attractive for Tegel. It also appears growers already have some appreciation of each other's bargaining positions.
76. To the extent that some proportion of any increased growing costs to Tegel might be passed onto end consumers, this raises the potential for harm to these consumers. We note that given any potential allocative efficiency loss from higher retail prices is likely to be insubstantial, any harm to consumers would effectively be a transfer to growers.

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<sup>39</sup> See TGA Authorisation Application (16 September 2021) at [8.11]; Appendix D – Castalia Report (16 September 2021) at [3.5.2]; and TGA Provisional Authorisation Application (30 September 2021).

77. Therefore, we consider less harm is likely to arise from granting the Provisional Authorisation than from not granting it.

### **Balancing of factors**

78. Based on the information available to the Commission at this time, we consider it is appropriate to grant the Provisional Authorisation.
79. We have assessed the potential benefits and detriments and consider that the Provisional Authorisation is likely to produce at least a small benefit through transaction cost savings, which are likely regardless of whether [ ] and has a real chance of larger benefits if [ ].
80. We also consider that there is a low likelihood that the Provisional Authorisation would generate large detriments. Significant efficiency detriments appear most likely to arise if a collectively bargained agreement is reached between the growers and Tegel that results in materially higher returns to growers. However, Tegel would have to agree to such terms and if they were agreed, this would also be likely to generate substantial benefits because [ ]. Given this causal link, we consider the potential benefits arising from the Provisional Authorisation are more likely than not to outweigh the potential detriments.
81. We further consider that:
- 81.1 granting the Provisional Authorisation to allow collective bargaining may help balance the bargaining power of Tegel and individual growers, and thereby help promote workable or effective competition and therefore is consistent with the purpose of the Act;
  - 81.2 urgency is a neutral factor as there are no imminent or substantial detriments that need to be avoided, nor any wider potential benefit to the public or industry;
  - 81.3 it is unlikely that the Provisional Authorisation will permanently, or for a substantial period, alter the market. We are satisfied that the Proposed Arrangement would not permanently alter the market in terms of asset ownership, and the benefit to the growers of sharing information during the provisional period would diminish over time if the Full Authorisation was not granted; and
  - 81.4 on balance the possible harm favours provisional authorisation because Tegel is able to mitigate potential harm, and any cost increases to Tegel, and/or end consumers, would amount to a neutral transfer to growers.
82. Based on the information available we consider that, on balance, the relevant factors favour provisional authorisation. Our analysis of the potential benefits and detriments find that provisional authorisation is likely to result in the potential benefits outweighing the detriments, the potential harm favours granting the Provisional Authorisation, and authorisation meets the purpose of the Act. We have

treated urgency as a neutral factor that neither favours nor counts against the Provisional Authorisation being granted.

- 83. Growers sharing information during a provisional period presents some harm to Tegel. However, any such harm would diminish with time, and so we are satisfied that it would not have a permanent effect on the market. Consequently, we do not view information sharing to alter the balance of factors which would otherwise favour granting the Provisional Authorisation.

**Duration**

- 84. Under s 65AD(5) and (6), a grant of provisional authorisation remains in force until:

- 84.1 the end of a determined period;
- 84.2 the application is revoked;
- 84.3 the application is granted, declined or withdrawn; or
- 84.4 the end of such a period imposed as the Commission sees fit.

- 85. TGA submitted its Provisional Authorisation on 30 September 2021. It seeks a grant of provisional authorisation until the Commission either declines or grants the Full Authorisation. While noting TGA’s submission on this point, the Commission considers it is appropriate to set an end date for the Provisional Authorisation. The natural end date is 25 March 2022, being the current date by which the Commission will issue a decision in respect of the Full Authorisation, unless an extension is agreed otherwise.

- 86. We note that the Commission may grant a further provisional authorisation, if we decide it is appropriate to do so.

Dated this .... day of November 2021

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Sue Begg  
Deputy Chair