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Commerce Commission
PO Box 2351
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Dear James

NZTGA Authorisation Application - Cross-Submission

1. NZTGA in this cross-submission:
 - (a) responds to Tegel's submission dated 20 May 2022 and the supporting report by NERA dated 20 May 2022; and
 - (b) otherwise addresses points made by the Commission in its draft determination dated 13 April 2022.
2. This cross-submission has been jointly prepared by Lane Neave and John Land, Barrister.
3. Together with this cross-submission, a report has been prepared by Emma Ihaia of Link Economics which responds to the NERA report, and also addresses certain points made by the Commission in the draft determination. Due to the confidential nature of some of the material in the Link Economics report, that report is being sent to the Commission separately by John Land. To the extent that the Link Economics report refers to information that is confidential to Tegel or individual growers that information has only been reviewed by John Land and not by Lane Neave.

Imbalance of Bargaining Power between Tegel and the Growers

4. Tegel in para 2 of its submission;
 - (a) Rejects the characterisation by NZTGA and Castalia that there is an imbalance of bargaining power between Tegel and the growers;
 - (b) Instead characterises the relationship between Tegel and growers as one of "mutual dependence";
 - (c) Relies heavily on the decision of the Australian Competition Tribunal in the Port of Newcastle decision¹; and
 - (d) Suggests that authorisation of collective bargaining by the Commission would create an imbalance of bargaining power in favour of growers.
5. In response NZTGA submits:

¹ *Application by Port of Newcastle Operations Pty Ltd (No 2) [2022] ACompT 1 ("Port of Newcastle").*

- (a) That it is abundantly clear that there is an imbalance of bargaining power between Tegel and the growers (in favour of Tegel), and further that the Commission granting authorisation would only partially offset that imbalance;
- (b) That the *Port of Newcastle* decision of the Australian Competition Tribunal is entirely distinguishable as the coal producers in that case were often in fact larger in size than the Port of Newcastle, and the Port was dependent on the coal producers for the bulk of its revenue;
- (c) By contrast the *VFF Chicken Growers* case² of the Tribunal, and the ACCC's *Perishable Agricultural Goods Inquiry* findings³, demonstrate that collective bargaining by chicken growers with chicken processors is in an entirely different category. Collective bargaining by chicken growers does provide growers with some degree of countervailing power but does not eliminate the substantial monopsony power of chicken processors.

6. The following comments can be made in relation to the *Port of Newcastle* case;

- (a) The *Port of Newcastle* case involved:
 - (i) negotiation with the Port by a small number of parties, being nine coal producers);
 - (ii) the nine coal producers were large businesses often larger in size than the Port itself, and who could be expected to have a strong negotiation position. The coal producers as the applicants for authorisation were said to be "*a modest number (nine) of generally large and sophisticated companies. In financial terms, they are generally much larger than PNO*"⁴. The Tribunal frequently referred to the coal producers as large "*sophisticated entities*"⁵) who were capable of conducting their own separate negotiations⁶, and who were not at a bargaining disadvantage to the Port. The Tribunal did not consider that individual coal producers were at a disadvantage in negotiations with the Port that could only be remedied by collective negotiation. "*To the contrary, the authorisation applicants are large and sophisticated companies and many of the authorisation applicants are financially much larger than PNO.*"⁷
 - (iii) A situation in which the Port was just as dependent on the coal producers as an important source of revenue, as the coal producers were dependent on the Port as a key input for getting its product to market. The Tribunal considered that the Port's bargaining conduct with the coal producers was constrained by a number of matters including the fact that the Port had approximately 50% unused capacity at the Port, and the risks of regulatory intervention which was applicable to port services pursuant to Commonwealth or state (New South Wales) legislation or regulation⁸. The expert economists in the *Port of Newcastle* case agreed that the Port's pricing conduct was not consistent with the presence of unconstrained market power.⁹

² *VFF Chicken Meat Growers' Boycott Authorisation* [2006] ACompT 2 ("*VFF Chicken*" case).

³ ACCC *Perishable Agricultural Goods Inquiry- Final Report* published 10 December 2020 available at <https://www.accc.gov.au/system/files/Perishable%20Agricultural%20Goods%20Inquiry%20-%20Final%20Report%20-%20December%202020.pdf>

⁴ *Port of Newcastle*, above n.1, at [200] See also at [204] and [270]).

⁵ *Port of Newcastle*, above n.1 at [254] and [270].

⁶ *Port of Newcastle*, above n.1 at [270].

⁷ *Port of Newcastle*, above n.1 at [204].

⁸ *Port of Newcastle*, above n.1 at [239] and [273]-[274].

⁹ *Port of Newcastle*, above n.1 at [241].

- (b) The *Port of Newcastle* case is accordingly completely different from the present case which involves a significant number ([] of small chicken growers endeavouring to collectively bargain with a much larger corporate entity. The growers are all small businesses which are much smaller than Tegel and do not have a strong negotiating position. Further, Tegel is not particularly dependent on any one or small number of growers, and could also readily sponsor the entry of new growers into the market.
- (c) The “*mutual dependence*” discussed in the *Port of Newcastle* case was very specific to that case and bears no resemblance to the case of Tegel and the growers. The Port was dependent “*upon the provision of Port access services in relation to export coal being transported to overseas markets for approximately 70 per cent of its revenue*”.¹⁰ In other words, the coal producers were the main customers of the port.
- (d) The position is different with Tegel and the growers. The growers are not customers of Tegel. They do provide an important input but unlike the position with Port of Newcastle and the nine major coal producers, Tegel is not dependent on any single or small number of growers. Tegel could do without any particular grower, and could if it wished sponsor the entry of replacement growers.
7. The approach of the Australian Competition Tribunal to issues involving collective bargaining in a market involving a port and a limited number of major coal producers in the *Port of Newcastle* case, can be contrasted with the same Tribunal’s consideration of market power issues in the quite different markets involving chicken growing in the *VFF Chicken Growers* case.
8. Although the *VFF Chicken Growers* case dealt principally with an application for authorisation of a proposed collective boycott arrangement, the case is still helpful in considering markets almost identical to the chicken growing markets in which Tegel and the growers are involved. (By way of comparison, the chicken growers involved in the *VFF Chicken Growers* case ranged significantly in size from 25,000 to 400,000 birds¹¹).
9. Further, the *VFF Chicken Growers* case does refer to and discuss the impact of a collective bargaining authorisation obtained by the chicken growers in that case (although that particular authorisation was not the subject of challenge before the Tribunal¹²).
10. Unlike the position with the *Port of Newcastle* who were subject to constraints in dealing with the coal producers, the Tribunal did not see the chicken processors in the *VFF Chicken Growers* case as being subject to strong competitive constraints in their dealings with the chicken growers.
11. The chicken processors were seen as having strong monopsony or oligopsony market power¹³. While there was some degree of interdependence between processors and growers this did not constrain the market power that processors held due to being monopsony or oligopsony purchasers of chicken growing services¹⁴. The growers did not have countervailing power¹⁵.
12. The Tribunal said that the chicken processors were monopsony purchasers in two of the three relevant regional chicken growing markets and did not appear to compete with each other for grower services

¹⁰ *Port of Newcastle*, above n.1 at [238].

¹¹ *VFF Chicken*, above n.2 at [46].

¹² *VFF Chicken*, above n.2 at [84].

¹³ *VFF Chicken*, above n.2 at [109]-[113], [408].

¹⁴ *VFF Chicken*, above n.2 at [125]-[126].

¹⁵ *VFF Chicken*, above n.2 at [128].

in the third relevant market. Further, growers had significant sunk costs in investments made by them in their facilities¹⁶.

13. As a result, the Tribunal considered that the chicken processors would as monopsonists restrict investment in growing capacity and output of chicken meat below the allocatively efficient levels that would be expected in competitive markets for growing services¹⁷.
14. The Tribunal was clear that there were likely to be “*on-going material detriments to the public resulting from the exercise of monopsony power by the Processors*”¹⁸.
15. The Tribunal noted that the previous authorisation of collective bargaining:
 - (a) would give growers confidence that there was a mechanism in place to assist in renegotiating contracts;
 - (b) probably would reduce the costs to Processors and to Growers of contract negotiations;
 - (c) would increase the capacity of Growers to have enhanced input into contract terms; and
 - (d) would facilitate an improved flow of commercially relevant information from Processors to Grower groups.¹⁹
16. The Tribunal also noted that the experts in the case had agreed:
 - (a) collective negotiations may improve the efficiency of relations between Processors and Growers; and
 - (b) collective negotiations may lead to higher prices paid to suppliers²⁰.
17. However, the Tribunal considered that the chicken processors’ monopsony market power had only been *partially* reduced by the collective bargaining authorisation obtained by the VFF grower groups:

*“The fact that VFF Grower groups now have an authorisation to collectively negotiate with their Processors probably has equipped Growers with a degree of countervailing market power. However, we consider it unlikely that the ability of VFF Grower groups to collectively negotiate with their respective Processors will result in them being able to restrict the capacity of Processors to behave monopsonistically.”*²¹
18. So although the Tribunal was not deciding on an appeal from the collective bargaining authorisation, its comments about that authorisation were broadly positive- that authorisation had provided the growers with *some* countervailing power, but had not eliminated the processors’ monopsony power.
19. The Tribunal’s concerns were simply as to whether it was justified to add a collective boycott authorisation *on top of* the collective bargaining authorisation²².

¹⁶ VFF Chicken, above n.2 [409], [443].

¹⁷ VFF Chicken, above n.2 at [341]-[342], [384], [411]-[412], [415], [444], and [446].

¹⁸ VFF Chicken, above n.2 at [435].

¹⁹ VFF Chicken, above n.2 at [432].

²⁰ VFF Chicken, above n.2 at [61].

²¹ VFF Chicken, above n.2 at [415]

²² VFF Chicken, above n.2 at [382] and [416].

20. The Tribunal considered it was not appropriate to authorise a collective boycott having regard to the potential detriments involved in actual boycotts (and costly actions taken by processors to avoid the potential impact of future threatened boycotts)²³. Providing growers with the additional countervailing power produced by the ability to boycott would lead in the Tribunal's view to highly unpredictable outcomes.²⁴ The Tribunal considered that it was possible this might improve the efficiency of chicken growing markets but also possible it might lead to inefficient levels of investment²⁵. (There is of course no application before the Commission for the authorisation of collective boycott conduct by the New Zealand growers).
21. In summary, while the Tribunal decision was a rejection of the application in that case for authorisation of a collective boycott, the decision is a useful consideration of very similar chicken growing markets to those at issue in the present application. It is clear that the Tribunal saw those markets as involving a very substantial imbalance of power between chicken processors and growers, and that a previous authorisation of collective bargaining in that case was only likely to give rise to a *partial* reduction in that imbalance of bargaining power. Even with the granting of the collective bargaining authorisation, the Tribunal was clear that the chicken processors would have monopsony market power.
22. The fact that there is an imbalance of bargaining power between chicken processors and chicken growers despite the presence of collective bargaining authorisations is also suggested by the ACCC market inquiry into *Perishable Agricultural Goods*²⁶ and recent ACCC investigation into unfair contract terms being imposed by chicken processors advised by ACCC media release on 25 May 2022²⁷.
23. An imbalance of bargaining power between chicken processors and chicken growers has also led to recent governmental action in the United States as summarised in a US Department of Agriculture announcement on 26 May 2022²⁸. The US government announced a number of measures designed among other things to “prevent abuse of farmers by poultry processors and make prices fairer for farmers and American consumers”. The announcement noted that the measures were designed to “combat market dominance” held by poultry processors “where excessive concentration and control has led to lower prices paid to producers and higher prices paid by consumers”. The announcement commented that currently poultry processors exert control through “take it or leave it” contracts with growers.
24. An imbalance of bargaining power between chicken processors and chicken growers is also present in New Zealand.
25. If on a non-renewal or termination of contract, a Grower cannot reach agreement with Tegel, [] . Each shed costs about [] . Therefore if a grower does not reach a deal with Tegel, their average [] investment per shed is lost.

²³ VFF Chicken, above n.2 at [392]-[396], [402]-[404], [417]-[420], [427], [437] and [452].

²⁴ VFF Chicken, above n.2 at [423], [436], [451].

²⁵ VFF Chicken, above n.2 at [433], [436], [451].

²⁶ ACCC Perishable Agricultural Goods Inquiry- Final Report published 10 December 2020 particularly at pages 17-20, 53-55 (discussing imbalance of bargaining power between chicken processors and growers), 102-104 (generally as to limitations of collective bargaining authorisations), 117 (in relation to proposed ACCC investigation of unfair contract terms imposed by chicken processors on growers) and 121-122 (in relation to proposed class exemption for small business collective bargaining). The report is available at <https://www.accc.gov.au/system/files/Perishable%20Agricultural%20Goods%20Inquiry%20-%20Final%20Report%20-%20December%202020.pdf>

²⁷ ACCC media release 25 May 2022- see <https://www.accc.gov.au/media-release/chicken-meat-processors-address-potential-unfair-contract-terms>.

²⁸ <https://www.usda.gov/media/press-releases/2022/05/26/biden-harris-administration-announces-new-actions-strengthen-food>.

This point is also noted in ACCC decisions as a feature of chicken growing markets that gives rise to an imbalance in bargaining power²⁹.

26. On the other hand, Tegel does have options if it has a shortage of capacity, it can look to build new farms (NERA suggest this is a two-three year process), sponsor new sheds on existing farms, approach Inghams growers in the Waikato (although the lead time on Inghams' growers coming off contract is unknown), reduce the number of days between runs so producing more through existing farms or raise prices. Any constraints are only on growing the business. Tegel would still achieve comparable profit from the business.
27. Accordingly, the comparable options and bargaining power as between Tegel and individual growers are very different.
28. There is also a vast difference in commercial expertise and experience between Tegel as a large commercial organisation and many individual growers. Included within the grower groups are a number of individual growers who would have less commercial experience []].

Breadth of the Collective Bargaining Authorisation

29. Tegel in para 3 of its submission asserts that the scope of the authorisation sought by NZTGA is too broad.
30. Tegel again relies on the *Port of Newcastle* case for the proposition that authorisation should not be granted unless it is clear that:
 - (a) the current terms are harming economic efficiency;
 - (b) that collective bargaining would be likely to cause a change in the terms; and
 - (c) the change would result in a public benefit.
31. Importantly in the *Port of Newcastle* case the Tribunal considered "*the proposed collective bargaining conduct is unlikely to result in a bargaining change or outcome that differs from bilateral negotiations*"³⁰. This appears to be largely because of an assessment by the Tribunal that the individual coal producers were large companies with substantial countervailing power capable of negotiating with the Port (see discussion above).
32. By contrast in the present case, the expert economic evidence from Castalia is to the effect that a different position can be expected with collective bargaining. Collective bargaining will reduce in part the imbalance of bargaining power that otherwise exists between Tegel and the growers, and will produce a more efficient outcome.
33. The situation is more similar to that discussed in the *VFF Growers* case discussed above where the Australian Competition Tribunal considered that the chicken processors' monopsony market power had been partially reduced by the collective bargaining authorisation obtained by the VFF grower groups.

²⁹ See for example ACCC Authorisation A90659 dated 17 March 1999 in relation to Application for Authorisation lodged by Inghams Enterprises Pty Ltd in relation to the collective negotiation of chicken growers' contracts in Tasmania at 7.23: "*For example, the capital investment by growers in land and specialised shedding is large which can necessitate high borrowings and lead to high sunk costs. On the other hand, processors tend to be large vertically integrated companies that own and control virtually all inputs in the production process.*" The same point is made in other decisions by the ACCC granting authorisation for collective bargaining by chicken growers eg ACCC Authorisation A90825 dated 22 January 2003 in relation to the Application for Authorisation lodged by Inghams Enterprises Pty Ltd in respect of collective negotiation involving its current and future contract chicken meat growers in South Australia at 8.55.

³⁰ *Port of Newcastle*, above n.1, at [203]. See also [204], [205], [252], [269], [273]-[274], [336], [344] and [346].

34. In the *VFF Growers* case as discussed above the Australian Competition Tribunal noted that the monopsony power of the chicken processors meant that there was a restriction in investment in growing capacity and output of chicken meat below the allocatively efficient levels that would be expected in competitive markets for growing services, and that there were ongoing public detriments as a result. Collective bargaining partially reduces such detriments through the partial reduction in the imbalance of bargaining power.

35. There are numerous ACCC decisions authorising collective bargaining of chicken growing contracts with chicken processors. These decisions explain the economic efficiencies that the ACCC considers arises from such collective bargaining. For example, see the decision of the ACCC in relation to the 2011 application by Western Australian growers which explains those efficiencies³¹.

36. At para 3.3 Tegel suggests there is no evidence of specific terms in the FMA that are harming efficiency. [

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37. At para 3.5 and 3.6 of its submission Tegel suggests that a counterfactual involving [

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38. [

(a)

(b)

39.

][

]

40. []. NZTGA considers that this resolution is most unlikely to occur in the absence of collective bargaining.

41. [

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42. Tegel suggests at para 3.7 that there is no material difference to the variation agreements that have been signed whether negotiated collectively or individually.

43. [

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³¹ 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 [5.21]-[5.40].

44. [
- (a)
- (b)

45.

46.

]

47. [

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48. Tegel suggests at para 3.9-3.10 and in section 7 of its submission that it is amenable to collective negotiation of;

(a) [

(b)].

49. However, from the growers' perspective those matters are inextricably intertwined with the negotiation of other matters under the contract. [

]

Nor are those matters the only matters that are usefully and appropriately the matter of collective negotiation. The history of the FMA to date demonstrates that variations can be required in order to address matters such as [] (in the case of the First Variation, []), [] (as in the case of the Second Variation) and [] (as in the case of the Variation Deed entered into with the Growers [])

50. At para 3.11 Tegel submits [

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51. This is a very surprising submission given that [

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61. Tegel has previously submitted that there is a large degree of heterogeneity between different grower farms.

62. As previously submitted, there is a greater degree of heterogeneity in Australian grower farms and sheds than exists in New Zealand. That heterogeneity in Australia has not, however, prevented the consistent granting by the ACCC of authorisation for the collective negotiation of grower contracts with chicken processors.

63. See in particular NZTGA's submission dated 23 December 2021 at [20]-[31] and Confidential Schedule 1 of that submission (with confidential details as to [

-]. That previous submission provides details as to the level of heterogeneity of Australian grower farms and the approach of the ACCC despite that heterogeneity.
64. Tegel at para 3.17 criticises the NZTGA application for seeking authorisation for collective negotiation of all terms and conditions of chicken growing contracts.
65. However, that is entirely appropriate. By comparison, it can be noted that the standard application for collective bargaining authorisation sought (and frequently granted) in Australia (including for collective negotiation of chicken growing contracts) is essentially the same as that sought by NZTGA here.
66. For example, the form of authorisation sought in the *Port of Newcastle* case was in very similar terms to what was sought by NZTGA and provisionally authorised by the Commission³². That form of wording was not criticised by the Australian Competition Tribunal (despite Minters' suggestion it is too wide). The only reason for the Tribunal setting aside the authorisation in the *Port of Newcastle* case was a determination on the facts that benefits did not exceed detriments (largely driven by a finding in that case that collective negotiation would not make a significant difference to bargained outcomes).
67. Specifically in relation to collective bargaining by chicken growers with chicken processors, the common form of authorisation by the ACCC extends to collective negotiation of *all* terms and conditions of the grower contracts. For example, in the recent authorisation of the South Australian growers authorisation application the ACCC agreed to authorise conduct which "*involves the Applicants [being the South Australian Baiada Grower group] collectively bargaining with Baiada in relation to:*
- (a) *growing fees and other terms and conditions of chicken growing contracts;*
 - (b) *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*
 - (c) *resolution of disputes which from time to time arise under chicken growing contracts or otherwise arise between the processor and a grower or growers.*"³³
68. This was a form of authorisation that permitted collective bargaining of all terms of the relevant contracts- see (a) and (b) above. This makes sense given the extent to which price of the provision of grower services is inevitably interconnected with service and performance standards.
69. The form of authorisation granted by the ACCC also permitted collective bargaining of all disputes in relation to the growing contracts.
70. Previous ACCC authorisations in relation to collective bargaining of chicken growing contracts have been similarly wide³⁴.
71. The jurisdictional basis of authorisation is not materially different between Australia and New Zealand. A similar form of authorisation which extends to negotiation of all terms and conditions of growing contracts, and to resolution of any disputes which arise from time to time, is equally justified in New Zealand.

³² *Port of Newcastle*, above n.1, at para [3(a)-(c)].

³³ 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 [28].

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 [1.2]; 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 [31].

Term of Authorisation

72. Tegel in para 4 of its submission considers that a 10 year authorisation period is too long.
73. A 10 year authorisation period has been standard for ACCC authorisation of chicken grower collective bargaining in recent years. The ACCC appears to have accepted a submission by the growers that a ten year term is necessary as increasingly chicken growing contracts are entered into for ten year terms because of the very high capital costs of establishing new chicken farms³⁵.
74. The same is true in New Zealand. The cost of new sheds are very expensive. In fact in relation to the most expensive sheds, it is normal practice to provide for a [] contract to ensure that the grower has the opportunity to recover the cost of the investment. Examples of NZTGA member Growers on [] contracts include:
- (a) []
 - (b) []
 - (c) []
 - (d) []
 - (e) []
 - (f) []
75. In relation to NZTGA members:
- (a) [];
 - (b) []].
76. Accordingly, there will inevitably be the need for important negotiations in relation to a number of grower members in []. It is convenient to ensure that the authorisation permits those negotiations to occur by way of collective bargaining.
77. The use of collective bargaining during a contract term for variations to the FMA can also be expected from time to time. The need for contractual variations to take into account current circumstances will commonly be the case with contracts for long terms such as these arrangements. []
78. The use of collective negotiation is also useful for the settlement of disputes which may arise under the grower contracts []
79. In its 2016 Victorian decision, the ACCC noted that recent authorisations for chicken growers to collectively bargain with processors had been granted for ten years, and duly granted an authorisation

³⁵ 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 [26].

for a 10 year period³⁶. Similarly, in its 2017 South Australian decision, the ACCC again granted an authorisation for a 10 year period³⁷. See also the summary of other recent authorisations set out at para [12] in the 2017 South Australian decision, all of which are for 10 years.

80. The term of authorisation granted by the Commission to the Waikato-Bay of Plenty Chicken Growers Association in 2017 for collective bargaining with Inghams was also for 10 years³⁸.

Pricing for Consumers

81. Tegel suggests at para 5 that collective bargaining could lead to higher wholesale prices for chicken.
82. This is unlikely. As discussed in para 7 below under the heading of allocative efficiency, grower prices are a small proportion of retail prices, collective bargaining will not increase the price for grower services above a competitive price and the price elasticity of chicken is low.

Public Benefit

83. Tegel submits at para 6 of its submission that the authorisation will not result in any public benefit.
84. In particular, at para 6.2 Tegel submits that the estimated benefits relating to the [] must be ignored.
85. However, the benefits arising from cost savings due to resolution of the present [] are both:
- (a) a demonstration of clear and substantial cost savings to both parties that have already occurred as a direct result of the provisional authorisation, and which otherwise would not have occurred³⁹; and
 - (b) an indication of the likely future benefits which can be expected to arise in the future due to the ongoing nature of the issues between Tegel and the growers [].
86. []
-]
87. []
-]

³⁶ 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 [28]. See also previous decisions cited by the ACCC at footnote 11.

³⁷ 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 [31]. See the summary of other recent authorisations set out at para [12] in that case all of which are for 10 years.

³⁸ *Waikato-Bay of Plenty Chicken Growers Association Incorporated* [2017] NZCC 37 at [92].

³⁹ Another difference between this case and the *Port of Newcastle* case relied on by Tegel is that the interim authorisation in the *Port of Newcastle* case did not lead to any collective negotiations (see *Port of Newcastle*, above n.1, at [8],[43] and [197]) while provisional authorisation in our case did in fact lead to collective negotiations and further, to [].

88. Tegel submits at 6.5- 6.8 that [

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89. [

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90. [

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91.

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92. [

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Potential Narrower Scope of Authorisation

93. Tegel in para 7 of its submission says that it would not oppose an authorisation for Tegel and NZTGA to discuss:

(a) [

(b)]

94. However, these are not matters that can be negotiated in isolation. Any contractual negotiation involves give and take with different parties having different concerns. Tegel is particularly concerned about the [] it has referred to. The growers are also concerned about the [] which it considers needs replacement or adjustment. However, the growers are also concerned about other issues such as []

A negotiation of contract terms by way of collective bargaining is not practical if the parties are restricted as to the topics that can be discussed in a collective bargaining process. Nor is it possible to know in advance what issues or disputes will arise that require bargaining.

95. For that reason, previous ACCC authorisations of collective bargaining between growers and chicken processors have extended to collective bargaining of *all* contract terms and conditions, and the resolution of all disputes (see paras 67 - 70 above and the common form of authorisations granted by the ACCC for collective bargaining by chicken growers such as the 2012 and 2017 authorisations for South Australian growers and 2016 authorisation for Victorian growers).

96. Tegel suggests at paras 7.2-7.3 that any authorisation not include the discussion of []
97. Tegel has also suggested only a 12 month period of collective negotiation should be permitted. That is an unreasonable restriction especially given the inevitable need for further negotiations in the lead up to the []. As discussed above, a substantial number of issues from the [].
98. A 10 year authorisation period is very important in ensuring []
- (a)
- (b)
- (c)
99. Limiting the authorisation to just a 12 month period would also encourage []
100. As discussed above, a 10 year term was the term authorised by the Commission in its authorisation of collective bargaining between the Waikato-BOP growers and Inghams in 2017. It is also the common term authorized by the ACCC in all recent authorisations of collective bargaining by chicken growers with chicken processors. (In fact in Australia now, collective bargaining is available as of right under the ACCC class exemption regime granted by the ACCC on 3 June 2021⁴² without the need for a specific ACCC authorisation. Further details relating to the class exemption regime are provided in NZTGA's authorisation application⁴³).

Authorisation in relation to Future Contracts and Provisions

101. In para 8 of its submission, Tegel submits that authorisation cannot be granted to enter into contracts where the terms are not known, or to giving effect the provisions of agreements where the provisions are not known.
102. The jurisdiction for authorisation in this case was explained in detail in NZTGA's application for authorisation at paras [2.13]-[2.48].

First Heading of Authorisation- Collective Negotiation Provisions (para 2.9(a) application for authorisation)

⁴⁰ NZTGA Submission dated 26 October 2021 at [93]-[103].

⁴¹ Castalia Report Public Benefits and Detriments of a Provisional Authorisation for Collective Activity 28 September 2021 at pages 10-11.

⁴² The ACCC collective bargaining class exemption can be found at <<https://www.accc.gov.au/public-registers/class-exemptions-register/collective-bargaining-class-exemption-0>>.

⁴³ NZTGA Application for Authorisation dated 15 September 2021 at [1.14]-[1.15].

103. The application first seeks authorisation for the growers to collectively discuss and negotiate with Tegel:
- (a) growing fees and other terms and conditions of chicken growing contracts,
 - (b) adjustment and review of growing fees and other matters under or in relation to chicken growing contracts, and
 - (c) resolution of disputes which arise under chicken growing contracts from time to time.
104. An arrangement to engage in such collective negotiation is itself:
- (a) an arrangement which might contain a cartel provision (the agreement by the growers to collectively negotiate includes an agreement to negotiate on grower fees which agreement to so negotiate amounts to “a *provision*” which might be considered to be likely to fix or control price); or
 - (b) an arrangement which might include provisions that fall within section 27 (as the agreement to collectively negotiate includes agreement to negotiate on grower fees and other terms of competitive importance which agreement to negotiate on a common basis is a provision which might have an impact on the competitive process which is meaningful/ substantial).
105. The relevant “*provision*” is simply the particular agreement by all growers (and Tegel) for growers to negotiate with Tegel on a collective basis on growing fees and other terms and conditions of competitive importance.
106. So growers (and Tegel) entering into an “*arrangement*” including “*provisions*” for collective negotiation between the growers and Tegel, and giving effect to such provisions by in fact engaging in collective negotiation, fall clearly with the grounds on which applications for authorisation can be sought and obtained under:
- (a) Sections 65AA(2) and (3) and 65AB(3), in respect of entering into an arrangement containing a cartel provision, and giving effect to a cartel provision; and
 - (b) Sections 58(1) and (2) and 61(6), in respect of entering into an arrangement containing a provision to which section 27 may apply, and giving effect to such a provision.
107. The Commission is clearly capable of assessing whether giving effect to the provisions for collective negotiation is likely to result in a benefit to the public:
- (a) which would be likely to result in such a benefit to the public that giving effect to the provision should be permitted (the test in section 65AB); or
 - (b) which would likely result in a benefit to the public which would outweigh the lessening in competition that would be likely to result (the test in section 61(6)).
108. The courts have previously held that these different formulations of the test are the same. The formulation used in s65AB(3) (that there is such a public benefit that the giving effect “*should be permitted*”) is essentially the same formulation as that used for merger authorisations in section 67(3)(b). The High Court has held on more than one occasion that this formulation means the same thing as the formulation in section 61(6) (based on benefits outweighing the lessening of competition)⁴⁴.
109. The test under section 61(6) of the Commerce Act is almost identical to that which the ACCC applies to authorisations under section 90(7)(b) of the Competition and Consumer Act 2010. Section 90(7)(b) provides that the ACCC should be “*satisfied in all the circumstances that:*

⁴⁴ *Air New Zealand and Qantas Airways Ltd v Commission* (No.6) [2004] 11 TCLR 347 (HC) at [33]; *Godfrey Hirst NZ Ltd v Commerce Commission* (2011) 9 NZBLC 103,396 at [89].

- i *The conduct would result, or would be likely to result, in a benefit to the public, and*
- ii *The benefit would outweigh the detriment to the public that would result, or would be likely to result from the conduct⁴⁵.*

110. That test has been applied repeatedly by the ACCC to the authorisation of collective bargaining conduct that extends to collective bargaining of all terms of grower contracts with processors, and to all future disputes under such grower contracts (see for example paras [] above).
111. The Commission is just as capable as the ACCC at assessing whether there is a public benefit from such collective negotiation conduct/ provisions that outweighs any detriments/ lessening of competition arising from the conduct/ provisions.

Second Heading of Authorisation- Information Exchange Provisions (paras 2.9(b) and (c) of authorisation application

112. Secondly, NZTGA seeks under para 2.9(b) authorisation for provisions of an arrangement between the growers under which they agree to discuss among themselves matters relating to growers' discussions and negotiations with Tegel in relation to the matters referred to para 2.9(a)(i)-(iii) ie growing fees and other terms and conditions of chicken growing contracts, adjustment of fees and other matters under chicken growing contracts and resolution of disputes under such contracts.
113. Para 2.9(c) then clarifies that the information exchange would extend to disclosure between growers of offers made by one or more growers to Tegel or by Tegel to one or more growers.
114. Provisions for exchange between competitors of competitively sensitive information have previously been considered by the Commission as giving rise to issues under sections 27 and 30⁴⁵.
115. Accordingly, provisions for such information exchange fall within the jurisdiction of the Commission to authorise in the same way as provisions for collective bargaining. For an example of a decision by the ACCC to authorise provisions for information exchange see *Re Australian Retail Credit Assn Ltd*⁴⁶.

Third heading of authorisation- entering into and giving effect to contracts including provisions setting growing fees, providing for the adjustment or review of growing fees or providing for payments to be made by Tegel to growers or by growers to Tegel (paras 2.9(d) and (e) of authorisation application).

116. Third, NZTGA seeks authorisation to be able to enter into and give effect to contracts or arrangements collectively negotiated with Tegel that include provisions setting growing fees, providing for the adjustment or review of growing fees or providing for payments to be made by Tegel to growers or by growers to Tegel.
117. This form of authorisation is necessary for completeness given that agreement in any new or amended grower contracts setting or amending growing fees or providing for a formula for adjustment or review of growing fees would inevitably be considered price fixing (and to amount to a provision substantially lessening competition) unless authorized. Similarly, collective negotiation on behalf of all growers of [], would also likely infringe section 27 or section 30 unless authorised.
118. It is consistent with the authorisation of collective bargaining conduct, that price setting provisions agreed on pursuant to such collective bargaining should also be protected by the authorisation.

⁴⁵ See NZTGA's application for authorisation at [2.38]-[2.48]).

⁴⁶ *Re Australian Retail Credit Assn Ltd* (AA1000521, 15 December 2020) reauthorizing *Re Australian Retail Credit Assn Ltd* (A91482, 3 December 2015) rules for a standardized system for exchanging credit liability information between credit reporting bodies and credit providers.

119. Tegel appears to be suggesting (in paras 1.7 and 8 of its submission) that the only way to implement standard collective bargaining is either:
- (a) authorisation of collective bargaining followed by separate authorisation of any terms actually agreed pursuant to the bargaining process or;
 - (b) to propose terms of contract that could be the subject of authorisation without knowing whether the parties would actually agree to those.
120. Either approach is grossly inefficient and does not make sense - if parties are authorised to collectively bargain on terms of contract then the authorisation should also extend to the outcome of that collective negotiation.
121. It can be noted that the form of authorisation sought in the *Port of Newcastle* case (and originally granted by the ACCC) was expressed in a similar way to what is sought by NZTGA in the present case (and which was provisionally authorised by the Commission). That form of wording (which would have authorised the applicants to “*enter into, and give effect to, contracts, arrangements or understanding with PNO containing common terms which relate to access to the Port and the export of minerals through the Port*”⁴⁷) was not criticised by the ACT as being too widely expressed. The only reason for the ACT setting aside the authorisation in the *Port of Newcastle* case was a determination on the facts that benefits did not exceed detriments (apparently largely driven by a finding that collective negotiation would not make a significant difference to bargained outcomes).
122. Similarly, the Commission’s authorisation granted to the Waikato-Bay of Plenty Growers in 2017 included authorisation permitting the growers to enter into and give effect to agreements collectively negotiated between the growers and Inghams (in relation to growing fees and other terms and conditions of chicken growing contracts, adjustment and review of growing fees and other matters from time to time under growing contracts and resolution of disputes which arise from time to time under growing contracts)⁴⁸.
123. If authorisation is given to negotiate contracts, variations and disputes from time to time then it must also make sense that the authorisation extend to the actual agreed outcomes resulting from those negotiations.

Wealth Transfers

124. It is clear that structurally markets for provision of chicken growing services are subject to substantial imbalances in market power, with chicken processors having monopsony market power. Previous assessments by regulators in New Zealand, Australia and the United States have suggested this as discussed in paras 22-23 above (in the case of Australia and the United States) and as suggested by the authorisation granted by the Commission to the Waikato-Bay of Plenty Chicken Growers Association in 2017 for collective bargaining with Inghams (in the case of New Zealand). In the absence of collective bargaining there is clearly a wealth transfer from chicken growers to chicken processors due to the exercise by processors of their monopsony market power.
125. In the Draft Determination, the Commission takes the view that Tegel’s recent performance is not consistent with earning supranormal profits, though it acknowledges the contributing causes of the COVID-19 pandemic and IBD outbreaks⁴⁹.
126. The authorisation application is for a period of 10 years, and therefore the analysis of public benefits (including welfare transfers), should be a forward-looking analysis based on the likely conditions over that 10-year period, rather than giving undue weight to extremely unusual temporary downturn in demand.

⁴⁷ *Port of Newcastle*, above n.1, at [3(c)].

⁴⁸ *Waikato-Bay of Plenty Chicken Growers Association Incorporated* [2017] NZCC 37 at [91].

⁴⁹ Commerce Commission draft determination dated 13 April 2022 at [153].

127. Trading conditions are now improving through: (1) the easing of domestic COVID restrictions and international borders reopening, and (2) the IBD outbreak having been resolved and the Australian border reopened to New Zealand chicken meat. As a result, the period in which Tegel made losses is highly unlikely to be indicative of the next 10 years. [
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128. In the Commission’s determination on the Waikato-Bay of Plenty Chicken Growers Association’s authorisation application, the Commission noted that wealth transfers may represent a positive public benefit when the transfer is between New Zealanders and non- New Zealanders⁵⁰. There is no good reason why that conclusion would not equally apply to NZTGA’s authorisation application.
129. In the case of NZTGA’s authorisation application, the Commission finds (para 141.1 of the Draft Determination) that Tegel is likely to have more bargaining power in the counterfactual than with collective bargaining⁵¹.
130. Therefore, as Link Economics discuss in the attached report, it stands to reason that under usual trading conditions (which can be expected to emerge going forward) Tegel would earn supranormal profits in the counterfactual as a result of its strong bargaining power.
131. As a result, the authorisation of collective bargaining could be expected to somewhat reduce those supranormal profits and provide a public benefit through a wealth transfer to chicken growers (or more accurately reduction of a wealth transfer from growers to Tegel).
132. Accordingly, contrary to the Commission’s initial view at [154] of the Draft Determination, there is a further public benefit from the authorisation in the form of a wealth transfer from Tegel’s foreign shareholders to the New Zealand growers. The quantum of that public benefit was quantified in the First Castalia report as []⁵².

NERA Submission

133. In response to the report from NERA dated 20 May 2022, we attach a report from Link Economics dated 15 June 2022. A summary of the key responses to NERA’s report follows.

NERA Submission- More Efficient Contracts

134. In response to NERA’s submission at para 4 about whether collective bargaining is likely to lead to more sophisticated and efficient contracts, the Link Economics report comments on a confidential basis on the relative efficiency of collective and individual negotiations.
135. NERA at para 6 raises the question of whether less [] would occur under individual bargaining. However, []
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136. NERA refers at para 11 to its previous submission that a “one size all” contract may be inefficient.
137. However, as Link Economics points out, the FMA does not purport to be a one-size-fits-all contract. []

⁵⁰ *Waikato-Bay of Plenty Chicken Growers Association Incorporated* [2017] NZCC 37 at [73].

⁵¹ Commerce Commission draft determination dated 13 April 2022 at [141.1].

⁵² Castalia Report Public Benefits and Detriments of Collective Bargaining by Tegel’s Chicken Growers dated 2 September 2021 (First Castalia Report) at [3.5.2].

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138. Further, as Link Economics discusses, the [] If a grower knew that if its costs were higher that it would be paid more, it would have less incentive to keep costs down. In any case, a small-scale chicken farm may achieve economies of scope (instead of scale) by being located on a farm which raises other types of animals.
139. All of the members of the NZTGA [] agreed to the recent [], suggesting a high degree of commonality of interest.
140. NERA further discusses heterogeneity/homogeneity at paras [12]-[15] and refers to a paragraph from the *Port of Newcastle* decision. As Link Economics notes, the Tribunal's reasons in the *Port of Newcastle* case for not finding any material transactions cost savings did not include comment on homogeneity/heterogeneity⁵³. The reasoning behind the Tribunal's decision is primarily that many, if not all, of the nine coal producers would want to be represented at meetings with the Port and would want to consider the contractual terms within their own management teams and potentially take their own advice, and that the Port would likely continue to meet individually with the coal producers even in the presence of collective bargaining.
141. In the *Port of Newcastle* case, the coal producers were quite heterogenous but that did not by itself prevent a decision not to authorise. The different circumstances applying to each coal producer were not likely to result in significant differences in the commonality of their interests. Further if any coal producer did not consider that its interests were being effectively addressed, it would be free to negotiate bilaterally. Accordingly, there was a low risk of detriments arising from any heterogeneity⁵⁴. So although NERA make much of the importance of heterogeneity, it was not that factor that led to the Tribunal refusing authorisation in the *Port of Newcastle* case.
142. As Link Economics notes, in the case of chicken growers, the FMA reflects that the nature of the relationship between Tegel and growers is the same across all growers. []

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NERA Submission- Allocative Efficiency

143. NERA comments on allocative efficiency in paras [16] to [31] of its report.
144. Link Economics note the following important points:
- (a) First, grower prices are a relatively small proportion of retail prices;
 - (b) Secondly, Tegel will still have buyer power if the authorisation is granted (as has been held to be the position in Australian markets as discussed above in relation to the *VFF Chicken* decision) so the difference in price between collective bargaining and the counterfactual, is likely to be small and collective bargaining will not increase the price for grower services above a competitive price,
 - (c) Thirdly, the price elasticity of chicken is low,
 - (d) Fourth, given Tegel's financial position and its announcement that wholesale prices will increase it is unlikely that Tegel will pass through any reduction in grower fees in the form of lower wholesale prices.

⁵³ *Port of Newcastle*, above n.1, at [347]-[350].

⁵⁴ *Port of Newcastle*, above n.1, at [253], [271]-[272], [276].

145. NERA does not address the point that grower prices are a relatively small proportion of retail prices.

NERA Submission- Dynamic Efficiency

146. At para 34 NERA repeats its view that “*the very nature of collectivism is likely to stifle individual innovation (or effort more generally) because there would be no individual reward for innovation (effort) under a collective agreement (or at least it would be more limited than could occur under individual contracts).*”

147. However, as Link Economics points out, growers still have the option to negotiate an individual agreement with Tegel. So under the example given by NERA, a grower can separately negotiate an agreement (or variation) to provide the new innovative service. That militates against any loss of dynamic efficiency.

148. Furthermore, the NZTGA provides a mechanism to coordinate innovation by growers. For example, in 2017 and 2018, NZTGA members ran trials to use sawdust instead of wood-shavings in sheds, and also trialled mixes of the two materials. The goal of the trials was to address pad-burn. [

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NERA Submission- Productive Efficiency

149. NERA comments on productive efficiency at paras [40]-[43].

150. The key reasons why productive efficiency would be expected to be higher with collective bargaining than without are set out in the first Castalia report⁵⁵.

151. As Castalia explained, under collective bargaining growers can pool resources to fund specialist advisors and share information to develop more sophisticated and efficient contractual arrangements.

152. The ACCC has also recognised that collective bargaining by chicken growers “*is likely to enable growers to become better informed of relevant market conditions, which is likely to improve their input into contractual negotiations with processors to achieve more efficient outcomes*”⁵⁶.

153. Similarly, the ACCC has commented that the collective bargaining group “*provides a mechanism for members to discuss innovations in production techniques which may result in improving productive and allocative efficiency*”⁵⁷.

154. Castalia comments that []⁵⁸.

155. NERA suggest at para 41 that para [174] of the draft determination “*implies that Tegel would behave as some sort of automaton in the counterfactual and []*”.

156. The factual position supports the Commission’s position as per para [174] of the draft determination. [

⁵⁵ First Castalia Report above n.52 at [3.5.3].

⁵⁶ 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 [23].

⁵⁷ At [24].

⁵⁸ First Castalia Report above n.52 at [3.5.3].

(a)

(b)

(c)

157.

(a)

(b) []

(c)

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NERA Submission- Bargaining Power

158. NERA comments on bargaining power at paras [44]-[50].

159. NERA takes the view that the relationship between Tegel growers is one of mutual dependence.

160. However, as discussed in the attached Link Economics report NERA overlooks the key fact that while individual growers are entirely dependent on Tegel, Tegel is not entirely dependent on any individual grower.

161. As explained in the First Castalia report⁵⁹: *“the value to an individual grower of obtaining a contract with Tegel exceeds the value to Tegel of contracting with an individual grower”*. Further, Castalia explained that this [

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162. The substantial inequality of bargaining power between chicken processors and chicken growers is discussed further in paras 4-28 above.

NERA Submission- Transaction Cost Savings

163. NERA says that Tegel has a different view of the transaction costs of collective vs individual bargaining – ie, that the resources required to negotiate individual contracts are lower than Castalia assumptions. NERA base this on the time taken to negotiate recent contracts with the growers that had opted out of the existing contract.

164. However, as discussed in the attached Link Economics report, it is not clear that information from recent negotiations would give an approximation of the resources/cost required to negotiate individual contracts on the counterfactual. Recent negotiations have occurred in a context where the FMA provided an option. As indicated by the Commission, in the counterfactual the FMA would no longer be able to be used and new contracts would need to be negotiated⁶⁰. It seems likely that Tegel would seek to substantially renegotiate them.

165. As NERA points out, estimating transaction costs 10 years into the future is difficult. However, it stands to reason that the economies of scale in negotiating with one party rather than a large number [] means that there are significant transactions costs savings, particularly as the growers are unlikely to want to all be involved in the negotiation or seek their own

⁵⁹ First Castalia Report above n.52 at [3.2.1].

⁶⁰ Commerce Commission draft determination dated 13 April 2022 at [74].

advice (by contrast to the position with the coal producers in the *Port of Newcastle* decision as discussed above).

166. In the *Port of Newcastle* case all the experts and the Tribunal itself agreed that the more numerous the issues to be negotiated and the more numerous the number of counterparties, the greater the potential for cost savings from collective bargaining⁶¹. There are a much larger number of counterparties in the present case- [] growers compared with nine coal producers in *Port of Newcastle*. And the number of potential issues that Tegel and the growers will need to address and negotiate from time to time is significant. In the *Port of Newcastle* case the Tribunal said it was not self-evident that collective bargaining would result in transaction cost savings of any significance⁶². The present case is quite different.

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171. The Link Economics report reiterates the view in the First Castalia report that \$1.4 million to \$3.1 million is a reasonable estimate of the transaction cost savings of collective bargaining. A figure for transaction cost savings at the higher end of that range is appropriate applying the counterfactual suggested by the Commission under which growers would need to individually negotiate new agreements with Tegel (which Link Economics refers to as Counterfactual 1). If a counterfactual is used under which the existing FMAs would continue to be valid but would not be sustainable over time (which Link Economics refers to as Counterfactual 2) an appropriate figure for cost savings would be somewhere between the lower and upper ranges of the estimate.

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⁶¹ *Port of Newcastle*, above n.1, at [244] and [347].

⁶² *Port of Newcastle*, above n.1, at [349]-[350].

⁶³ NZTGA Application for Authorisation dated 15 September 2021 at [8.43]; NZTGA Submission dated 26 October 2021 at [79] and Schedule 2.

Confidentiality

173. Confidentiality is requested for the information in this application that is contained in square brackets and 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.
174. The Applicant waives confidentiality in respect of the information highlighted in green, in respect of Tegel.
175. 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.
176. A public version of this cross-submission will be provided to the Commission shortly.

Yours faithfully
Lane Neave

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Schedule 1 – Confidential
