

Draft Determination

Note: This is a draft determination issued for the purpose of advancing the Commerce Commission's decision on this matter. The conclusions reached in this draft determination are preliminary and take into account only the information provided to the Commission to date.

This is a draft determination under the Commerce Act 1986 in the matter of an application for authorisation of a restrictive trade practice. The application is made by:

New Zealand Tegel Growers Association Incorporated

The Commission:

Sue Begg
Dr Derek Johnston
Vhari McWha

Summary of application:

The New Zealand Tegel Growers Association Incorporated has applied for authorisation, on behalf of its members, to collectively negotiate with Tegel Foods Limited.

Draft determination:

The Commerce Commission's draft decision is to grant authorisation as it is satisfied that the proposed arrangements will in all the circumstances result, or be likely to result, in such a benefit to the public that the conduct should be permitted.

Date of draft determination:

13 April 2022

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

INTRODUCTION	3
BACKGROUND	3
DRAFT DETERMINATION	4
ASSESSMENT PROCEDURE.....	5
PROPOSED ARRANGEMENT.....	5
HOW WE ASSESS AUTHORISATIONS DURING AN ‘EPIDEMIC PERIOD’	7
STATUTORY FRAMEWORK	7
<i>Jurisdictional threshold.....</i>	<i>7</i>
<i>Public benefit test.....</i>	<i>8</i>
ANALYSIS - JURISDICTION.....	9
<i>Section 65AA – Has the Commission received an application during the epidemic period?.....</i>	<i>9</i>
<i>Section 65AA – Does the proposed arrangement contain a cartel provision?.....</i>	<i>10</i>
<i>Section 58 – Will the proposed arrangement lessen competition?.....</i>	<i>11</i>
RELEVANT MARKETS	11
TGA’S SUBMISSIONS.....	11
OUR ASSESSMENT	12
WITH AND WITHOUT THE PROPOSED ARRANGEMENT	13
THE SITUATION WITH THE PROPOSED ARRANGEMENT	13
<i>TGA’s submissions.....</i>	<i>13</i>
<i>Tegel’s submissions.....</i>	<i>14</i>
<i>Our assessment.....</i>	<i>14</i>
THE SITUATION WITHOUT THE PROPOSED ARRANGEMENT	16
<i>TGA’s submissions.....</i>	<i>16</i>
<i>Tegel’s submissions.....</i>	<i>17</i>
<i>Our assessment.....</i>	<i>17</i>
OUR ASSESSMENT OF BENEFITS AND DETRIMENTS	18
POTENTIAL BENEFITS.....	20
<i>Submissions on avoided transaction costs.....</i>	<i>20</i>
<i>Submissions on [] costs.....</i>	<i>22</i>
<i>Our assessment of avoided transaction [] costs</i>	<i>23</i>
<i>Incentives [] in the short term.....</i>	<i>26</i>
<i>More efficient contracts.....</i>	<i>28</i>
<i>Impact of wealth transfers.....</i>	<i>34</i>
POTENTIAL DETRIMENTS.....	36
<i>Loss of allocative efficiency.....</i>	<i>36</i>
<i>Loss of productive and dynamic efficiency.....</i>	<i>40</i>
BALANCING OF BENEFITS AND DETRIMENTS.....	42
LENGTH OF THE PROPOSED AUTHORISATION	43

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).¹
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). The Commission granted provisional authorisation on 19 November 2021 until the earlier of 25 March 2022 or the date determined by the operation of section 65AD(5) of the Act.²
3. On 15 March 2022 TGA sought a further provisional authorisation on the same terms through to the conclusion of the Commission's investigation in respect of the Full Authorisation. The Commission granted TGA a further provisional authorisation on 23 March 2022 until the date determined by the operation of section 65AD(5) of the Act (the Second Provisional Authorisation).³
4. TGA proposes to collectively discuss and negotiate with Tegel about the terms of, adjustments to and reviews of, and resolution of disputes arising from, its chicken growing contracts and other associated issues. The proposed arrangement for which TGA seeks full authorisation is described at paragraph 20 below (the Proposed Arrangement).

Background

5. TGA is an industry association. Its membership consists of three regional industry associations (Regional Associations) and chicken growers.⁴ The Regional Associations represent approximately 75 growers in the greater Auckland, Taranaki, and Canterbury regions who supply chicken growing services to Tegel.
6. Tegel is New Zealand's largest poultry processor, which is wholly owned by Inoza Foods Incorporated, a privately-owned company registered in the Philippines.⁵
7. Since its incorporation in 2006, TGA has collectively negotiated the terms of its members' supply of chicken growing services with Tegel. Prior to this, each Regional

¹ The statutory timeframe in which the Commission has to complete this investigation has been extended from 25 March until 30 May 2022.

² [Provisional authorisation granted for New Zealand Tegel Growers Association to engage in collective bargaining with Tegel Foods.](#)

³ [Continuation of provisional authorisation for New Zealand Tegel Growers Association to collectively negotiate with Tegel.](#)

⁴ Namely, the Auckland Meat Chicken Growers Association, the Taranaki Broiler Growers Associations and the Canterbury Poultry Meat Producers Association.

⁵ Full Authorisation Application at [8.12].

Association collectively negotiated with Tegel (or its predecessor) on behalf of its member growers.

8. TGA’s negotiations with Tegel resulted in various individual contracts concluded between Tegel and TGA growers based on collectively agreed terms over the years. The contracts which are currently in place between the parties are known as the ‘Farm Management Agreements’ (FMAs).

9. The commercial dealings between Tegel and the growers [].

10. [].⁶

11. [].

12. []:

12.1 []; or

12.2 [],

[].

13. During the Provisional Authorisation period the parties have negotiated collectively in an attempt to [] amend certain terms of the FMAs. [].

Draft determination

14. The Commission’s preliminary view is that authorising the Proposed Arrangement would more likely than not lead to public benefits that outweigh any detriments.

⁶ [].

15. Our preliminary view is based on our assessment of the likely benefits and detriments on the evidence available to us at this time.
16. Accordingly, the Commission's draft determination is to authorise the Proposed Arrangement for a period of ten years.

Assessment procedure

17. In making this draft determination, we have reviewed:
 - 17.1 the Provisional Authorisation and Full Authorisation applications, as well as TGA's cross-submissions dated 26 October 2021 and 23 December 2021;
 - 17.2 Van Den Brink Poultry Limited (Brinks)'s combined submission on the Provisional Authorisation and Full Authorisation dated 7 October 2021;
 - 17.3 Tegel's submissions in response to the Provisional Authorisation dated 12 October 2021 and Full Authorisation dated 5 November 2021; and
 - 17.4 information received from TGA and Tegel about their negotiations [].⁷
18. We have interviewed and received information from various interested parties.⁸
19. Tegel and Brinks both oppose the Full Authorisation in their written submissions.

Proposed Arrangement

20. TGA seeks for itself, the Regional Associations, and the growers, together with future growers, authorisation to:
 - 20.1 collectively discuss and negotiate with Tegel:
 - 20.1.1 growing fees and other terms and conditions of chicken growing contracts;
 - 20.1.2 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
 - 20.1.3 resolution of disputes which from time to time arise under chicken growing contracts or otherwise arise between Tegel and a grower or growers;

⁷ Letter from MinterEllisonRuddWatts to Commerce Commission dated 25 March 2022.

⁸ Public versions of TGA's application documents, parties' submissions and the Commission's Statement of Preliminary Issues (SOPI) can be accessed on our [case register](#).

- 20.2 discuss amongst themselves matters relating to growers' discussions and negotiations with Tegel (whether collective or otherwise) on the matters referred to above;
- 20.3 without limiting paragraph 20.2 above, exchange information between themselves concerning growers' discussions and negotiations with Tegel (whether collective or otherwise) on the matters referred to at paragraph 20.1 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;
- 20.4 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 20.1 above; and
- 20.5 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 20.1 above, including provisions:
- 20.5.1 setting growing fees;
- 20.5.2 providing for the adjustment or review of growing fees; and
- 20.5.3 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.
21. Together, the Commission refers to the above behaviour as the Proposed Arrangement.
22. 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.⁹
23. 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.

⁹ TGA's cross-submission dated 26 October 2021 sets out at [75] that
[
].

How we assess authorisations during an ‘epidemic period’

Statutory framework

24. A three-stage assessment is undertaken in any authorisation application under ss 65AA and 58 of the Act:¹⁰
- 24.1 First, confirming:
- 24.1.1 for s 58 applications, whether the applicant believes s 27 might apply to the agreement; or
- 24.1.2 for s 65AA applications, whether the applicant believes the agreement may contain a cartel provision;¹¹
- 24.2 second, establishing whether the Commission has jurisdiction to authorise under s 61(6) (the ‘jurisdictional threshold’), and in addition, for s 65AA applications, whether the application has been made during the epidemic period;¹²
25. third, assessing whether the associated benefits mean that authorisation should be granted (the ‘public benefit test’).
26. The first stage of the assessment is generally assessed at the time the application is registered. We note NZTGA states at 2.13 of the Full Authorisation Application that it believes the Proposed Arrangement may contain a cartel provision or might breach s 27.

Jurisdictional threshold

27. The Commission has jurisdiction to grant an authorisation under s 58 only for arrangements that will, or are likely to, lessen competition. This is called the ‘competition threshold’. The competition threshold arises from the s 61(6) test which requires a “lessening in competition that would result, or would be likely to result” from the arrangement.
28. Usually, the Commission can only authorise cartel provisions to which s 27 would also apply, because s 58 does not make any express reference to cartel provisions. However, during the epidemic period, a person can also apply for authorisation under s 65AA of an arrangement containing a cartel provision.¹³
29. For the purposes of s 65AA, s 61(6) and the competition threshold are replaced by s 65AB(3) and (4). The Commission will have jurisdiction to grant authorisation under s 65AA if the application is made during the epidemic period,¹⁴ and the Commission

¹⁰ See generally our [Authorisation Guidelines, December 2020 \(Authorisation Guidelines\)](#).

¹¹ Sections 58(1) and (2) and ss 65AA(1) and (2).

¹² Noting that, in respect of section 65AA applications, s 61(6) is modified by s 65AB(3).

¹³ Our process for determining s 65AA applications, and applications under s 58 made during the epidemic period, is explained in our [Guidelines on Approach to Authorisations under the COVID-19 Response \(Further Management Measures\) Legislation Act](#) (COVID-19 Guidelines).

¹⁴ Sections 65AA(2) and (3).

has reasonable grounds to believe the arrangement might contain a cartel provision. It is not necessary for the Commission to determine whether a provision is in fact a cartel provision.¹⁵

Public benefit test

30. Although the jurisdictional thresholds differ under ss 65AA and 58, the public benefit test is the same:¹⁶
- 30.1 In relation to s 65AA, the Commission can authorise an arrangement that contains (or on reasonable grounds we believe might contain) a cartel provision if it is satisfied that the arrangement will in all the circumstances result, or be likely to result, in such a benefit to the public that it should be permitted.¹⁷
- 30.2 In relation to s 58, the Commission can authorise an arrangement that may lessen competition if it is satisfied that the arrangement will be likely to result in a benefit to the public that would outweigh the lessening of competition.¹⁸
31. While stated differently, the courts have held that there is no material difference between the two assessments of public benefit.¹⁹
32. In each case the Commission needs to investigate the nature, likelihood and magnitude of any detriments and benefits that might arise from the proposed arrangement.²⁰
33. The detriments and benefits must arise from the proposed arrangement for which authorisation is sought.²¹ To determine whether the detriments and benefits are specific to the proposed arrangement, we assess, in relation to a relevant market(s):
- 33.1 what is likely to occur in the future without the arrangement (the counterfactual);
- 33.2 what is likely to occur in the future with the arrangement (the factual); and
- 33.3 once identified, we then assess all likely detriments and benefits relevant to our assessment of the arrangement.²²

¹⁵ Section 65AB(4) of the Act.

¹⁶ COVID-19 Guidelines at [36].

¹⁷ Sections 65AB(3) and (4) of the Act.

¹⁸ Section 61(6) of the Act.

¹⁹ See *Air New Zealand and Qantas Airways Limited v Commerce Commission* (2004) 11 TCLR 347 (HC) at [33] and *Godfrey Hirst NZ Ltd v Commerce Commission* (2011) 9 NZBLC 103,396 (HC) at [88]-[90].

²⁰ COVID-19 Guidelines at [38].

²¹ Authorisation Guidelines at [39].

²² *NZME Ltd v Commerce Commission* [2018] 3 NZLR 715 (CA) at [83] and [86(a)].

34. As a general principle, detriments and benefits will be considered likely if there is a “real and substantial risk” or “real chance” that they will happen if the arrangement proceeds.²³

Analysis - Jurisdiction

Section 65AA – Has the Commission received an application during the epidemic period?

35. Section 65AA requires that the Commission receives an application during the epidemic period (and that the Commission believes on reasonable grounds the arrangement might contain a cartel provision – discussed below). Given the application has been made during the epidemic period, the Commission considers that threshold has been met.
36. However, Tegel submits that: “It is self-evident from this history and context that the Application does not relate to or support a response to COVID-19, and therefore authorisation cannot be granted under s 65AA(2) and (3).” Tegel refers to its submissions in relation to the Provisional Authorisation in support.²⁴
37. We do not consider it appropriate to ‘read in’ any additional requirements to the plain wording of ss 65AA – 65AD. Similar to our view expressed in the Provisional Authorisation determination, we consider:
- 37.1 Legislation must be interpreted from its text in light of its purpose and context.²⁵
- 37.2 Parliament turned its mind to, and expressly provided for, the requirements an applicant must meet to be granted authorisation in ss 65AA(2) and (3), and at s 65AB(3).
- 37.3 The lack of any other reference to COVID-19 in ss 65AA – 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.
- 37.4 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 the effects of COVID-19.²⁶

²³ *Ibid.*

²⁴ Tegel Submission on SOPI, 5 November 2021 at [2.5] of section 2.

²⁵ 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].

²⁶ One example would be to prevent arguments as to whether the need for 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. This has had multiple iterations, but

38. Given the clear wording and purpose of s 65AA as outlined above, we do not consider any further light is brought to the interpretation of ss 65AA – AD by the submissions in relation to cl 65AAA of the then Commerce Amendment Bill 2021 which relates to “Interim Authorisations”.
39. Subsequently the Commerce Amendment Bill 2021 has passed into law as the Commerce Amendment Act 2022.²⁷ Because the Commerce Amendment Act commences in part before a final determination will be made, to offer the parties the opportunity to submit on this point we have also considered whether our preliminary view should be different with the amendments to the Act effected by the Commerce Amendment Act.
40. Our preliminary view is that our view should not change given:
- 40.1 the amendment to s 65AA(b), triggering its repeal at a time potentially earlier than s 65AE, will not occur until section 19 of the Commerce Amendment Act 2022 commences, which will not occur until the first anniversary of when Royal assent is given;²⁸
- 40.2 the amendments are unlikely to change the effect of Schedule 1AA, Part 3, subclause 12 of the Act in this case given they do not commence until 5 October 2022. That, for the purposes of an application made during the epidemic period, ss 65AA – AD continue to apply as if they remained in force despite their repeal; and
- 40.3 while enacted provisions can be taken into account when interpreting legislation,²⁹ the general replacement of the ss 65AA – AD powers, which are tied to the epidemic period, with similar powers not tied to the epidemic period, does not in itself give rise to any reason to change our interpretation of the s 65AA power above.

Section 65AA – Does the proposed arrangement contain a cartel provision?

41. Accordingly, we can proceed to consider whether the Proposed Arrangement contains a cartel provision. As outlined above the Commission is only required to consider whether on reasonable grounds the Proposed Arrangement might contain a cartel provision.³⁰
42. Any agreement between TGA, its members and Tegel will be a contract containing provisions. We consider there are reasonable grounds to believe that:

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.

²⁷ The Bill received Royal assent on 5 April 2022.

²⁸ Commerce Amendment Act 2022, s 2. The power to grant interim authorisations under s 65AAA commences on 5 May 2022 but as noted above this does not immediately trigger the repeal of s 65AA.

²⁹ *Burrows and Carter Statute Law in New Zealand*, 6th Edition, LexisNexis 2021 at [791 – 804].

³⁰ Section 65AB(4) of the Act.

- 42.1 as some of those provisions intend to set the price of chicken growing services; and
- 42.2 but for any arrangement those services are supplied to Tegel by growers in competition with each other;

those provisions might have the effect of fixing, controlling or maintaining price or restricting output, and therefore there are reasonable grounds to believe that the Proposed Arrangement might contain a cartel provision.

Section 58 – Will the proposed arrangement lessen competition?

43. With the Proposed Arrangement, TGA would seek to collectively negotiate the relevant fees and charges that its members could agree with Tegel. TGA also submits collective negotiation of non-price terms that are of competitive significance may also lessen competition. The Proposed Arrangement would likely interfere with the normal competitive process of competitors independently negotiating the price and terms on which they would offer their services to a purchaser.
44. We consider that, when compared to individually negotiated supply contracts, collective bargaining would have the potential to raise the (quality adjusted) price paid by Tegel for chicken growing services and standardise non-price terms amongst the growers. Therefore, we agree with TGA that the Proposed Arrangement may lessen competition.³¹

Relevant markets

TGA's submissions

45. TGA submits that the relevant markets are:³²
- 45.1 Regional markets for broiler chicken growing services in the greater Auckland, Canterbury, and Taranaki regions. In support of its characterisation of the relevant markets, TGA cites animal welfare considerations for the transport of chickens,³³ the Waikato – Bay of Plenty Authorisation Determination,³⁴ and the Tegel Foods Authorisation Determination³⁵ in which the Commission has defined regional markets, and the specialised capital investment required to provide chicken growing services.
- 45.2 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 Determination.

³¹ Authorisation Application at [2.20]. It is not necessary for any lessening to be substantial, see s (6A).

³² Tegel has not opposed these proposed relevant markets.

³³ Code of Welfare: Transport within New Zealand at section [4.1].

³⁴ *Waikato-Bay of Plenty Chicken Growers Association Incorporated* [2017] NZCC [37].

³⁵ See *Tegel Foods Limited and Brinks Group of Companies* (Commerce Commission Decision 658, 2008).

Our assessment

46. We consider that the relevant markets are the regional markets for both free-range and barn-raised chicken growing services in the greater Auckland, Canterbury, and Taranaki regions:
- 46.1 Animal welfare considerations limit the distance a grower’s farm can be located from the processing plant it supplies. The Code of Welfare limits the transport of animals to “the shortest possible time”.³⁶ The Society for the Prevention of Cruelty to Animals (SPCA) standards limit this duration so that “the time between the loading of the last bird, to the time of arrival at the final destination, must be less than two hours”.³⁷ Supplementing TGA’s submissions on this point, the Commission heard at interview that the duration of travel limits growers’ ability to supply a processor located in another region.³⁸
- 46.2 The locations of farms currently supplying Tegel confirm that growers are located within a two-hour radius of Tegel’s processing facilities.³⁹
- 46.3 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.⁴⁰ The Determination further identified that growing free-range and barn-raised chickens are suitably similar to be included in the same market. This view was supported by a chicken processor who indicated that there are not large barriers to growers who wish to switch from barn-raised to free-range.⁴¹
47. The Commission further considers that there are downstream markets for the wholesale supply of chicken products. Our view is that there are likely to be separate product markets for the wholesale supply of primary and secondary processed chicken.^{42, 43} There may also be separate geographic markets for the North and South Islands in relation to primary processed chicken because of the cost and potential delays associated with transporting these products across the Cook Strait. As a precise definition of the relevant downstream markets is not required for our analysis, we have not sought to define these.

³⁶ Code of Welfare: Transport within New Zealand at section [4.1].

³⁷ SPCA Certified Standards for Free Range Meat Chickens (version 1.1 – 2021) at [E64].

³⁸ Commerce Commission interview with Inghams (29 November 2021).

³⁹ See Appendix H of the Full Authorisation Application.

⁴⁰ See *Waikato-Bay of Plenty Chicken Growers Association Incorporated* [2017] NZCC [37] at [35.4].

⁴¹ Commerce Commission interview with Inghams (29 November 2021).

⁴² Primary processed chicken might include both whole birds and basic cuts (eg, breast, thigh, drumstick). Secondary processed chicken might include value-added products (eg, nuggets, burgers, skewers).

⁴³ This is consistent with a previous Commission Determination in which there was little supply-side or demand-side substitution between primary and secondary processed chicken. See *Tegel Foods Limited and Brinks Group of Companies* (Commerce Commission Decision 658, 2008) at [84].

With and without the Proposed Arrangement

48. In reaching our preliminary view below we have considered all submissions and evidence received on the likely situations that would arise with and without full authorisation being granted for the Proposed Arrangement.

The situation with the Proposed Arrangement

TGA's submissions

49. TGA submits that if the Commission grants full authorisation it would engage in the Proposed Arrangement – ie, it would engage in collective negotiations with Tegel as submitted.
50. TGA further submits that if Tegel chooses not to negotiate with TGA, the growers would discuss their positions as a collective before negotiating individually with Tegel.⁴⁴ In that way, TGA says, many of the benefits of the Proposed Arrangement (or similar benefits) are likely even if Tegel negotiates with growers individually.⁴⁵
51. TGA refers to these two scenarios in the situation with the Proposed Arrangement as Factual 1 and Factual 2 respectively.⁴⁶

51.1 According to TGA the FMAs would largely remain in place under Factual 1, and it speculates that some payment terms and terms unclear in their application are likely to be amended or removed – [].⁴⁷

51.2 Under Factual 2, TGA anticipates similar outcomes to Factual 1.⁴⁸

52. For the purpose of its analysis of the Proposed Arrangement's likely benefits and detriments following a grant of full authorisation, TGA adopts Factual 1.

53. [].⁴⁹ [].⁵⁰
[].⁵¹

54. [].

⁴⁴ Full Authorisation at [1.25] and [8.3(g)].

⁴⁵ *Ibid.*

⁴⁶ Annexure D of the Full Authorisation at [3.4.1].

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ TGA's Cross-Submission dated 23 December 2021 at [33].

⁵⁰ *Ibid.*

⁵¹ *Ibid* at [35].

Tegel's submissions

55. Tegel disputes TGA's submitted Factual 1 and Factual 2.
56. Tegel submitted in its submission dated 12 October 2021 [].⁵²
- 56.1 [].⁵³
- 56.2 [].⁵⁴
57. Tegel's submissions regarding the situation with the Proposed Arrangement are not, however, limited to []. It submits more broadly on the FMAs [].
58. According to Tegel:
- 58.1 []; and
- 58.2 as far as [] are concerned, it would continue to consult with TGA (which, it submits, falls within the scope of a 'collaborative activity' between Tegel and the growers).^{55, 56, 57}
59. [].⁵⁸

Our assessment

60. We consider it is likely negotiations seeking to [] and vary the FMAs (or facilitate the conclusion of new agreements largely reflecting the current terms of the FMAs) would continue on a collective basis with the Proposed Arrangement – that is, TGA's submitted Factual 1. We also consider such negotiations are likely to result in an agreement, although the precise terms of any resulting agreement are unclear on the available evidence.

⁵² Tegel' submission in response to TGA's Provisional Authorisation at [4.1].

⁵³ *Ibid* at [7.6].

⁵⁴ Tegel's Submission in Response to SOPI dated 5 November 2021 at [6.5].

⁵⁵ *Ibid* at [6.5] to [6.7].

⁵⁶ Tegel's Submission in Response to TGA's Provisional Authorisation dated 30 September 2021 at [5.9].

⁵⁷ We do not express any view on the existence or otherwise of a collaborative activity between Tegel and the growers in this draft determination.

⁵⁸ [].

61. First, evidence preceding and following the Commission’s grant of provisional authorisation is not consistent with Tegel’s submissions. Tegel has historically and more recently collectively negotiated with TGA.

61.1 We note in one of its submissions on the Provisional Authorisation Tegel said [].⁵⁹

61.2 And more recently [] after the Commission’s grant of the Provisional Authorisation and prior to the Second Provisional Authorisation:

61.2.1 [].⁶⁰

61.2.2 Tegel participated in [] collective negotiations with TGA. [].

62. Second, [].⁶¹

63. Lastly, we remain of the view expressed in the Provisional Authorisation that the parties are likely to enter into an agreement given:

63.1 [].

63.2 The parties are in a ‘symbiotic relationship’: the growers are vested in Tegel’s financial wellbeing and vice versa. [].

63.3 And lastly, the FMAs play an important role in the parties’ operations, such that when there is uncertainty (or a dispute) the operation of the parties’ businesses is affected. It is in the long-term interest of all the parties that their businesses operate smoothly.

⁵⁹ Tegel’s Submission in Response to TGA’s Provisional Authorisation dated 30 September 2021 at [2.16].

⁶⁰ Letter from Lane Neave to MinterEllisonRuddWatts dated 25 November 2021 at [1].

⁶¹ We note, by way of example, the following remarks made by Tegel at interview (Commerce Commission interview with Tegel (7 December 2021)):

[

].

64. We also assessed TGA's Factual 2. In our view Factual 2 is not a likely situation with the Proposed Arrangement.
65. Given the evidence before us we consider the probability that Tegel would not participate in collective negotiations is so low that we can exclude the real chance that Tegel would not do so.
- 65.1 Following provisional authorisation the parties have engaged in collective negotiations as contemplated by Factual 1.
[].
- 65.2 We consider the reasons given above at paragraphs 61 and 61.2.2 establishing the real chance of Tegel engaging in collective negotiations in fact support a much higher probability for Tegel engaging in collective negotiations.

The situation without the Proposed Arrangement

TGA's submissions

66. TGA submits the FMAs are complex [] contracts that necessitate ongoing negotiations between Tegel and the growers regarding the suitability of their terms.⁶² Such negotiations have, TGA notes, in the past resulted in amendments to the FMAs.⁶³
67. Because of the complexity [] of the FMAs TGA considers that absent authorisation, [].⁶⁴
68. Other factors according to TGA that might necessitate changes to the FMAs include:
- 68.1 economic and trading conditions;
- 68.2 customer preferences or requirements;
- 68.3 Tegel's shed standards; and
- 68.4 animal welfare requirements,
- all of which would, in TGA's submission, be costly through individual negotiations.⁶⁵
69. As a result, TGA says "simpler", [] contracts would result without the Proposed Arrangement.⁶⁶

⁶² Full Authorisation at [5.1].

⁶³ *Ibid* at [5.6].

⁶⁴ *Ibid* at [5.11].

⁶⁵ *Ibid* at [5.8].

⁶⁶ Which we understand to mean less nuanced and efficient contracts.

70. Therefore, as regards the likely situation without the Proposed Arrangement, TGA submits:

70.1 the FMAs are unlikely to continue beyond the short to medium term – []; and

70.2 the FMAs are likely to be replaced by simpler, [] contracts that are negotiated with each grower based on a standard short form template.⁶⁷

Tegel's submissions

71. Tegel disputes the situation TGA considers likely absent a grant of full authorisation.

72. As to the situation without the Proposed Arrangement, Tegel submits the FMAs will continue in force in accordance with their terms until expiry, unless a grower agrees to a variation.⁶⁸

72.1 Tegel submits further, if a grower agrees to vary its FMA the variation would be individually negotiated.⁶⁹

72.2 Tegel considers such variations unlikely, however, for two reasons.⁷⁰ First, Tegel has no ability to compel the growers to agree to variations of the FMAs. And second, the growers generally have no incentive to [].

72.2.1 For these reasons Tegel is of the view that the growers – [] only to the extent that renegotiations are required – are likely to negotiate on an individual basis as an alternative to the Proposed Arrangement.⁷¹

73. Tegel notes such individual negotiations are [].⁷²

Our assessment

74. Without the Proposed Arrangement the growers and Tegel would, in our assessment, have little choice but to negotiate individually. By adhering to the FMAs without authorisation the parties would continue to give effect to provisions that may fix the price of chicken growing services to Tegel.

⁶⁷ TGA's Cross-Submission dated 23 December 2021 at [41].

⁶⁸ See Tegel Submission in Response to SOPI dated 5 November 2021 at [7.4].

⁶⁹ *Ibid.*

⁷⁰ *Ibid* at [7.7] and [7.13].

⁷¹ Report by NERA dated 5 November 2021 at [8].

⁷² Tegel's Submission in Response to SOPI dated 5 November 2021at [7.8].

75. As the nature of the contracts in the counterfactual has some bearing on the benefits and detriments of the Proposed Arrangement, we consider the following scenarios are likely:

75.1 In the short term, [] the contracts are likely to closely reflect the existing FMAs, albeit with minor but important variations [].⁷³ This is supported by the [] practical considerations given the contractual uncertainty which will result if authorisation is declined.

75.2 However, in the long term, we consider it most likely that these contracts will become increasingly divergent variations on the existing FMAs. Nevertheless, it is also likely that they are replaced by standard form, less nuanced contracts as submitted by TGA, depending on the respective bargaining position of the parties in the future.

76. []. We remain of the view expressed in the Provisional Authorisation that:

76.1 growers who seek to negotiate [] will only be able to negotiate on an individual basis;

76.2 [];

76.3 while possible, there is not a real chance that every grower would [];

76.4 therefore, it is not likely that [].

Our assessment of benefits and detriments

77. The Commission will grant authorisation if it is satisfied, on the evidence before it, that the proposed conduct will result, or will be likely to result, in a benefit to the public that would outweigh the lessening in competition.⁷⁴ In making this assessment, the Commission considers the quality of the evidence and makes judgements about how much weight to give to the evidence.

⁷³

[]

[]; see Tegel's Submission in Response to SOPI dated 8 October 2021 at Appendix 1 – Variation of Agreement.

[]

[]; see Commerce Commission Interview with [].

⁷⁴ Authorisation Guidelines at [14.2].

78. In *Godfrey Hirst*, the Court of Appeal observed that the Commission must consider a broad range of benefits and detriments in applications for authorisation. This may include efficiencies and non-economic factors.⁷⁵
79. In particular, the Court of Appeal indicated that the Commission must have regard to efficiencies when weighed together with long-term benefits to consumers, the promotion of competition, and any economic and non-economic public benefits. The Court stated that “[w]here possible these elements should be quantified; but the Commission and the courts cannot be compelled to perform quantitative analysis of qualitative variables.”⁷⁶
80. The Commission’s approach is to quantify benefits and detriments to the extent that it is practicable to do so.⁷⁷ Regarding the weight that can be given to qualitative factors, the Court of Appeal said in *Godfrey Hirst* that “[q]ualitative factors can be given independent and, where appropriate, decisive weight”.⁷⁸
81. The Court of Appeal in *NZME* confirmed that the Act allows the Commission to apply a ‘modified total welfare’ approach but does not require us to do so. A modified total welfare approach can take into account the distributional effects of benefits and detriments within a community. No party has proposed to depart from the total welfare approach and the Commission does not propose to do so of its own motion given that it does not appear that it would affect our decision to grant authorisation.⁷⁹
82. In general, collective bargaining has the potential to cause both public benefits and detriments. Collective bargaining can reduce the costs of negotiating contracts by reducing the number of negotiations and by allowing advisory costs to be shared.⁸⁰ Collective bargaining may also enable access to higher quality advice through the pooling of member’s resources. It can also change incentives to obtain mutually beneficial gains from trade by allowing information to be shared and by rebalancing bargaining power. Consequently, collectively negotiated contracts may be more efficient in the sense that they are more nuanced and take account of more contingencies than might be the case if negotiated individually.
83. Detriments arise if a market experiences a loss in allocative, productive or dynamic efficiency, in this case within the relevant regional markets for chicken growing services. Allocative efficiency is lost when inefficient (higher) prices result in substitution to less preferred alternatives or to the purchase of smaller quantities. Productive efficiency is lost when resources are inefficiently employed in production, typically increasing costs above efficient levels. Consequently, costs or unit costs may

⁷⁵ *Godfrey Hirst NZ Ltd v Commerce Commission* [2016] NZCA 560 (CA) at [24] and [31] (*Godfrey Hirst*).

⁷⁶ *Godfrey Hirst* at [36].

⁷⁷ *Telecom Corporation of New Zealand Ltd v Commerce Commission* [1992] 3 NZLR 429 (CA) (AMPS-A CA) at 447; *Air New Zealand* at [319]; and *Ravensdown Corporation Ltd v Commerce Commission* High Court, Wellington API68/96 (16 December 1996) at [47] to [48].

⁷⁸ *Godfrey Hirst* at [38].

⁷⁹ *NZME Ltd v Commerce Commission* [2018] 3 NZLR 715 at [75]; and see Authorisation Guidelines at [84].

⁸⁰ Stephen King (2013) Collective Bargaining by Business: Economic and Legal Implications. *UNSW Law Journal*, 36(1), [107] – [138].

increase, and capacity may be sub-optimally used. Dynamic efficiency is typically lost when the incentive or the ability to innovate/invest is reduced. These potential impacts are discussed in further detail below.

Potential benefits

84. There are three main categories of potential benefits from the Proposed Arrangement:

84.1 lower transactions costs, which we have further categorised into:

84.1.1 costs associated with bargaining and negotiation that would be ongoing over the long term; and

84.1.2 costs associated with [] that are unlikely to continue past the short term;

84.2 more efficient/sophisticated contracts; and

84.3 beneficial wealth transfers.

Submissions on avoided transaction costs

85. TGA submits that collective bargaining would result in transaction cost savings in the range of \$1.4 million to \$3.1 million over the ten-year period for which authorisation is sought.⁸¹ Such cost savings would arise because collective negotiations with Tegel are less costly than the sum of costs associated with Tegel negotiating with each individual grower.

86. While TGA does not consider Tegel's submitted counterfactual to be likely (that the FMAs would continue in its current form), they provided a further transaction cost saving analysis. TGA estimates that the transaction costs savings under the collective negotiation arrangement when compared with Tegel's submitted counterfactual, would be in the range of \$1 million to \$1.5 million over the ten-year period.⁸²

87. TGA stresses that transaction cost savings can be obtained due to the extent of commonality among growers. While growers differ with respect to several variables such as [], the FMAs covers many factors that do not vary between growers.⁸³ This includes [

].⁸⁴ These terms are the same across growers, and so transaction cost savings can be obtained by discussing them collectively.

⁸¹ At [3.5.1] of Castalia, "Public Benefits and Detriments of Collective Bargaining by Tegel's Chicken Growers" (16 September 2021); and Full Authorisation at [8.6].

⁸² TGA's Cross-Submission dated 23 December 2021 at [40] – [42] and at Schedule 2.

⁸³ *Ibid* at [13] and [16].

⁸⁴ *Ibid* at [17] to [18].

88. TGA further points to the Waikato Bay of Plenty Authorisation,⁸⁵ which involved Inghams Enterprises (NZ) Pty Limited (Inghams), and several chicken grower related authorisations in Australia. Regarding the former, TGA submits that Inghams collectively negotiating with its growers post-authorisation is evidence of transaction cost savings existing regardless of similar variation in grower characteristics.⁸⁶ With respect to the latter, TGA submits that the ACCC has consistently accepted claims of transaction cost savings for chicken grower authorisations even though greater heterogeneity exists among Australian growers.⁸⁷ The authorisation, and subsequent engagement in, collective bargaining by chicken growers is commonplace in Australia.
89. At interviews, some TGA member growers claimed that negotiations with Tegel through TGA have been a quick process.⁸⁸ These growers submit that there is rarely disagreement among growers and that matters generally gain near to full support at association meetings. These TGA growers also claim that authorisation would allow them to share the costs of negotiating with Tegel.⁸⁹ Absent authorisation, growers would pay advisory costs (largely legal and accounting costs) individually.
90. [],⁹⁰ [].⁹¹
91. In contrast, Tegel submits that transaction cost savings are either non-existent or at least overstated. This is because Tegel disputes TGA's factual and counterfactual assumptions.⁹² Tegel claims that the growers have no incentive to [].⁹³ [].⁹⁴

⁸⁵ *Waikato-Bay of Plenty Chicken Growers Association Incorporated* [2017] NZCC [37].

⁸⁶ See TGA's Cross-Submission dated 23 December 2021 at [19].

⁸⁷ *Ibid* at [20] to [24].

⁸⁸ Commerce Commission interview with []; and Commerce Commission interview with [].

⁸⁹ Commerce Commission interview with []; Commerce Commission interview with []; and Commerce Commission interview with [].

⁹⁰ Commerce Commission interview with TGA (15 December 2021); and Commerce Commission interview with [].

⁹¹ [], see Second Provisional Authorisation at [10].

⁹² Tegel's Submission in Response to SOPI dated 5 November 2021 at [10.2].

⁹³ *Ibid* at [7.13] and [7.17].

⁹⁴ *Ibid* at [10.4] and [10.7] to [10.8].

92. Tegel claims that heterogeneity among growers would effectively substitute internal negotiating costs (within the TGA) for external negotiating costs (between the TGA and Tegel).⁹⁵ Transaction costs would arise as the growers internally negotiate a collective position that aligns all members’ interests but that is also acceptable to Tegel. Given differences in grower circumstances, this alignment would be difficult says Tegel. Internal negotiations would be costly and lengthy, Tegel submits, shifting transaction costs to internal discussions rather than producing net savings.

93. One grower who resigned from TGA claims that the annual TGA membership fees do not provide real value,⁹⁶ and another former TGA grower claims that additional legal fees [] were larger than if they were negotiated individually.⁹⁷ These former TGA growers considered that TGA did not represent all growers’ opinions, and poor communication from TGA made it difficult to quickly reach a collective view.

94. []^{98, 99}
[]

Submissions on [] costs

95. []

96. []:¹⁰⁰

96.1 []
];¹⁰¹ and

⁹⁵ NERA – Submission on TGA’s SOPI (5 November 2021) at [17] to [19].

⁹⁶ Commerce Commission interview with []. The Commission understands that the NZTGA []. Commerce Commission interview with TGA (15 December 2021).

⁹⁷ Commerce Commission interview with []. Former TGA growers also said TGA does not communicate well with growers. Commerce Commission interview with []; and Commerce Commission interview with [].

⁹⁸ []

⁹⁹ []

¹⁰⁰ Provisional Authorisation at [4.19] to [4.20].

¹⁰¹ Commerce Commission interview with TGA (15 December 2021); and Commerce Commission interview with []

96.2 []].

97. []^{.102}
[]^{.103}

98. []^{.104}
[]^{.105} []].

99. Tegel further claims that a collectively negotiated contract does not provide for the unique needs and circumstances of individual growers, []^{.106}

Our assessment of avoided transaction [] costs

100. In regard to avoided transaction [] costs, the Commission must consider:

100.1 the likely short-term costs of negotiating individual agreements in the counterfactual as against the short-term costs of negotiating a collective agreement, []; and

100.2 the likely long-term costs of negotiating individual agreements as against the long-term costs of negotiating amendments to the FMAs.

101. We consider there are likely to be material cost savings from the Proposed Arrangement in relation to both long-term transaction costs savings and short-term [] costs. However, the overall magnitude of these benefits is uncertain and difficult to quantify. This uncertainty arises because it is difficult to predict the scope and extent of negotiations that might occur under the factual and counterfactual, [].

[] negotiations in the counterfactual in the short term

¹⁰² []. Provisional Authorisation at [4.26 (a)].

¹⁰³ Provisional Authorisation at [4.7].

¹⁰⁴ Commerce Commission interview with Tegel (7 December 2021).

¹⁰⁵ Commerce Commission interview with Tegel (7 December 2021).

¹⁰⁶ NERA – Submission on NZTGA SOPI (5 November 2021) at [19]; and Tegel’s Submission in Response to SOPI dated 5 November 2021 at [10.5].

102. Absent authorisation, Tegel is likely to engage in negotiations with growers on an individual basis.¹⁰⁷ [],¹⁰⁸
 [].¹⁰⁹
 [].¹¹⁰
 [].

103. On one hand, even if Tegel attempted to engage with most, if not all, TGA members [], negotiations may be relatively short and straightforward. If negotiations were to relate only to the amendment of a few key terms, [], then short-term transactions costs in the counterfactual may not necessarily be large.

104. On the other hand, attempts to individually negotiate with TGA growers in the counterfactual could be time-consuming and ultimately unsuccessful [].

105. On balance, we consider that it is more likely than not that the costs incurred in negotiations [] will be substantial without authorisation. This is because of the need for Tegel to negotiate individually with all growers and the added difficulty this would present in arriving at a satisfactory outcome for all parties. As a result, we have assigned more weight to this outcome.

Impact of heterogeneity of growers on [] negotiations in the short term

106. While there exists a range of grower operations in terms of [] we do not consider that these specific differences would necessarily lead to substantial transaction costs being incurred (internalised) by TGA in the process of collective bargaining. This is because there is sufficient similarity in the services provided by

¹⁰⁷ [] Commerce Commission interview with Tegel (7 December 2021).

¹⁰⁸ []

¹⁰⁹ []

¹¹⁰ Commerce Commission interview with Tegel (7 December 2021).

growers such that the scope of negotiations is likely to be relatively narrow, ie, fees, contract duration, and/or termination provisions.¹¹¹

107. However, heterogeneity amongst growers in terms of performance may have the potential to give rise to additional negotiating costs in the factual if it creates a difference in the incentives of various growers

[

].

108. Similarly, there may be variation in growers' financial positions

[

].

109. Consequently, if collective bargaining is authorised, any inherent tension amongst growers within TGA could hinder the organisation from arriving at a position []. Any subsequent drawing out of the collective bargaining process could then effectively increase these negotiating costs.

110. However, two factors mean that the Commission does not place a lot of weight on this outcome:

110.1 [

].

110.2 Growers have the choice of leaving TGA if they disagree with its negotiating strategy and positions, []. This could both reduce the scope for internal disagreements amongst remaining members and also discipline TGA to negotiate in a timely manner with Tegel. Nevertheless, some growers who disagree with some of TGA's strategies and/or positions

¹¹¹ We note our view on the evidence in this case is consistent with the ACCC's observation in Determination: Application for Authorisation A91007: Coalition of Major Professional Sports (13 December 2006) at [7.25] to [7.26]:
 "... where the collective bargaining group supply very similar products or services (i.e. milk, chicken growing services) the potential scope of the negotiations are likely to be narrower than if the parties supply a wide-range of products requiring broader and more complex negotiations."

may be reluctant to leave TGA because they would prefer not to negotiate with Tegel on an individual basis.

111. On balance, we consider that it is more likely than not that the heterogeneity across growers would not cause substantial delays and transactions costs. This is because we do not consider the differences across growers would materially hinder the TGA’s ability to come to a unified position. We consider this is evidenced by [].¹¹²

Incentives [] in the short term

112. [].

113. [],¹¹³
[],¹¹⁴
[].

114. [],¹¹⁵
[].

115. However, the Commission considers it is more likely than not that collective bargaining would better facilitate and expedite a resolution to the current negotiations. TGA possesses commercial experience negotiating with Tegel and collective bargaining enables the growers to pool their resources and knowledge into hiring better or more specialised advisors.¹¹⁶
[].

¹¹² [], see Second Provisional Authorisation at [10].

¹¹³ Full Authorisation Application at [5.12]; and Provisional Authorisation at [4.2].

¹¹⁴ []. Commerce Commission interview with TGA (15 December 2021).

¹¹⁵ Commerce Commission interview with TGA (15 December 2021); and Commerce Commission interview with [].

¹¹⁶ Full Authorisation at [8.3 (e)]; [3.5.3] of Castalia, “Public Benefits and Detriments of Collective Bargaining by Tegel’s Chicken Growers” (16 September 2021); and Commerce Commission interview with [].

The combination of these factors means that we consider TGA members are more likely to reach a more informed position [] that is satisfactory to Tegel than if collective bargaining was not available. [].

Transactions costs over the longer-term

116. In relation to transactions costs over the longer term, the Commission considers it likely that over time, more complex elements of the FMAs are likely to require amendments, clarification, or renegotiation. Given the detail and substantial nature of any such negotiations, for many of the reasons discussed above the Commission considers that collective bargaining is more likely to reduce transactions costs for both parties compared to those that would arise if only individual negotiations were permitted. Collective bargaining is more likely to reduce the duration and costs of any negotiation period by allowing Tegel to engage in a single negotiation process, removing the duplication of negotiations and advisory costs for both parties.
117. In particular we consider that TGA's long-term transaction costs savings estimate of between \$1 million to \$3 million appears to be a reasonable estimate of the likely upper bound of these potential benefits and we have placed weight on this figure.

Assessment of total (short- and long-term) transactions costs

118. Given the uncertainty regarding the duration and outcome of current and future negotiations, we consider that the actual transactions costs likely to be incurred in either the with or without authorisation scenarios could fall within relatively wide ranges. At the top of that range the benefit from lowered transaction costs could be substantial, potentially in line with TGA's estimates. This would materialise if:
- 118.1 collective bargaining facilitates short-term cost reductions through quicker negotiations [] than would occur with individual negotiations; and/or
- 118.2 collective bargaining facilitates long-term transaction cost reductions if more complex elements of the FMAs are likely to require amendments, clarification, or renegotiation over time.
119. Alternatively, there may be little or no transactions cost savings from collective bargaining. This could be the case if:
- 119.1 heterogeneity adds to internal negotiating costs [], or if collective bargaining reduces the incentive for the growers []; and/or

- 119.2 any negotiations over the long-term are relatively straightforward, or heterogeneity between growers adds to internal costs or creates delays, such that there would be little to be gained in reduced transactions costs from collective bargaining.
120. Nevertheless, our overall view is that substantial benefits in the form of reduced transactions [] costs are more likely than not to arise from collective bargaining.
121. However, because of the uncertainty regarding the likelihood and timing [] under both the factual and counterfactual, it is difficult to estimate the magnitude of this benefit. Based on the figures provided by TGA, we consider that a reasonable upper bound for the potential avoided [] costs could be around \$1 million to \$2 million, where this upper bound reflects a scenario in which collective bargaining [].
122. Even if the magnitude of short-term transaction costs savings is unclear, over time we expect the range of contract terms that could be subject to negotiation would expand, and therefore transaction costs are likely to be materially lower if negotiations were resolved collectively. We consider that TGA’s long-term transaction costs savings estimate of between \$1 million to \$3 million appear to be a reasonable estimate of the likely upper bound of these potential benefits. The range of total transactions [] costs savings could therefore be around zero to potentially around \$5 million in total.¹¹⁷

More efficient contracts

123. TGA submits that collective bargaining would allow growers to share information and pool together resources to fund specialist advisors so that they can develop more sophisticated and more efficient contract terms.¹¹⁸ TGA argues that this sophistication can be observed in the difference between the FMAs and the relatively simple payment structure that was in place prior to collective bargaining.¹¹⁹
124. TGA claims that bargaining power and risk would be rebalanced with collective bargaining, so that growers could obtain more favourable terms relative to if they faced Tegel alone.¹²⁰ Such rebalancing could help address potential ‘hold-up’ problems. That is, without [] contractual certainty, growers would be less likely to invest in their farms out of fear of becoming too reliant on Tegel. The capital equipment used for chicken growing is specialised and cannot be readily put to

¹¹⁷ We consider zero to be a conservative lower bound because we consider it is not likely that any potential increase in transactions costs from collective bargaining over the short term, [], would outweigh the benefits from a more efficient negotiating process over the medium- to long-term.

¹¹⁸ At [3.5.3] of Castalia, “Public Benefits and Detriments of Collective Bargaining by Tegel’s Chicken Growers” (16 September 2021).

¹¹⁹ Full Authorisation at [8.3 (b)].

¹²⁰ *Ibid* at [8.3 (e)] and [8.15] to [8.16].

alternative use. This means growers risk being left with large debts and stranded assets if they fail to secure a sufficiently secure supply arrangement with Tegel.¹²¹ Without [] contractual certainty Tegel would have strong bargaining power over growers, leaving little incentive for growers to invest in their farms.

125. TGA claims that the FMAs minimise this risk by []. Both [] demonstrate how collective bargaining can facilitate a resolution to the hold-up problem.
126. TGA further submits that these current efficient terms are unlikely to persist absent authorisation.¹²² In TGA’s view, detailed bilateral negotiations would be too complex and costly for Tegel, and when combined with greater bargaining power that individual bargaining would provide it, Tegel would have a reduced incentive to retain the current agreements, rendering the FMAs unstable.
127. []¹²³ []. The consequence of this would be that efficiencies within the FMAs, which are [] pages long and were negotiated over a [] period, would likely be lost absent authorisation.¹²⁴
128. The TGA growers the Commission interviewed support TGA’s claims. These growers have claimed that the [], nature of the FMAs are essential for receiving bank loans to invest further into their farms.¹²⁵ This contrasts with the [] payment structure that was typical of the prior contracts. Therefore, TGA submits that collective bargaining has resulted in the current FMAs and has enhanced dynamic efficiency.
129. The TGA growers interviewed have also indicated that, in their view, many growers are not confident negotiating with a large commercial entity such as Tegel.¹²⁶ These

¹²¹ Full Authorisation at [1.21 (c)]. See also [3.1.2] and [3.2.2] of Castalia, “Public Benefits and Detriments of Collective Bargaining by Tegel’s Chicken Growers” (16 September 2021).

¹²² *Ibid* at [3.3].

¹²³ We use the term “individual contract” here to refer to an essentially take-it-or-leave-it contract that favors Tegel, []. Full Authorisation at [5.12]; and [3.3] of Castalia, “Public Benefits and Detriments of Collective Bargaining by Tegel’s Chicken Growers” (16 September 2021).

¹²⁴ See Appendix B of the Full Authorisation; and Tegel Foods Limited, Submission in Response to TGA Provisional Authorisation (12 October 2021) at [2.5] to [2.7].

¹²⁵ Commerce Commission interview with []; and Commerce Commission interview with [].

¹²⁶ *Ibid*; and Commerce Commission interview with [].

growers consider that greater bargaining power would allow Tegel to obtain more favourable terms at the expense of growers

[]. Supplying Tegel is the only realistic option for most growers to earn a return on their investments in shedding and other equipment.

130. Tegel disputes these submitted efficiencies, claiming that in the counterfactual the FMAs would continue in their current form [].¹²⁷ []. Tegel claims that the efficiencies of the already collectively negotiated FMAs will continue into the future even if authorisation is not granted.

131. Tegel submits that grower payments under the FMAs are:

131.1 inefficiently structured,

[];¹²⁸ and

131.2 inefficiently high,

[].¹²⁹

132. Although these two issues are interrelated, we discuss the second issue, the level of grower fees and how these could be affected by collective bargaining, in more detail in the allocative efficiency detriments section below.

133. Regarding the structure of grower fees,

[].¹³⁰

[].

134. Tegel submits that the FMAs, that were collectively negotiated between Tegel and TGA, [] effectively insulated growers from the negative shocks arising from the Infectious Bursal Disease (IBD) outbreak and COVID-

¹²⁷ Tegel's Submission in Response to SOPI dated 5 November 2021 at [7.8]; Commerce Commission interview with []; and Commerce Commission interview with [].

¹²⁸ Tegel's Submission in Response to SOPI dated 5 November 2021 at [5.2] to [5.7]; and Commerce Commission Interview with Tegel (8 December 2021).

¹²⁹

[] Commerce Commission Interview with Tegel (8 December 2021); and Tegel's Submission in Response to SOPI dated 5 November 2021 at [5.4] to [5.7].

¹³⁰ Tegel's Submission in Response to SOPI dated 5 November 2021 at [5.1].

19, both of which have adversely affected domestic and export demand.¹³¹
[]].

Our assessment

135. The Commission considers that collective bargaining is more likely than not to lead to more sophisticated and more efficient contracts, particularly over the long term.

136. Elements of the current FMAs are likely to be more sophisticated and provide more efficient incentives to both growers and Tegel as a result of historic collective bargaining. These elements include
[]].

137. A specific instance put forward as an example of collective bargaining leading to more efficient contract terms occurred
[]].¹³²
[]].

We consider that more efficient outcomes like this are more likely with collective bargaining.

138. We have not counted benefits arising from any collective bargaining prior to authorisation. We also consider that some of the traditional short-term efficiencies of collective bargaining may have already been realised, because the FMAs were established through collective bargaining.
[]].¹³³
[]].¹³⁴
[]].

¹³¹

[] Commerce Commission interview with Tegel (7 December 2021).

¹³² Commerce Commission interview with []].

¹³³

[] Commerce Commission interview with []].

¹³⁴ Tegel’s Submission in Response to SOPI dated 5 November 2021 at [7.8]; Commerce Commission interview with []]; and Commerce Commission interview with []].

139. However, we have placed weight on these outcomes as evidence that there is a high likelihood that collective bargaining would continue to create contractual efficiencies in the factual in the longer term. Ongoing changes within the poultry processing industry over time are likely to continue to require amendments to the FMAs. For instance, contractual variations may be desirable to account for and incentivise investment in new technologies. Future regulatory changes (eg, animal welfare and environmental) are likely to continue to require amendments to existing contracts.¹³⁵
140. Given such developments are likely, enabling discussions between growers and the collation of information via a collective bargaining process involving TGA is likely to help ensure amendments to existing contractual terms result in more efficient contractual terms than would occur through individual bargaining. This is especially the case given TGA's experience negotiating with Tegel. Nevertheless, we have taken into account that some of these efficiencies, [], are also likely to occur in the counterfactual under individual contracts. However, we consider contracting efficiencies are nonetheless smaller without authorisation because:
- 140.1 the efficiencies are somewhat less likely (that is, closer to a real chance than a certainty) to arise without a collective agreement because the growers have less ability to negotiate or obtain expert advice, and less bargaining power with Tegel to resist requirements []; and
- 140.2 if these efficiencies did arise under individual bargaining, they are less likely to be disseminated across all growers or be of a longer duration if Tegel exercises greater bargaining power and negotiates shorter-term contracts or otherwise transfers more risk onto growers.
141. Furthermore, it is unclear whether existing contractual mechanisms which allow Tegel to [] are sufficiently sophisticated.
[]. However, the evidence is mixed as to whether it is more likely in the scenario with or without authorisation that these issues would be resolved:
- 141.1 Tegel is likely to possess greater bargaining power in the counterfactual and, as New Zealand's largest poultry processor, it is also significantly larger and more sophisticated than individual growers and has access to more and better resources and information. Tegel's increased bargaining power in the counterfactual means it would be better positioned to negotiate terms that would enable Tegel to respond more dynamically []. To some extent it has been successful in this regard [].¹³⁶ Whether this is beneficial or

¹³⁵ [].

¹³⁶ Tegel Foods Limited, Submission on SOPI, 5 November 2021 at [7.8].

detrimental overall would depend on the precise terms that are re-negotiated, for instance whether renegotiated terms would impact on Tegel's variable costs.

141.2 [

].

142. The current [] potentially illustrates both the efficiency of collective bargaining in general, as well as the potential inefficiency in this particular situation. For instance:

142.1 [

]. In this regard, collective bargaining has been particularly effective at promoting investment in the chicken growing industry; and

142.2 The current [] Tegel experiences resulted from recent unanticipated shocks to Tegel and the poultry industry generally (in the form of the IBD outbreak and COVID-19 pandemic), [], although it is not clear whether individual bargaining would have produced a more efficient mechanism.

143. Consequently, if collective bargaining strengthened growers' bargaining positions, authorisation in the current environment may hinder Tegel's ability to impose terms that better enable it to [] in the short term. That is, if individual bargaining is likely to provide Tegel with more leverage against individual growers, [], Tegel may be able to introduce some more efficient contract terms that enable it to []. Such terms may more effectively []. This must however also be weighed against the likelihood of this issue being resolved through collective bargaining and/or that terms that resolve the short-term [] via individual bargaining could adversely affect efficiency by reducing long-term investment incentives.

144. Nevertheless, even if authorisation has the potential to hinder Tegel’s ability to negotiate terms that better allow it to respond to [] in the short run, the Commission considers it is more likely that collective bargaining would produce more sophisticated and efficient contracts over the long term.
145. Considering the potential for any short-term detriments against likely long-term benefits, the Commission considers that, on balance, the likely overall net impact of collective bargaining is that it is more likely to facilitate more sophisticated and efficient contract terms when considered over a ten-year period.

Impact of wealth transfers

146. TGA claims that if collective bargaining were to result in growers receiving higher growing fees, this would constitute a beneficial wealth transfer from Tegel’s foreign shareholders to New Zealand resident TGA growers.¹³⁷
147. TGA claims that Tegel possess significantly greater bargaining power compared to individual growers and so collective bargaining would, at least partially, redress this imbalance.¹³⁸ Therefore, TGA argues that the extent to which grower fees would be lower in the counterfactual would be a product of Tegel’s bargaining position and buyer power, and not a reflection of efficient prices.¹³⁹
148. TGA estimates that any wealth transfer from authorisation would be at most \$[] per annum.¹⁴⁰ This estimate is based on TGA’s assumption that the [].
149. In relation to the losses that Tegel has experienced in recent years and whether this is relevant to the assessment of any foreign wealth transfers, TGA considers that Tegel’s current financial position is immaterial to this assessment.¹⁴¹ Because the FMAs are [], TGA considers that short term fluctuations in Tegel’s financial position are irrelevant. Rather, what is important is the significant buyer power that chicken processors possess.¹⁴²
150. In contrast, Tegel claims that if [] fees paid to growers were lower under the counterfactual, this would not constitute a public detriment, and so higher fees under the factual would not be a benefit.¹⁴³

150.1 First, Tegel claims that the
\$[]

]

¹³⁷ Full Authorisation at [8.11].

¹³⁸ Full Authorisation at [8.15].

¹³⁹ Full Authorisation at [8.15] to [8.16].

¹⁴⁰ At [3.5.2] of Castalia, “Public Benefits and Detriments of Collective Bargaining by Tegel’s Chicken Growers” (16 September 2021).

¹⁴¹ TGA’s Cross-Submission dated 23 December 2021 at [50] to [55].

¹⁴² *Ibid* at [53].

¹⁴³ NERA – Submission on NZTGA SOPI (5 November 2021) at [24].

.^{144, 145}

[

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150.2 Second, Tegel claims that any transfer does not amount to the transfer of a “functionless monopoly rent”.¹⁴⁶ Tegel considers that [], while it is being squeezed between [] and downstream chicken prices that have steadily declined in New Zealand over the last five years.^{147, 148} Tegel experiencing [], combined with the operating losses it faced since May 2018, does not support the claim that Tegel is earning supra-competitive returns.¹⁴⁹

150.3 Third, even if a benefit were to exist, Tegel claims that TGA’s assumption of a \$[] overestimates any likely difference in factual and counterfactual prices.¹⁵⁰ Tegel claims [], and by extension, reducing TGA’s \$[] wealth transfer estimation.¹⁵¹

Our assessment

151. Wealth transfers under the total welfare standard may be relevant where the transfer is between New Zealanders and persons in other countries, such as in this case where Tegel is foreign owned and the Growers are largely domestically owned, or domestic owner-operators. This is because the public benefit test focuses on benefits to the New Zealand public. However, as the Court of Appeal outlined in *Godfrey Hirst*, the Commission must also take into account feedback effects in the long term. Specifically on the matter of transfers to foreign shareholders the Court of Appeal found that “without evidence the New Zealand public will be exploited, gains

¹⁴⁴ Tegel’s Submission in Response to Statement of Preliminary Issues dated 5 November 2021 at [10.12] to [10.13].

¹⁴⁵ NERA – Submission on NZTGA SOPI (5 November 2021) at [31].

¹⁴⁶ Tegel’s Submission in Response to TGA’s Provisional Authorisation dated 30 September 2021 at [10.14].

¹⁴⁷ NERA – Submission on NZTGA SOPI (5 November 2021) at [25].

¹⁴⁸ “Functionless monopoly rents” are “supranormal profits” that arise neither from cost savings nor from innovation, where “supranormal profits” refer to profits above a normal (competitive) rate of return. See NERA – Submission on NZTGA SOPI (5 November 2021) at [26].

¹⁴⁹ Tegel’s Submission in Response to TGA’s Provisional Authorisation dated 30 September 2021 at [2.15].

¹⁵⁰ NERA – Submission on NZTGA SOPI (5 November 2021) at [33].

¹⁵¹ []. Commerce Commission interview with TGA (15 December 2021).

to foreign shareholders” should be treated consistently with New Zealand shareholders to encourage foreign investment.¹⁵²

152. The Commission does not consider there is evidence to suggest any wealth transfers to Tegel’s foreign shareholders from growers in this case are “functionless monopoly rents”.¹⁵³ The investment (and continued reinvestment) of substantial funds in a business in New Zealand which employs New Zealanders, adds value to New Zealand primary production and produces goods sold to New Zealand consumers in competition with other domestic companies, appears to be the kind of “trade and investment which, from a long-run perspective, benefits the New Zealand public”.¹⁵⁴
153. Tegel’s recent financial performance is not consistent with deriving supranormal profits,¹⁵⁵ although much of these losses are likely the result of the ongoing COVID-19 pandemic and IBD outbreak market shocks, [].¹⁵⁶
154. Based on this mix of evidence, the Commission considers that any wealth transfer from Tegel’s foreign shareholders to New Zealand growers would most likely constitute a neutral transfer and not a public benefit.¹⁵⁷ It is therefore unnecessary for us to quantify those transfers.

Potential detriments

155. The potential detriments from the Proposed Arrangement include:

- 155.1 allocative efficiency losses; and
- 155.2 productive and dynamic efficiency losses.

Loss of allocative efficiency

156. In isolation, individual growers are likely to have little bargaining power in relation to Tegel as they have no effective alternative demand for their growing services; whereas Tegel has a large network of substitutable growers. Collective bargaining

¹⁵² *Godfrey Hirst* at [50]. The Court went on to note the benefit of allowing a domestic competitor in an international market, which is not the case here, though an analogy may be drawn to the benefits of allowing an international competitor to compete in a domestic market.

¹⁵³ In this document, a “wealth transfer” is actually the prevention of a transfer from domestic growers to Tegel.

¹⁵⁴ *Godfrey Hirst* at 27, citing *Telecom Corporation of New Zealand Ltd v Commerce Commission* (1991) 4 TCLR 473 (HC) [“AMPS-A”].

¹⁵⁵ “Tegel made an operating loss of \$12.5 million before a goodwill write down of \$30.9 million, followed by an operating loss of \$29.2million (and goodwill write down of \$50 million) for the 2019 financial year. In 2020 it made an operating loss of \$17.1million.” See Tegel’s Submission in Response to TGA’s Provisional Authorisation dated 30 September 2021 at [2.15].

¹⁵⁶ Full Authorisation at [8.39]; Tegel’s Submission in Response to TGA’s Provisional Authorisation dated 30 September 2021 at [2.14]; and Commerce Commission Interview with Tegel (7 December 2021).

¹⁵⁷ Noting that in *Godfrey Hirst* the wealth transfers at issue were savings arising from the transaction and therefore the question was whether they could be counted as benefits. In this case the transfers are revenue arising from business-as-usual operations that will occur in both the scenario with and without the transaction and are neutral.

could effectively provide the opportunity for growers to redress this bargaining power imbalance. Acting collectively, growers could then use any greater bargaining power to extract more beneficial terms from Tegel, including higher growing fees. Tegel may then pass some, or all, of these higher growing fees through to its downstream customers in the form of higher wholesale chicken prices. These wholesale customers may in turn pass at least some proportion of this increase through into higher retail prices for final consumers.

157. In general, when the price of a product increases from the exercise of market power, the quantity of that product demanded by customers will decrease, as some customers switch to less preferred alternatives or merely purchase less. Either way, the net result is that resources are allocated less efficiently.
158. The size of this allocative efficiency loss depends, to a large extent, on the extent of the expected price increases following the Proposed Arrangement's implementation and the responsiveness of demand to price changes (price elasticity of demand). All else being equal, the higher the expected price increases and the more elastic/responsive demand is to price changes, the larger the expected allocative efficiency loss. Conversely, small or negligible price increases, or less responsive demand to price changes, tend to reduce the potential for a material loss in allocative efficiency.
159. TGA submits that any subsequent downstream price change resulting from authorisation would be sufficiently insignificant so that it would not materially affect demand for chicken products.¹⁵⁸ TGA estimates that if there is an increase in grower fees because of collective bargaining, it would be equivalent to no more than around [] cents per bird. An increase in fees of this magnitude would generate approximately \$[] per year of additional cost to Tegel.¹⁵⁹ In comparison, Tegel's current grower costs are in the order of \$[]¹⁶⁰ and Tegel's total revenue from chicken products are in the order of \$[].¹⁶¹ TGA claims that even if growing fees were lower with individual bargaining, the small difference compared to collective bargaining, along with Tegel's current losses, means that downstream wholesale and retail chicken prices would be no lower than if collective bargaining were authorised.

¹⁵⁸ At [3.5.4] of Castalia, "Public Benefits and Detriments of Collective Bargaining by Tegel's Chicken Growers" (16 September 2021).

¹⁵⁹ 55 million birds multiplied by the [] cent per bird increase in price. Full Authorisation at [3.12]; and [3.5.4] of Castalia, "Public Benefits and Detriments of Collective Bargaining by Tegel's Chicken Growers" (16 September 2021).

¹⁶⁰ []. See Tegel's Submission in Response to SOPI dated 5 November 2021 at Table 5. [] Tegel's Submission in Response to SOPI dated 5 November 2021 at [5.1 (a)].

¹⁶¹ Tegel's poultry revenues are estimated based on figures at [2.13] of Tegel's Submission in Response to TGA Provisional Authorisation Application (with redactions) (12 October 2021).

160. []¹⁶²
 [] Tegel has recently
 announced that it would increase its downstream prices by approximately 10%¹⁶³
 []¹⁶⁴
 []¹⁶⁵

161. []¹⁶⁶

162. Brinks’ submission supports this claim that TGA could exert inappropriate price pressure on Tegel if collective bargaining is authorised.¹⁶⁷ Brinks considers that Tegel would have no option but to pass any cost increase on to its customers, who would in turn increase prices to final consumers.

163. Tegel submits that authorisation could lead to less allocatively efficient outcomes. If the counterfactual would result in lower grower fees and reduce Tegel’s losses, then if collective bargaining would lead to higher fees this would likely be less allocatively efficient.¹⁶⁸

164. Some non-TGA member growers have also suggested that grower fees are “hurting” Tegel.¹⁶⁹
 []¹⁷⁰ Because of the symbiotic relationship between Tegel and

¹⁶² Tegel’s Submission in Response to SOPI dated 5 November 2021 at [11.4].

¹⁶³ See <https://www.newshub.co.nz/home/lifestyle/2021/08/tegel-announces-chicken-prices-to-be-bumped-up-10-percent.html>.

¹⁶⁴ []
 [] Commerce Commission interview with Tegel (7 December 2021).

¹⁶⁵ []
 Commerce Commission interview with Tegel (7 December 2021)

¹⁶⁶ []
 [] Commerce Commission interview with Tegel (7 December 2021).

¹⁶⁷ Van Den Brinks Poultry Limited – Submission on NZTGA SOPI (7 October 2021).

¹⁶⁸ NERA – Submission on NZTGA SOPI (5 November 2021) at [44].

¹⁶⁹ []
 [] Another claims that growers need to work with Tegel rather than fight them. The grower suggests that they should not “bite the hand that feeds you”. Commerce Commission interview with []; and Commerce Commission interview with [].

¹⁷⁰ Commerce Commission interview with [].

its growers, Tegel must be sustainable for the growers to be sustainable.¹⁷¹

Our assessment

165. The Commission considers that there is a real chance that growing fees would be higher if collective bargaining is authorised than under individual negotiations absent authorisation.

165.1 As the FMAs currently stand, collective bargaining could enhance growers' bargaining positions, relative to bilateral negotiations with Tegel absent authorisation, so as to produce an efficiency detriment in the form of greater grower fees payable to the growers.

165.2 However, the likelihood that grower fees would be higher under collective bargaining, along with the likely magnitude of any difference, is uncertain.

166. Despite this uncertainty, our view is that any potential allocative efficiency detriments that would result from grower fees being higher with authorisation are likely to be relatively small. This is because:

166.1 [

].¹⁷²

166.2 Tegel faces competition in wholesale markets from other poultry processors who are likely to have some ability to expand to constrain Tegel should it seek to pass on cost increases that are not also incurred by its rivals.¹⁷³

166.3 Even if higher grower fees were passed on by Tegel into its chicken prices, grower fees comprise a relatively small portion of Tegel's total costs and

¹⁷¹ Commerce Commission interview with [].

¹⁷² In general, profit maximizing firms produce a level of output where marginal cost equals marginal revenue. See Greenlaw, S., & Shapiro, D. (2011) *Principles of Microeconomics* 2nd edition. *OpenStax*. pages 194, 225, and 240.

[

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¹⁷³ Tegel faces direct competition from Inghams, Brinks, and Turks for primary processed chicken in the North Island, faces direct competition for primary processed chicken from Brinks in the South Island, and faces direct competition for value-added chicken from Inghams nationwide. See Full Authorisation Application at [7.5]; Commerce Commission interview with Tegel (7 December 2021); Commerce Commission interview with Inghams (29 November 2021); and Commerce Commission interview with Brinks (23 November 2021).

revenues, so any increase in downstream wholesale and retail prices is likely to also be relatively small.¹⁷⁴

166.4 Downstream retail demand for chicken products does not appear to be especially elastic.¹⁷⁵ Therefore, even if there is an increase in Tegel's retail prices, we consider that a relatively large demand response by consumers is unlikely.¹⁷⁶

Loss of productive and dynamic efficiency

167. TGA claims authorisation would produce no productive or dynamic efficiency detriment because a collectively negotiated agreement is more sophisticated and efficient.¹⁷⁷ TGA submits that the current collectively negotiated FMAs are [] which did not exist prior to collective bargaining. These terms incentivise innovation, capital investment, and performance producing outcomes which are both productively and dynamically efficient.
168. TGA also claims that growers are less likely to innovate and make new investment if they are being paid less in the counterfactual.¹⁷⁸
169. Tegel submits that a collective contract does not incentivise individual innovation or competitiveness. The current collectively negotiated FMAs pay growers a [] and so do not adequately incentivise competition among growers.¹⁷⁹ Secondly, if a grower were to innovate or provide Tegel with some additional service, this will not be captured in a collective agreement.¹⁸⁰ This grower must vary the contract for all growers or leave the collective to account for their individual innovations. This would be costly, and so would reduce dynamic and productive efficiency.
170. Both TGA and non-TGA growers the Commission interviewed considered that [].¹⁸¹

¹⁷⁴ []. Tegel's poultry revenue is estimated based on figures at [2.13] of Tegel Submission in Response to TGA Provisional Authorisation Application (with redactions) (12 October 2021).

¹⁷⁵ Tegel Foods Limited and Brinks Group of Companies (Commerce Commission Decision 658, 2008) at [62] to [76].

¹⁷⁶ The relatively moderate demand elasticity for chicken products likely reflects the fact that chicken is generally the lowest priced meat protein available in New Zealand. Long term trends suggest an increase in chicken coinciding with a decrease in the consumption of red meat. Commerce Commission interview with Tegel (7 December 2021); Commerce Commission interview with Woolworths (2 December 2021); and Commerce Commission interview with Foodstuffs North Island (1 December 2021).

¹⁷⁷ Full Authorisation at [8.31].

¹⁷⁸ Full Authorisation at [8.31]; and TGA's Cross-Submission dated 23 December 2021 at [45] to [46].

¹⁷⁹ Tegel's Submission in Response to SOPI dated 5 November 2021 at [5.1].
[]

¹⁸⁰ NERA – Submission on TGA's SOPI (5 November 2021) at [40] to [41].

¹⁸¹ Commerce Commission interview with [].

[
[
[
].¹⁸²
].¹⁸³

Our assessment

171. The Commission considers the evidence on the likely impact of collective bargaining on productive and dynamic efficiency as somewhat mixed in this case. In relation to productive efficiency, if collective bargaining enabled more sophisticated and efficient contracts, authorisation could increase the likelihood of gains in productive efficiency, or at least reduce or offset any potential productive efficiency detriments. Similarly, more sophisticated contracts that provide sufficient incentives for investment and innovation could enhance dynamic efficiency, or at least limit any detriments to dynamic efficiency.

172. However, if collective bargaining were to result in the maintenance of existing contractual terms that limit Tegel’s ability to [], this could be detrimental to productive efficiency, at least in the short term.

173. Similarly, if collective bargaining were to stifle amendments that might otherwise occur to the FMAs that would improve performance incentives, the incentive for growers to innovate and improve farm management practices may be weaker than in the counterfactual.

174. In contrast, authorisation could improve productive efficiency if it led to the [].¹⁸⁴

175. [].¹⁸⁵
[].

¹⁸² Commerce Commission interview with [].
¹⁸³ Commerce Commission interview with TGA (15 December 2021); and Commerce Commission interview with [].
¹⁸⁴ Commerce Commission interview with [].
¹⁸⁵ Commerce Commission interview with TGA (15 December 2021).

176. []¹⁸⁶
 []
].

177. Further, Tegel growers are some of the most efficient in the world when measured by 'Feed Conversion Ratio'.¹⁸⁷ It is efficient for Tegel to import feed from Australia, raise and process chickens in New Zealand, and export them back to Australia. While it is unclear whether Tegel's growers would have been more efficient without collective bargaining, and the Commission places limited weight on this point, it does provide some support that collective bargaining has not had any remarkably adverse effect on productive or dynamic efficiency outcomes when compared to other jurisdictions.

178. Overall, the Commission considers that collective bargaining has the potential to give rise to both beneficial and detrimental impacts with respect to productive and dynamic efficiency, but that it is difficult to determine the relative likelihoods, and likely magnitudes, of these impacts. Our assessment is that the most likely outcome from collective bargaining is a []
]. Consequently, on balance our view is that any productive and dynamic efficiency impacts are more likely to either be relatively small detriments or benefits than to be substantial detriments.

Balancing of benefits and detriments

179. On the basis of evidence currently available to us, we consider that authorising collective bargaining by TGA is more likely than not to lead to a net public benefit.

180. There is a high degree of uncertainty regarding how collective bargaining would influence specific outcomes in this case, in particular those outcomes relating to the [], both arising from two recent unforeseen shocks (IBD outbreak and COVID-19 pandemic). Accordingly, the extent to which the Commission has been able to meaningfully quantify the effects of collective

¹⁸⁶ []. Commerce Commission interview with Tegel (7 December 2021); and Commerce Commission interview with TGA (15 December 2021).

¹⁸⁷ le, the amount of feed to create 1kg of chicken. Commerce Commission interview with TGA (15 December 2021). Supported in Commerce Commission interview with []. See also Tegel Annual Report 2018.

bargaining has been limited. Therefore we have relied more on our qualitative assessment of the evidence.

181. With regards to the potential benefits, we consider that beneficial impacts are more likely than not to arise from transactions costs savings, more efficient contracts, and [] costs. The likely magnitude of these impacts is difficult to determine, but the benefit from [] transaction costs could range from zero up to perhaps \$5 million dollars.
182. We have not placed weight on the potential for wealth transfers from Tegel’s foreign shareholders to TGA growers to generate public benefits. In line with case law,¹⁸⁸ the Commission considers that there is insufficient evidence to suggest that Tegel is deriving profits that are in excess of those necessary to incentivise efficient foreign investment in New Zealand. Wealth transfers from Tegel to growers are therefore unlikely to produce a benefit to the public and are likely to constitute a neutral transfer.
183. Regarding detriments, any allocative efficiency detriments appear most likely to be relatively small, as do potential productive and dynamic efficiency impacts. These latter two impacts have the potential to be immaterial or potentially even beneficial.
184. Nevertheless, we consider there is the potential for collective bargaining to lead to a net public detriment in this case, particularly if it were to []. However, on balance we consider that collective bargaining is more likely to resolve these issues in a more efficient manner. Even if collective bargaining were to result in greater detrimental impacts in the short-term on these issues, over time these detrimental impacts are more likely to be outweighed by ongoing benefits, such as transaction costs savings and more efficient contracts.

Length of the proposed authorisation

185. The Commission can grant authorisation for such period as it thinks fit.¹⁸⁹ We consider it would be appropriate to authorise the Proposed Arrangement for ten years given:
- 185.1 our assessment of the likely benefits and detriments;
- 185.2 the characteristics of the markets (particularly the prevalence of long-term capital investments); and
- 185.3 the duration of the FMAs which are likely to endure for ten years.

¹⁸⁸ *Godfrey Hirst* citing *Telecom Corporation of New Zealand Ltd v Commerce Commission* (1991) 4 TCLR 473 (HC) [“AMPS-A”].

¹⁸⁹ Section 61(2) of the Act.

Dated this day of 2022

Sue Begg
Deputy Chair