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Commerce Commission  
PO Box 2351  
Wellington 6140

Dear James

## NZTGA Authorisation Application - Cross-Submission in Response to Tegel and NERA Submission dated 5 November 2021

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1. This cross-submission responds to submissions (with redactions) made by Tegel Foods Limited (**Tegel**) dated 5 November 2021 and NERA Economic Consulting (**NERA**) dated 5 November 2021 on the Statement of Preliminary Issues dated 8 October 2021 issued by the Commerce Commission in respect of the Authorisation Application submitted by the New Zealand Tegel Growers Association Incorporated (**NZTGA**).
2. Confidentiality is claimed for information set out in yellow or green in this submission. Information set out in green is however information that Tegel may view.

### Jurisdiction

3. Tegel submits in paragraph 2 of its submission that there is a lack of jurisdiction for the application under section 65AA. Tegel asserts that the circumstances giving rise to the application did not arise from Covid-19.
4. NZTGA submits that the position with section 65AA is the same was with section 65AD (providing for provisional authorisation). Both sections are clear on their face. Their wording is such that they are not restricted to Covid-19 related situations. Instead, the only jurisdictional limit is that the application must be lodged within the duration of the epidemic period (as defined in s65AA(1)).
5. Section 65AA(2) and (3) provide:

*“(2) A person who wishes to enter into a contract or arrangement, or arrive at an understanding, that the person considers would contain, or may contain, a cartel provision may, during the epidemic period, apply to the Commission for an authorisation to do so and the Commission may grant an authorisation for that person to enter into the contract or arrangement, or arrive at the understanding.*

*“(3) A person who wishes to give effect to a provision of a contract or arrangement or understanding that the person considers would contain, or may contain, a cartel provision, may, during the epidemic period, apply to the Commission for an authorisation to do so, and the Commission may grant an authorisation for that person to give effect to the provision of the contract or arrangement or understanding.”*

6. It is clear therefore that the jurisdictional threshold for application of section 65AA is just the party must make application to the Commission “**during the epidemic period**” if they wish to enter into a relevant arrangement that includes a cartel provision, or if they wish to give effect to a cartel provision. There

is no requirement that the arrangement or provision be based on circumstances *caused* by the epidemic.

7. The point made by the Commission in its determination on NZTGA's application for provisional authorisation at paragraph [23.2] (in relation to section 65AD) applies equally in relation to section 65AA.
8. The lack of any reference to Covid-19 circumstances in section 65AA can be contrasted with amendments to other legislation also enacted by the COVID-19 Response (Further Management Measures) Legislation Act 2020. In some of those cases (such as the safe harbour provisions relating to directors' duties relating to reckless/ insolvent trading<sup>1</sup>) the availability of the relevant provisions is expressly limited to circumstances where there has been an effect due to Covid-19.
9. That is not the case with section 65AA where the jurisdictional limitation is simply the time when the applicant brings its authorisation application. As with section 65AD<sup>2</sup>, this prevents arguments and uncertainty as to whether the need for authorisation was sufficiently caused by Covid-19.

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### **Homogeneity/Heterogeneity of Growers**

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(a)

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<sup>1</sup> Clauses 6 and 7 of Schedule 12 of the Companies Act 1993 as introduced by Schedule 4 of the COVID-19 Response (Further Management Measures) Legislation Act 2020.

<sup>2</sup> Commerce Commission Provisional Authorisation Application- New Zealand Tegel Growers Association Incorporated [2021] NZCC 26 at [23.4].

<sup>3</sup> NZTGA Cross-submission dated 26 October 2021 at [26]-[41].

<sup>4</sup> Application for authorisation AA1000527 by Ingham's Group Ltd in respect of co-ordination between Victoria chicken meat processors to manage the impact of the COVID-19 pandemic, 29 October 2020.

- (c)
- (d)
- (e)
- (f)
- (g)
- (h)

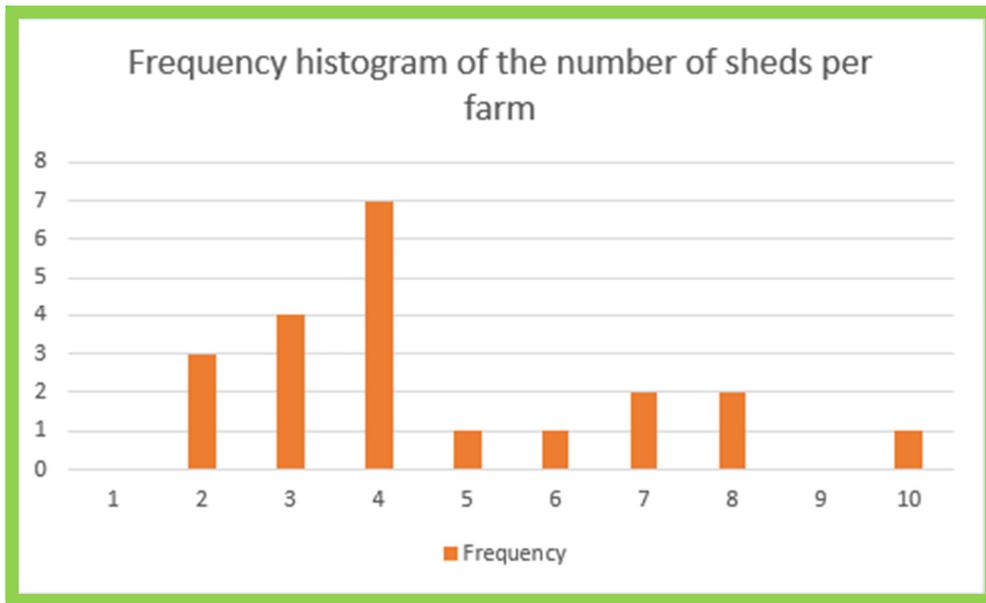
- (i)
- (j)

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- 19. The fact that Inghams' has negotiated collectively with growers in Waikato/Bay of Plenty indicates that chicken processors achieve transaction costs savings through collectively bargaining with chicken growers, regardless of differences in size, number or age of the chicken growers' sheds.
- 20. In Australia, growers would be more heterogenous than in New Zealand, as some Australian farms are extremely large. Despite this processors in Australia have collective agreements with growers, which further indicates that differences in scale (and likely also shed age) do not undermine transactional cost savings of collective bargaining.
- 21. Castalia has collected a sample of Australian chicken farm sizes by looking at those advertised for sale on real estate websites. As can be seen even from this relatively small sample of farms, the variation in the number of sheds per farm is similar to that in Table 3 of the Tegel submission.



Sources: poultryfarmsaustralia.com.au, farmbuy.com, and commercialrealestate.com.au

22. However, this level of heterogeneity has not prevented the ACCC from consistently accepting for many years claims of transaction cost savings in applications for authorisation of collective bargaining arrangements for Australian chicken growers<sup>5</sup>.

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(a)

(b)

(c)

(d)

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<sup>5</sup> See for example Authorisation no A90659 Application for authorisation by Inghams Enterprises Pty Ltd in relation to the collective negotiation of chicken growers' contracts in Tasmania, 17 March 1999 at [7.26]-[7.28]; Authorisation no A90825 Application for authorisation by Inghams Enterprises Ltd in respect of collective negotiations involving its current and future chicken meat growers in South Australia, 22 January 2003 at [8.65]-[8.67]; Authorisation no A91262 Application for Authorisation by Western Australian Broiler Growers' Association in respect of collective bargaining by chicken grower groups with their nominated processor in Western Australia, 16 June 2011 at [5.32]-[5.34]; Authorisation no A91294 Application for authorisation by South Australian Inghams Chicken Growers in respect of collective bargaining with Inghams Enterprises Pty Ltd, 14 June 2012 at [3.2]; Authorisation no A91534 Application for authorisation by Victorian Farmers Federation in respect of collective bargaining by Victorian chicken meat grower groups with the processor they supply, 16 June 2016 at [19]-[20]; Authorisation no AA1000403 Application for authorisation by South Australian Baiada Growing Group in respect of collective bargaining with Baiada Poultry Ltd, 20 December 2017 at [21]. This is not a comprehensive list. There have been a very large number of authorisations granted by the ACCC for collective bargaining by chicken growers.

24. Notwithstanding the substantial variation in grower size of the South Australian growers, and other differences between those growers, the ACCC accepted a claim of transaction cost savings in that case<sup>6</sup>.
25. NERA cites in support an article by Stephen King (economist and former commissioner of the ACCC) which comments that transaction cost savings from collective bargaining can be less in situations where the parties are heterogenous<sup>7</sup>.
26. However, that was not a concern expressed in the multitude of ACCC decisions giving authorisation to collective negotiation by chicken growers. Stephen King refers to some of those chicken growing decisions in his article<sup>8</sup>.
27. Stephen King was also himself a Commissioner who signed off on some of those decisions<sup>9</sup>. As discussed further below, he was also a Commissioner that was a party to a decision where the ACCC expressly referred to collective bargaining by chicken growers as an example of a situation involving the supply of “*very similar*” services<sup>10</sup>.
28. In all the ACCC decisions which NZTGA’s solicitors and counsel have been able to view involving applications for authorisation of collective bargaining by Australian chicken growers, the ACCC has accepted claims of transaction cost savings. There has been no suggestion made by the ACCC in those decisions that heterogeneity of growers reduced this claimed public benefit.
29. In discussing the issue of transaction costs, the ACCC has made it clear that it considers that chicken growing services are sufficiently homogenous so that collective bargaining does provide significant transaction cost savings.
30. For example, in the ACCC’s decision on the authorisation of collective bargaining by the Coalition of Major Sports Professionals (for which Stephen King was a Commissioner), the ACCC stated that:
- “While the ACCC usually accepts that some level of transaction cost savings are likely to arise from most authorised collective bargaining arrangements, the accepted size of those potential savings depends, amongst other things, on the characteristics and features of each individual set of proposed arrangements.*
- For example, 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. In addition, costs are likely to be lower where the collective bargaining group elects an individual or committee to negotiate on its behalf rather than comprising a representative from each of its member businesses.”<sup>11</sup>* (emphasis added)
31. It is apparent from this passage that the ACCC sees chicken growing as a relatively homogenous service in relation to which it is justifiable to make a claim of transaction cost savings arising from

<sup>6</sup> Authorisation no AA1000403 Application for authorisation by South Australian Baiada Growing Group in respect of collective bargaining with Baiada Poultry Ltd, 20 December 2017 at [21].

<sup>7</sup> Stephen King *Collective Bargaining by Business: Economic and Legal Implications* 36 (2013) UNSWLJ 107 at 131-133.

<sup>8</sup> See for example Stephen King *Collective Bargaining by Business: Economic and Legal Implications* 36 (2013) UNSWLJ 107 at FN66 where King cites ACCC decision A91262 in respect of the application for authorisation by the Western Australian Broiler Growers’ Association, 16 June 2011.

<sup>9</sup> Authorisation no A90659 Application for Authorisation by Inghams Enterprises Pty Ltd in relation to the collective negotiation of chicken growers’ contracts in Tasmania, 17 March 1999.

<sup>10</sup> Authorisation no 91007 Application for Authorisation by the Coalition of Major Professional Sports in relation to collective negotiations with sports betting operators, 13 December 2006 at [7.26].

<sup>11</sup> [

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collective bargaining. The same is true in New Zealand, especially as the range of size of New Zealand growers is not as great as the range in Australia.

**Factual**

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36. The most likely position then if the Authorisation is granted is that Tegel will engage with NZTGA on the basis that NZTGA is collectively negotiating on behalf of the Growers.

37. However, as submitted in NZTGA’s application for authorisation dated 15 September 2021, the public benefits identified by Castalia, and claimed in the application, will likely be obtained regardless of whether Tegel does in fact engage in collective negotiation.

38. [ <sup>13</sup> <sup>14</sup> ]

39. It is also notable that the ACCC has authorised arrangements for collective bargaining, and for discussion and exchange of information, even in circumstances where the counter-party has indicated an unwillingness to participate in collective bargaining<sup>15</sup>.

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<sup>12</sup> [ ]

<sup>13</sup> [ ]

<sup>14</sup> [ ]

<sup>15</sup> See for example, Australian Competition and Consumer Commission, AA1000473: Application by NSW Minerals Council and mining companies to collectively negotiate with Port of Newcastle Operations Pty Ltd all terms and conditions of access relating to the export of coal from the Port of Newcastle (27 August 2020).

## Counterfactual

40. In paragraph 7 of Tegel's submission, and in paragraph 2 of NERA's submission, Tegel challenges NZTGA's proposed counterfactual. NERA suggests a counterfactual of individual negotiation of the FMA.
41. NZTGA submits that in the absence of collective negotiation, the FMA is not workable or sustainable long-term. The reasons for this are discussed in detail in the first Castalia report<sup>16</sup>. Accordingly, NZTGA maintains its submission that the most likely counterfactual involves individual negotiation between growers and Tegel with the FMA not persisting in its current form beyond the short to medium term. Instead, [ ], the FMA would likely be replaced by a simpler agreement that is individually negotiated but based on a standard short form agreement.<sup>17</sup>
42. While NZTGA does not consider that an alternative counterfactual of individual negotiation of the FMA is a likely counterfactual, Castalia has undertaken a calculation of the benefits of authorisation compared to that alternative counterfactual. These calculations are set out in Schedule 2. Castalia considers that, even compared to this counterfactual, authorisation would significantly cut the costs required to negotiate individual agreements and would provide transaction costs savings of more than \$1m.

## Innovation

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## Transaction Cost Savings

47. Tegel's submission at paragraph 10 and NERA's submission at paragraph 3 challenge NZTGA's claim of transaction cost savings on the basis of heterogeneity of growers.
48. As discussed in paragraphs **Error! Reference source not found.** to 31 above, Australian growers have greater heterogeneity than New Zealand growers. This has not prevented the ACCC consistently accepting public benefit claims of transaction cost savings as part of ACCC decisions authorising collective bargaining by chicken growers.
49. Also as discussed above, the extent of commonality of growers in New Zealand is such that significant transaction costs can reasonably be expected from collective bargaining.

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<sup>16</sup> Castalia Report dated 2 September 2021 at [3.3].

<sup>17</sup> NZTGA Application for Authorisation dated 15 September 2021 at [5.1].

## Wealth Transfers

50. In paragraph 10 of Tegel's submission and paragraph 4 of NERA's submission, Tegel argues that there is no transfer on the basis that there are currently not supranormal profits by Tegel.
51. Tegel's current financial position is irrelevant. Any investor can make a commercial error. The issue here is not whether Tegel should be able to fix its problems at the expense of growers or, if growers who make commercial errors can correct them at the expense of Tegel. Collective agreement helps to enable the efficient balance of bargaining positions over a long period of time, where each party is responsible for its own financial choices and economic success.
52. The transfer of surplus from foreign owned Tegel to locally owned growers as a result of stronger collective bargaining position is a public benefit. This argument does not rely on short-term fluctuations in the fortunes of either Tegel or the growers. In considering whether there are wealth transfers, the long term is relevant rather than the position in the current year. The contracts in place between Tegel and the growers are long-term arrangements, running over a period of more than 25 years.
53. It is undoubtedly the case that chicken processors have significant buyer power. That has been held to be the case by the ACCC in relation to applications for authorisation of collective bargaining by chicken growers with the evening up of that negotiating power being considered a potential public benefit<sup>18</sup>.
54. NERA also argues at paragraph 31 that where growers [ ] this cannot be considered a wealth transfer because [ ]
55. Castalia's analysis accounts for the possibility that [ ]<sup>19</sup>. Castalia's analysis based on [ ]<sup>20</sup>. For example, when discussing the difference between grower prices in the factual and counterfactual, the Castalia Report 1 (p.4) states that: [ ]

## Allocative Efficiency

56. NERA contends at paragraph 44 of its submission that if the counterfactual would reduce the losses being made by Tegel then the factual (authorisation) would likely be less allocatively efficient. It is not clear that this is the case.
57. A reduction in the amount of losses in the short-term is irrelevant to the assessment of allocative efficiency, for similar reasons to those discussed above in the context of wealth transfers. As previously submitted by NZTGA<sup>21</sup>, [ ]
58. [ ]

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<sup>18</sup> See for example Authorisation no A90659 Application for authorisation by Inghams Enterprises Pty Ltd in relation to the collective negotiation of chicken growers' contracts in Tasmania, 17 March 1999 at [7.23]-[7.25]; Authorisation no A90825 Application for authorisation by Inghams Enterprises Ltd in respect of collective negotiations involving its current and future chicken meat growers in South Australia, 22 January 2003 at [8.51]-[8.61]; Authorisation no A91262 Application for Authorisation by Western Australian Broiler Growers' Association in respect of collective bargaining by chicken grower groups with their nominated processor in Western Australia, 16 June 2011 at [5.27]-[5.29].

<sup>19</sup> Castalia Report dated 2 September 2021 at [3.3.1]

<sup>20</sup> Castalia Report dated 2 September 2021 at [3.4].

<sup>21</sup> NZTGA submission dated 26 October 2021 at [124].

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59. Further, the granting of authorisation will (to a partial extent) even up bargaining power between the growers and NZTGA. This will likely make prices more efficient rather than less efficient.
60. As previously discussed in the first Castalia report, allowing for collective bargaining only slightly rebalances the playing field with Tegel still retaining the greater bargaining power<sup>23</sup>.
61. Even with the ability to collectively negotiate growers will not come close to having sufficient bargaining power to cause inefficient pricing. To the contrary, the slight rebalancing of the balance of bargaining power is likely to result in slightly more efficient pricing.

### Confidentiality

62. Confidentiality is requested for the information in this application that is highlighted in either yellow or green, on the basis that:
- (a) the information is commercially sensitive and valuable information which is confidential to the Applicant and/or the Growers and the disclosure of which would be likely unreasonably to prejudice the commercial position of the Applicant and/or the Growers, or the person who is the subject to the information; or
  - (b) to make the information public would be likely to result in its disclosure or use for improper gain or advantage; or
  - (c) [
- ]
63. The Applicant waives confidentiality in respect of the information highlighted in green, in respect of Tegel.
64. The Applicant requests that it be notified if a request is made to the Commission under the Official Information Act 1982 for the release of the information for which confidentiality has been claimed, and given a chance to provide submissions to the Commission on whether it should make disclosure prior to any such disclosure taking place.

Yours faithfully  
Lane Neave



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<sup>22</sup> Castalia Report dated 2 September 2021 at [3.4.1].

<sup>23</sup> Castalia Report dated 2 September 2021 at [3.2.2].





## Schedule 2 – Castalia Alternative Calculation of Benefits based on Tegel Claimed Counterfactual

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The Castalia 1 Report contained indicative estimates of the costs of contract negotiation in the factual and counterfactual. Castalia have re-run the analysis with lower costs reflecting the counterfactual that Tegel has claimed to be relevant. Castalia assumed that in this alternative counterfactual:

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With the above assumptions, Castalia estimates the transaction cost savings to be in the range of \$1.0 to \$1.5 million.