

Statement of Preliminary Issues

New Zealand Tegel Growers Association: Application seeking Authorisation for Collective Bargaining

8 October 2021

Introduction

1. On 16 September 2021, the Commerce Commission received an application from the New Zealand Tegel Growers Association Incorporated (TGA) seeking authorisation on behalf of its members to engage in collective bargaining with Tegel Foods Limited (Tegel).
2. TGA represents growers in the greater Auckland, Taranaki and Canterbury regions who supply broiler chicken growing services to Tegel, one of New Zealand's four major chicken processors.
3. As we are in an 'epidemic period', TGA applies for authorisation under s 65AA(2) and (3), and in the alternative s 58(1) and (2), of the Commerce Act 1986 (the Application). The epidemic period is the period between 16 May 2020 and the close of the 6-month period that starts on the date on which the Epidemic Preparedness (COVID-19) Notice 2020 expires or is revoked.¹
4. The details of the proposed collective bargaining arrangement for which TGA seeks authorisation is described fully in the Application (the Proposed Arrangement).²
5. The Commission will authorise the Proposed Arrangement if it is satisfied that the arrangement will result, or be likely to result, in such a benefit to the public that the conduct should be permitted. This statement of preliminary issues sets out the issues we currently consider to be important in deciding whether to grant authorisation.³
6. In 2017, the Commission granted authorisation to the Waikato - Bay of Plenty Chicken Growers Association Incorporated to collectively negotiate the terms and conditions of its members' supply of chicken growing services to Inghams Enterprises (NZ) Pty Limited.⁴

¹ Currently the Notice is due to expire on 19 December 2021.

² At [2.6] to [2.10]. A public version of the Application is available on the Commission's case register at [Commerce Commission - The New Zealand Tegel Growers Association Incorporated \(comcom.govt.nz\)](https://comcom.govt.nz/case-register/case-register-entries/new-zealand-tegel-growers-association-incorporated-on-behalf-of-its-members)

³ The issues set out in this statement are based on the information available when it was published and may change as our investigation progresses. The issues in this statement are not binding on us.

⁴ Our determination granting authorisation can be found on the Commission's case register at <https://comcom.govt.nz/case-register/case-register-entries/waikato-bay-of-plenty-chicken-growers-association-incorporated-on-behalf-of-its-members>

7. We invite interested parties to provide comments on the likely benefits and detriments of the Proposed Arrangement. We request parties who wish to make a submission to do so by 29 October 2021.
8. TGA has also applied for a provisional authorisation under s 65AD(2) of the Commerce Act (the Provisional Application). It did so on 30 September 2021. The Provisional Application is not the subject of this statement of preliminary issues. However, the Commission is currently separately accepting submissions on the appropriateness of allowing TGA to give effect to the Proposed Arrangement while the Commission considers the Application.⁵

The applicant

9. TGA is an industry association. Its membership consists of three regional industry associations (Regional Associations).⁶ 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 to Tegel.
10. 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 Association collectively negotiated with Tegel (or its predecessor) on behalf of their member growers.
11. TGA's negotiations with Tegel resulted in contracts between Tegel and the growers. The contracts currently in place are known as the 'Farm Management Agreements' (FMAs).

Our framework

12. We undertake a two-stage assessment in any authorisation application under ss 65AA and 58 of the Commerce Act:⁷
 - 12.1 first, establishing whether the Commission has jurisdiction to authorise (the 'jurisdictional threshold');
 - 12.2 second, assessing whether the associated benefits mean that authorisation should be granted (the 'public benefit test').⁸

⁵ For further details see our media release at <https://comcom.govt.nz/case-register/case-register-entries/the-new-zealand-tegel-growers-association-incorporated/media-releases/new-zealand-tegel-growers-association-seeks-provisional-authorisation-for-its-members-to-engage-in-collective-bargaining-with-tegel-foods>

⁶ Namely, the Auckland Meat Chicken Growers Association, the Taranaki Broiler Growers Associations and the Canterbury Poultry Meat Producers Association.

⁷ See generally our *Authorisation Guidelines* at [Commerce Commission - Authorising anti-competitive agreements or mergers that will likely benefit New Zealand \(comcom.govt.nz\)](https://comcom.govt.nz/authorisation-guidelines)

⁸ We note the test for provisional authorisations under s 65AD differs from the public benefit test used under ss 65AA and 58 authorisation applications which, as stated above, the Commission is consulting on separately.

Jurisdictional threshold

13. The Commission has jurisdiction under s 58 where a person applies for authorisation of an arrangement that is likely to lessen competition (s 27 of the Commerce Act).
14. During the epidemic period, a person can also apply for authorisation under s 65AA of an arrangement that might contain a cartel provision.⁹
15. The Commission will have jurisdiction to grant authorisation under s 65AA if it 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 provision¹⁰ (or whether there is a lessening of competition in relation to s 58 applications made during the epidemic period).
16. TGA submits the Commission has jurisdiction to authorise each element of the Proposed Arrangement under s 65AA(2) and (3), and in the alternative s 58(1) and (2), of the Commerce Act. Whether the Commission has jurisdiction under s 65AA or s 58 to authorise the Proposed Arrangement (or any part thereof) is a preliminary issue we are consulting on.

Public benefit test

17. Although the jurisdictional thresholds differ under ss 65AA and 58, the public benefit test is the same:¹¹
 - 17.1 In relation to s 65AA, the Commission can authorise an arrangement that contains, or there are reasonable grounds to believe it contains, 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.¹²
 - 17.2 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.¹³
 - 17.3 While stated differently, the courts have held that there is no material difference between the two assessments of public benefit.¹⁴

⁹ 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* at <https://comcom.govt.nz/business/merging-or-acquiring-a-company/authorising-anti-competitive-transactions-that-will-likely-benefit-new-zealand/authorisations-under-the-covid-19-response-further-management-measures-legislation-act>

¹⁰ Section 65AB(4) of the Commerce Act.

¹¹ *COVID-19 Guidelines* above at [36].

¹² Sections 65AB(3) and (4) of the Commerce Act.

¹³ Section 61(6) of the Commerce Act.

¹⁴ 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].

18. The benefits and detriments must arise from the proposed arrangement.¹⁵ To determine whether benefits and detriments are specific to the conduct, we assess:
- 18.1 what is likely to occur in the future without the proposed arrangement ('the counterfactual'); and
 - 18.2 what is likely to occur in the future with the proposed arrangement ('the factual').
19. Once we have identified all likely benefits and detriments, we assess the value of those benefits and detriments. When making that assessment, we consider how the conduct may affect:
- 19.1 allocative efficiency – whether the conduct would raise or lower prices; and whether it would reduce or improve quality, choice or other elements of value to consumers;
 - 19.2 productive efficiency – whether the conduct could improve or worsen production processes; and
 - 19.3 dynamic efficiency – whether the conduct could assist or hinder innovation in products or processes.
20. The Commission is not limited to considering efficiencies. New Zealand courts have recognised efficiencies are not the only benefits and detriments which are relevant to the Commission's assessment.¹⁶ Ultimately, the Commission seeks to assess what benefits accrue to the public in the circumstances of any given case.¹⁷
21. Our decision whether to grant authorisation is informed by a balancing exercise of the quantitative and qualitative benefits and detriments. Having assessed the value of benefits and detriments, if we are satisfied that the benefits of the arrangement likely outweigh the detriments, we will grant authorisation. If we are not satisfied, we will not grant authorisation.¹⁸

Market definition

22. Usually when we consider an application for authorisation of a potentially restrictive trade practice, we assess the competitive effects that the practices could have within a relevant market(s) in New Zealand.
23. We define markets in the way that we consider best isolates the key competition issues that arise from the proposed arrangement. In many cases, this may not

¹⁵ *Authorisation Guidelines* above at [39].

¹⁶ *NZME Ltd & Ors. v Commerce Commission* [2018] NZCA 389 at [81].

¹⁷ *Authorisation Guidelines* above n3 at [37] and [38].

¹⁸ *Authorisation Guidelines* above n3 at [45].

require us to precisely define the boundaries of a market. A relevant market is ultimately determined as a matter of fact and commercial common sense.¹⁹

24. TGA submits the relevant markets are:
 - 24.1 regional markets for broiler chicken growing services in the greater Auckland, Taranaki and Canterbury regions; and
 - 24.2 one or more markets for the wholesale supply of primary and secondary processed chicken products.
25. We will test TGA's submissions and explore whether there are any other relevant markets that may assist our assessment of the Proposed Arrangement.

With the Proposed Arrangement

26. TGA submits that if the Commission authorises the Proposed Arrangement, it would engage in collective negotiations, discussions, exchanges of information, and enter into, and give effect to, agreements or provisions collectively negotiated with Tegel.
27. 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. In this way, TGA says, many of the benefits of the Proposed Arrangement are likely to be achieved even if Tegel chose not to negotiate with TGA on behalf of the growers.
28. We will test TGA's submissions, particularly the likelihood of Tegel choosing not to negotiate with TGA and growers acting collectively in their individual negotiations with Tegel.

Without the Proposed Arrangement

29. TGA submits the FMAs are complex contracts that necessitate ongoing negotiations between Tegel and the growers regarding the suitability of their terms. Such negotiations have, TGA notes, in the past resulted in amendments to the FMAs.
30. Because of their complexity TGA considers that absent authorisation, the FMAs will require Tegel to individually negotiate amendments with the growers regularly and at great cost.
31. Therefore, as regards the likely situation without the Proposed Arrangement, TGA submits:
 - 31.1 the FMAs are unlikely to continue beyond the short to medium term; and
 - 31.2 the FMAs are likely to be replaced by simpler contracts that are individually negotiated with each grower based on a standard form template.

¹⁹ Section 3(1A) of the Commerce Act. See *Brambles v Commerce Commission* (2003) 10 TCLR 868 at [81].

32. The Commission may be required to consider multiple counterfactuals to determine all likely benefits and detriments relevant to its authorisation assessment.
33. We will explore:
 - 33.1 whether Tegel and the growers are likely to abide by the terms of the FMAs;
 - 33.2 whether Tegel and the growers are likely to enter into individually negotiated contracts with substantially the same terms as the current FMAs' terms;
 - 33.3 whether Tegel and the growers are likely to enter into individually negotiated contracts with terms that substantially differ from FMAs' terms; and
 - 33.4 TGA's submitted counterfactual: Tegel and the growers are likely to enter into individually negotiated, standard form contracts.
34. In relation to the scenarios identified in paragraphs 33.1 to 33.4, we will also explore the extent to which growers in some regions can switch to another chicken meat processor, and how that may affect negotiations of contractual terms between Tegel and the growers.
35. The Commission will only consider counterfactuals that are consistent with the Commerce Act.

Preliminary issues

36. At this this stage of our investigation, our focus is to identify and assess the detriments and benefits that are likely to arise from the Proposed Arrangement (and to the extent to which it is practicable, quantify the likely detriments and benefits).
37. TGA submits the Proposed Arrangement will not likely give rise to any detriments, and therefore the public benefits that are likely to arise would justify authorisation being granted.
 - 37.1 TGA estimates the Proposed Arrangement is likely to result in transaction cost savings of between \$1.4 to \$3.1 million over a ten-year period.
 - 37.2 In addition, TGA considers a grant of authorisation will provide the growers with greater bargaining power in negotiations with Tegel. It says growers will be able to negotiate more favourable terms and anticipates a wealth transfer to New Zealand growers from Tegel's foreign shareholders.
38. We will consider if the Proposed Arrangement could have any effects on competition that would create likely benefits or detriments. For example:
 - 38.1 We will assess how, if at all, the Proposed Arrangement could affect competition between TGA's growers in the relevant broiler chicken growing services markets. We will also assess if it could affect competition between Tegel and other chicken meat processors in the relevant wholesale markets.

38.2 We will also consider the extent to which any changes in the distribution of wealth between Tegel and TGA’s growers could amount to public benefits or public detriments (including any discounts on benefits). This will include assessing the direct effects of wealth transfers in addition to any flow-on detriments or reciprocal benefits owing to foreign investment within New Zealand.²⁰

Next steps in our investigation

39. The Commission is currently scheduled to decide on whether or not to authorise the Proposed Arrangement by 25 March 2022. However, this date may change to an earlier or later date as our investigation progresses.²¹
40. Prior to making our final decision, we will publish a draft determination and seek submissions on the draft. The draft determination sets out our preliminary view on whether we are likely to grant an authorisation, and the reasons for that view.
41. As part of our investigation, we will be identifying and contacting parties that we consider will be able to help us assess the preliminary issues identified above. This may impact our investigation timeline.
42. The Commission will make a decision as soon as practicable on TGA’s Provisional Application.

Making a submission

43. If you wish to make a submission, please send it to us at registrar@comcom.govt.nz with the reference “TGA Authorisation” in the subject line of your email, or by mail to The Registrar, PO Box 2351, Wellington 6140. Please do so by close of business on 29 October 2021.
44. Please clearly identify any confidential information contained in your submission and provide both a confidential and a public version. We will be publishing the public versions of all submissions on the Commission’s website.
45. All information we receive is subject to the Official Information Act 1982 (OIA), under which there is a principle of availability. We recognise, however, that there may be good reason to withhold certain information contained in a submission under the OIA, for example in circumstances where disclosure would unreasonably prejudice the supplier or subject of the information.

²⁰ For more information on the role of overseas wealth transfers in authorisation applications, see our *Authorisation Guidelines* above at [84] to [87].

²¹ The Commission maintains a case register on our website at <https://comcom.govt.nz/case-register> where we update any changes to our deadlines and provide relevant documents.