



TEGEL FOODS LIMITED

**SUBMISSION IN RESPONSE TO NZTGA PROVISIONAL
AUTHORISATION APPLICATION (WITH REDACTIONS) DATED 30
SEPTEMBER 2021**

12 OCTOBER 2021

PUBLIC VERSION



1. Introduction

- 1.1 On 30 September 2021, The New Zealand Tegel Growers Association (**NZTGA**) filed an application¹ for provisional authorisation under s 65AD of the Commerce Act 1986 (**Act**) to collectively discuss and negotiate with Tegel Foods Limited (**Tegel**) in relation to terms and conditions of chicken growing agreements with Tegel, including in relation to the resolution of disputes between Tegel and a grower or growers.²
- 1.2 This submission responds to the Provisional Application with redactions provided to us by the Commission. We will provide a supplementary confidential submission in response to the counsel-only material in the Provisional Application in due course.
- 1.3 The provisional authorisation process is designed to enable businesses to more effectively manage the immediate impacts of the response to COVID-19 and assist New Zealand in responding effectively to the effects of the COVID-19 epidemic. It was incorporated into the Act by the *COVID-19 Response (Further Management Measures) Legislation Act 2020* as a quick (20 working day) process to deal with emergency situations.
- 1.4 The Commerce Commission (**Commission**) can grant a provisional authorisation without issuing a draft determination or conducting a conference, and without having to be satisfied that the conduct authorised results in a public benefit that outweighs the resulting lessening of competition.
- 1.5 NZTGA claims that authorisation is needed urgently, and the Commission should therefore grant provisional authorisation:
- (a) [REDACTED];³
 - (b) [REDACTED];⁴ and
 - (c) for animal welfare and compliance reasons.⁵
- 1.6 As we set out in this submission, the Provisional Application must fail because:
- (a) it does not relate to a response to COVID-19. The events giving rise to the application occurred before the arrival of COVID-19 in New Zealand;
 - (b) the claim that there is an urgent need to carry out the conduct for which provisional authorisation is sought is without foundation;
 - (c) any urgency the NZTGA now faces is a consequence of its own failures; and
 - (d) the application seeks authorisation from the Commission to override freely negotiated contractual arrangements which can never be of public benefit.
- 1.7 We do not in this submission address in detail the benefits and detriments of the Provisional Application because the Commission is not required to make a public benefit assessment before granting a provisional authorisation.

¹ NZTGA *Application for Provisional Authorisation of a Restrictive Trade Practice* 30 September 2021 (**Provisional Application**).

² Provisional Application [3.1].

³ [REDACTED]

⁴ [REDACTED]

⁵ Provisional Application [4.12].



1.8 We will address those issues in response to the NZTGA authorisation applications under s 66AA and alternatively s 58 of the Act,⁶ and show that the conduct to which the applications relate is not likely to result in a benefit to the public which would outweigh the resulting lessening of competition.

2. Relevant History

2.1 Tegel produces 55 million broiler chickens each year. “Broiler chickens” are meat chickens. Tegel’s broiler chickens are grown by independent contract broiler chicken growers. Tegel’s broiler growers operate from farms in Auckland, Taranaki and Christchurch.

2.2 A broiler bird will stay on a broiler farm from day zero as a “day-old chick” to up to 42 days, before it is delivered to the plant for processing.

2.3 [REDACTED].⁷ [REDACTED].⁸

2.4 [REDACTED].

2.5 [REDACTED].

2.6 [REDACTED].

2.7 [REDACTED].

2.8 [REDACTED].

2.9 [REDACTED]:

(a) [REDACTED];

(b) [REDACTED].

2.10 [REDACTED]:

(a) [REDACTED];

(b) [REDACTED].

2.11 [REDACTED]:

[REDACTED]

2.12 At the same time however poultry prices reduced⁹ with the retail price per kg of chicken breast falling by more than 25% (from \$16.54 in June 2015 to \$12.34 in June 2021) as shown in the chart below:¹⁰

⁶ NZTGA Application for Authorisation of a Restrictive Trade Practice pursuant to sections 65AA(2) and 65AA(3) (or alternatively 58(1) and 58(2) of the Commerce Act 1986 15 September 2021 (**Applications**).

⁷ [REDACTED]

⁸ [REDACTED]

⁹ 979 in Q2 2015 and 1083 in Q2 2021

¹⁰ figure.nz/chart/ULUOqXsRYZMb

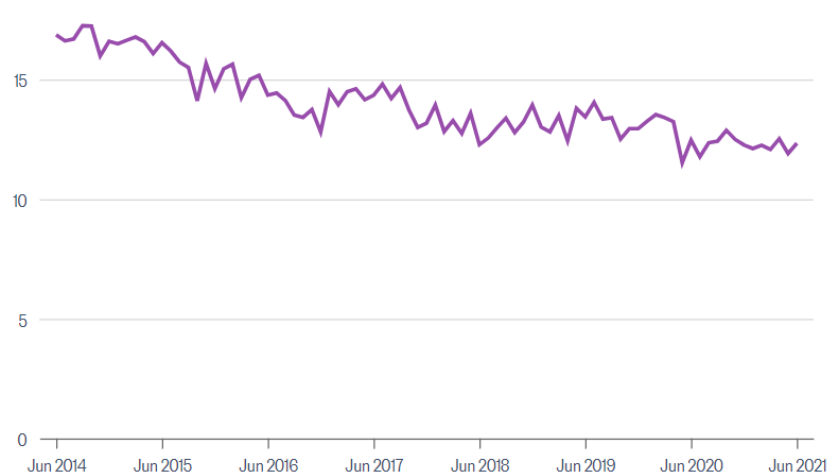


figure.nz

Retail price of chicken breast in New Zealand

Weighted average per 1kg, Jun 2014–Jun 2021, NZD

Provider: Stats NZ



- 2.13 [REDACTED].
- 2.14 [REDACTED] when infectious bursal disease was detected at a Mainland Poultry farm in the South Island in September 2019, which locked Tegel out of the Australian export market from October that year.
- 2.15 In the eight month period from 1 May 2018 to 31 December 2018 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 in 2020. [REDACTED]. [REDACTED].
- 2.16 [REDACTED].
- 2.17 [REDACTED].
- 2.18 NZTGA now seeks Provisional Authorisation to enable growers to collectively negotiate [REDACTED].
- 3. **Section 65AD of the Act can be invoked only for an agreement that relates to or supports a response to COVID-19 or its effects**
 - 3.1 Sections 65AA-65AE set out temporary new processes for authorisation applications made “*during epidemic period*”.¹¹ The provisions have short term application, expiring “*at the close of the 6-month period that starts on the date on which the Epidemic Preparedness (COVID-19) Notice 2020 expires*”.¹²
 - 3.2 They were introduced into the Act on 15 May 2020 by the COVID-19 Response (Further Management Measures) Legislation Act 2020. That act made amendments to several acts to “*enable businesses, local government, and others to more effectively manage the immediate impacts of the response to COVID-19 and mitigate unnecessary and potentially longer-term impacts on society*”.¹³

¹¹ Section 65AA - section heading.

¹² Section 65AA(1)(b).

¹³ COVID-19 Response (Further Management Measures) Legislation Bill (244-1) (explanatory note) at 1-2 (own emphasis).



- 3.3 The Epidemic Response Committee, in its report on the *COVID-19 Response (Further Management Measures) Legislation Bill*, noted that:¹⁴

“this omnibus bill would... assist New Zealand in responding effectively to the effects of the COVID-19 epidemic... The bill’s main amendments aim to help businesses, local government and others to manage the immediate effects of the response to COVID-19, and to ease potential longer-term impacts on society”.

- 3.4 The Commission in its guidelines acknowledges that the s 65AD process is a temporary process to address COVID-19 related emergencies:¹⁵

“The Commission recognises that businesses may need to take steps to respond to the effects of COVID-19 quickly, and that significant public benefits may be lost, or significant detriments or costs incurred, if these steps are delayed. The temporary amendments contained in the COVID-19 Response (Further Management Measures) Legislation Act 2020 [i.e. ss 65AA-65AE of the Commerce Act] will enable the Commission to better respond to the needs of businesses seeking legal certainty through the authorisation process. Ultimately, this will help strike the balance between ensuring that businesses can enter into agreements that benefit New Zealand, while protecting consumers and the competition needed for the long-term benefit of New Zealand consumers.”

- 3.5 The Guidelines recognise that authorisation applications made under these temporary provisions must relate to or support a response to COVID-19:

*“The Commission will endeavour to determine any **COVID-19 related application** as quickly as possible, while acting consistent with the requirements of the statutory framework, the rights and interests of affected parties, and the public interest.”¹⁶*

*“A COVID-19 related application is an application for authorisation of an agreement that **relates to or supports a response to COVID-19 or its effects**, including measures to prevent its entry or spread, or to address its economic, social and health effects.”¹⁷*

- 3.6 The NZTGA application does not satisfy these requirements. As explained in section 3 below, the application is a response to actions taken by Tegel [REDACTED] which it had first raised with NZTGA in August 2019, well before COVID-19 arrived in New Zealand.

- 3.7 While section 65AD(2)(b) allows the Commission to grant a provisional authorisation for any reason, this does not bestow an unfettered discretion of the Commission. It is well established that statutory powers must be exercised in accordance with the purpose and policy of the legislation conferring that power. As the Court of Appeal has held:

¹⁴ COVID-19 Response (Further Management Measures) Legislation Bill (244-1) (select committee report) at 2-3 (own emphasis).

¹⁵ NZCC *Guidelines on Approach to Authorisations under the COVID-19 Response (Further Management Measures) Legislation Act May 2020 (Guidelines)* at [5]–[6] (own emphasis).

¹⁶ Guidelines at [8] (own emphasis).

¹⁷ Guidelines at footnote 3 (own emphasis).



- (a) “as with any statutory discretion, that power is to be exercised in conformity with the purposes of the legislation and the policies underlying the legislation”;¹⁸
- (b) a “... [statutory] discretion must be exercised in accordance with the policy underlying the legislative provisions”;¹⁹
- (c) “it is well settled that statutory powers must be exercised in accordance with the principles and policies of the legislation”;²⁰ and
- (d) the exercise of a statutory discretion “... must be consonant with the scheme and purpose of the legislation”.²¹

3.8 The approach by the Court of Appeal in these cases is consistent with s 5(1) of the Interpretation Act 1999 which reads: “the meaning of an enactment must be ascertained from its text and **in the light of its purpose**”.

3.9 The purpose of the discretion provided to the Commission by s 65AD is clear from paragraphs 2.1-2.5 above: to provide a quick response to the effects of the COVID-19 emergency and to mitigate unnecessary and potentially longer-term impacts on society arising from the pandemic. The discretion can only be exercised for this purpose.

3.10 The Provisional Application self-evidently falls outside the purpose and policy of the *COVID-19 Response (Further Management Measures) Legislation Act 2020* and cannot be granted.

4. The Provisional Authorisation application does not relate to or support a response to COVID-19 or its effects

4.1 At a meeting on 5 August 2019 [REDACTED].

4.2 At a meeting with NZTGA on 16 June 2020, [REDACTED].²²

4.3 At a meeting on 18 September 2020, more than a year after it had first raised the issue with NZTGA [REDACTED].

4.4 [REDACTED].

4.5 At a meeting on 2 December 2020 [REDACTED].

4.6 At a meeting on 23 March 2021 [REDACTED].

4.7 [REDACTED].

4.8 [REDACTED].

4.9 [REDACTED].

¹⁸ *Fleetwing Farms Ltd v Marlborough District Council* [1997] 3 NZLR 257 (CA) at 267.

¹⁹ *R v Knight* [1998] 1 NZLR 583 (CA) at 587.

²⁰ *New Zealand Milk Corporation Ltd v McDonald* [1993] 2 NZLR 543 (CA) at 549.

²¹ *Meikle v Meikle* [1979] 1 NZLR 137 (CA) at 158.

²² [REDACTED]



4.10 [REDACTED].

4.11 [REDACTED]:

(a) [REDACTED];

(b) [REDACTED];

(c) [REDACTED];

(d) [REDACTED].

4.12 What is clear from this narrative is that the [REDACTED] was not a COVID-19 related event. The Provisional Application is not a COVID-19 related application. It does not relate to or support a response to COVID-19 or its effects, including measures to prevent its entry or spread, or to address its economic, social and health effects.

4.13 The Provisional Application must be declined on this ground alone.

5. The grounds for urgency described by NZTGA are without substance

5.1 The Provisional Application lists three “urgent” situations to justify the grant of provisional authorisation. Even if urgency unrelated to COVID-19 was a ground for provisional authorisation (which as explained in section 3 of this submission it is not), none of the situations described in the Provisional Application would justify intervention by the Commission as requested.

[REDACTED]

5.2 [REDACTED]:

(a) [REDACTED];

(b) [REDACTED].

5.3 [REDACTED].

5.4 [REDACTED].

5.5 [REDACTED].

[REDACTED]

5.6 NZTGA claims authorisation is urgent because [REDACTED].²³

5.7 This is no basis for urgent authorisation. [REDACTED].

5.8 [REDACTED].

5.9 In our view however (and we would expect NZTGA to have been so advised), Tegel's consultation with NZTGA on [REDACTED] matters is reasonably necessary for the purposes of the collaborative activity between Tegel and growers. Those discussions would not expose NZTGA to risk of a criminal cartel prosecution, and do not require authorisation.

²³ [REDACTED]



[REDACTED]

5.10 [REDACTED],²⁴

5.11 To the contrary, this issue is a case study of why collective bargaining is not appropriate or efficient. The grower group is too diverse for a 'one size fits all' solution. [REDACTED].

5.12 There was not, and is not, an “*unresolved animal welfare issue concerning the lighting in the chicken sheds*” as alleged by NZTGA,²⁵ and there is no “*future intangible public benefit*” from collective negotiation.

6. NZTGA's 'emergency' is a consequence of its own failures

6.1 NZTGA submits that “*there is an urgent need to carry out the conduct for which provisional authorisation is sought*”²⁶ for the reasons discussed in section 4 of this submission. As we have already explained, the subject matter of the Provisional Application is unrelated to COVID-19 and the claim that there is an urgent need to carry out the conduct for which provisional authorisation is sought is without foundation.

6.2 Another relevant factor is that if it were correct that there was an urgent need to engage in the conduct for which authorisation is sought, the Provisional Application should not be granted because the situation NZTGA finds itself in is a result of its own negligence and failure to act in a timely way.

6.3 In 2017, when the Commission granted authorisation to the Waikato-BOP Growers Association to collectively negotiate chicken growing contract with Inghams, the question arose whether the role of the NZTGA under the FMA also required authorisation.

6.4 [REDACTED].

6.5 [REDACTED].

6.6 [REDACTED].

6.7 [REDACTED].

6.8 In those circumstances, even if provisional authorisation were available for non-COVID related applications, it should not be granted. Tegel would be deprived both of its rights to contest the public benefits of the proposed arrangements and the benefit of due process encapsulated in ss 60–62 and 64 of the Act, [REDACTED].

7. The application seeks authorisation from the Commission to override freely negotiated contractual arrangements which can never be of public benefit

7.1 Although the provisional application process does not require the Commission to be satisfied that the authorised conduct is likely to result in a public benefit that would outweigh the resulting lessening in competition, we think it appropriate to show that the stated grounds for invoking s 65AD are clearly contrary to the public benefit.

7.2 What the Provisional Application seeks to do is gain Commission approval to [REDACTED] agreed to by Tegel and the growers in their collectively negotiated grower contracts.

²⁴ [REDACTED].

²⁵ Provisional Application at [4.30].

²⁶ Provisional Application at [4.1].



7.3 [REDACTED]²⁷ [REDACTED]²⁸

7.4 [REDACTED].

7.5 [REDACTED]²⁹ [REDACTED].

7.6 [REDACTED].

7.7 As the report prepared by NERA (**NERA Report**) notes, NZTGA's position is that the FMA was collectively negotiated and likely to have efficiency benefits³⁰ but it now seeks authorisation to effectively override provisions in that agreement. The public detriments of such an authorisation are discussed in the NERA Report.

7.8 [REDACTED]³¹ [REDACTED].

8. [REDACTED]

8.1 [REDACTED]

(a) [REDACTED]³² [REDACTED]³³

(b) [REDACTED]³⁴ [REDACTED]³⁵

8.2 [REDACTED]³⁶ [REDACTED].

8.3 [REDACTED]³⁷ [REDACTED].

8.4 [REDACTED]. [REDACTED].

END

27 [REDACTED]

28 [REDACTED]

29 [REDACTED]

³⁰ *Castalia Public Benefits and Detriments of a Provisional Authorisation for Collective Activity prepared for the New Zealand Tegel Growers Association 23 September 2021 (Castalia Report 2)* at [2.4].

31 [REDACTED]

32 [REDACTED]

33 [REDACTED]

34 [REDACTED]

35 [REDACTED]

36 [REDACTED]

37 [REDACTED]