

Application for Authorisation of a Restrictive Trade Practice

**THE NEW ZEALAND TEGEL GROWERS ASSOCIATION INCORPORATED
ON BEHALF OF ITS CURRENT AND FUTURE MEMBERS
AND THE CURRENT AND FUTURE MEMBERS OF THE AUCKLAND MEAT
CHICKEN GROWERS ASSOCIATION INCORPORATED, THE CANTERBURY
POULTRY MEAT PRODUCERS ASSOCIATION INCORPORATED, AND THE
TARANAKI BROILER GROWERS ASSOCIATION INCORPORATED**

**PURSUANT TO SECTIONS 65AA(2) AND 65AA(3)
(OR ALTERNATIVELY 58(1) AND 58(2))
OF THE COMMERCE ACT 1986**

15 SEPTEMBER 2021

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1. Executive Summary

Introduction

- 1.1 This is an application for authorisation under sections 65AA(2) and 65AA(3) (or alternatively sections 58(1) and 58(2)) of the Commerce Act 1986 (**Commerce Act**) in respect of collective bargaining. The application is made by the New Zealand Tegel Growers Association Incorporated (**Applicant**) on behalf of itself, the Regional Associations (defined in paragraph 1.3 below) and the current and future members of the Applicant and the Regional Associations.

Factual Background

- 1.2 This application concerns the provision of broiler chicken growing services.
- 1.3 The Applicant is an industry association, whose current members are the following three regional industry associations:
- (a) the Auckland Meat Chicken Growers Association Incorporated (**Auckland Association**);
 - (b) the Canterbury Poultry Meat Producers Association Incorporated (**Canterbury Association**); and
 - (c) the Taranaki Broiler Growers Association Incorporated (**Taranaki Association**),
- (together, the **Regional Associations**).
- 1.4 The Regional Associations represent growers in the Auckland, Canterbury and Taranaki regions (**Growers**) who supply broiler chicken growing services to one of New Zealand's three major chicken processors, Tegel Foods Limited (**Tegel**).
- 1.5 Tegel's business model follows that of other Australian and New Zealand chicken processors. Under this model, other than the rearing of chickens (which is outsourced to contract growers) the processor carries out most stages in the production and processing of chicken meat. The processor supplies the growers with day-old chickens, feed and medication, and the growers rear the chickens in accordance with the processor's specific requirements. Once the chickens reach the processor's required weight, they are collected by the processor and transported for processing at the processor's facilities. Growers provide specialist housing and equipment and inputs such as labour and management expertise. The processor retains ownership of the chickens at all times.
- 1.6 Tegel is a monopsonist purchaser of the Growers' services. This is typical of the broiler chicken growing services market.
- 1.7 Since its incorporation in 2006, the Applicant has negotiated the terms of supply of chicken growing services to Tegel on behalf of its members. Prior to this, each Regional Association undertook its own collective bargaining with Tegel (or its predecessor) on behalf of that Regional Association's members.
- 1.8 After communications from the Commerce Commission (**Commission**) (attached as Appendix **A**), the Applicant became aware that the collective negotiation by the Applicant of the Farm Management Agreement between Tegel and the Growers (**Farm Management Agreement**), including fees and contractual variations may constitute a breach of the Commerce Act. A copy of the Farm Management Agreement is attached as Appendix **B**.
- 1.9 In order to rectify this situation in respect of future negotiations of contractual matters with Tegel including contractual variations and negotiations of contractual disputes, the Applicant

is seeking an authorisation from the Commission under sections 65AA(2) and 65AA(3) (or alternatively sections 58(1) and 58(2)) of the Commerce Act.¹

1.10 [

] As a consequence, the Applicant also intends to seek the granting of a provisional authorisation under section 65AD(2).

- 1.11 As the Commission will be aware, the Commission granted authorisation in December 2017 to the Waikato-Bay of Plenty Chicken Growers Association Incorporated (**Waikato-BoP Growers Association**) under section 58 of the Commerce Act to enter into, and give effect to, various collective bargaining arrangements with Inghams Enterprises (NZ) Pty Limited (**Inghams**) for a period of ten years. The arrangements between the Waikato-BoP Growers Association and Inghams essentially mirror the arrangements between Tegel and the Applicant, except the Applicant and Tegel's arrangements are on larger scale.
- 1.12 For clarity, the current application for authorisation extends to proposed arrangements between the Applicant and growers to discuss matters between themselves, and to exchange information between themselves, relating to negotiations with Tegel, whether or not those negotiations take place on a collective basis or not.
- 1.13 The Australian Competition and Consumer Commission (**ACCC**) has repeatedly authorised collective bargaining arrangements for chicken growers in Australia since the mid-1990s.² The ACCC has also 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.³
- 1.14 Of significant note, on 3 June 2021 the ACCC granted a class exemption regime for collective bargaining.⁴ This class exemption is the first granted by the ACCC under the Competition and Consumer Act 2021 (Cth) and allows small businesses, franchisees and fuel retailers to carry out collective negotiation without first having to seek ACCC approval. The class exemption applies to businesses with a turnover of less than \$10 million in the financial year prior to the business forming or joining a bargaining group to collectively bargain with customers or suppliers.⁵
- 1.15 In its media release regarding this class exemption, the ACCC noted that the arrangement allows small business and farmers to bargain with their suppliers and processors and that

¹ Sections 65AA to 65AE remain in force until 6 months after the expiry of the 6-month period that starts on the date on which the Epidemic Preparedness (COVID-19) Notice 2020 (the "2020 Notice") expires or is revoked. Currently the 2020 Notice is due to expire on 19 December 2021 pursuant to the Epidemic Preparedness (COVID-19) Notice 2020 Renewal Notice (No 3) 2021.

² See, for example, Australian Competition and Consumer Commission, *A90595: Inghams Enterprises Pty Ltd* (Interim Determination 26 June 1996, Final Determination 9 April 1997); Australian Competition and Consumer Commission, *A30183: Steggle's Limited* (20 May 1998); and Australian Competition and Consumer Commission, *A90659: Inghams Enterprises Pty Limited* (17 March 1999).

³ 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).

⁴ 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>>.

⁵ For further information about how the class exemption operates, including the criteria that businesses must meet in order to be eligible for the exemption, see the ACCC's Collective Bargaining Class Exemption Guidelines (June 2021) <<https://www.accc.gov.au/public-registers/class-exemptions-register/collective-bargaining-class-exemption-0>>.

under collective bargaining such businesses “*can share the time and cost of negotiating contracts, and have more say when negotiating*”. The media release also noted that “*counterparties that small business groups collectively bargain with can also benefit from time and cost savings, because they will not have to negotiate with each business individually*”.⁶

1.16 Currently in Australia:

- (a) Chicken growers that are members of the Victorian Farmers Federation are authorised until 7 July 2026 to collectively bargain with the chicken processor they supply.⁷
- (b) The Western Australian Broiler Growers' Association is authorised until 21 June 2026 for its chicken grower members to collectively bargain with the chicken processor they supply.⁸
- (c) The New South Wales Farmers' Association is authorised until 17 July 2024 to form a series of common interest grower groups which will each collectively bargain the terms and conditions of grower contracts with the relevant poultry processor.⁹
- (d) The South Australian chicken growers are authorised until 30 June 2022 to collectively bargain over certain terms and conditions with Inghams Enterprises Pty Limited.¹⁰
- (e) The Queensland Chicken Growers Association is authorised until 14 February 2023 for its members to collectively negotiate with their processors.¹¹

1.17 In each case, the ACCC authorised the conduct on the basis that it was likely to result in a net public benefit.

1.18 We note that these Australian growers, on the lapsing of their respective authorisations, will be able to use the collective bargaining exemption referred to in paragraph 1.14 above and that there will be no need to seek further authorisation for collective bargaining from the ACCC.

The Proposed Arrangements

1.19 The Applicant seeks authorisation on behalf of itself, the Regional Associations and the Growers, together with future members of the Applicant and the Regional Associations (**Future Growers**) for a period of 10 years to:

- (a) collectively discuss and negotiate with Tegel:
 - (i) growing fees and other terms and conditions of chicken growing contracts;

⁶ See <https://www.accc.gov.au/media-release/collective-bargaining-by-small-business-facilitated-by-class-exemption>.

⁷ Australian Competition and Consumer Commission, A91534: *Victorian Farmers Federation* (16 June 2016).

⁸ Australian Competition and Consumer Commission, A91527: *Western Australian Broiler Grower Association* (31 May 2016).

⁹ Australian Competition and Consumer Commission, A91417: *NSW Farmers' Association* (25 June 2014).

¹⁰ Australian Competition and Consumer Commission, A91294: *South Australian Inghams Chicken Growers* (14 June 2012).

¹¹ Australian Competition and Consumer Commission, A91347: *Queensland Chicken Growers Association* (24 January 2013).

- (ii) 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
 - (iii) resolutions of disputes which from time to time arise under chicken growing contracts or otherwise arise between Tegel and a grower or growers;
- (b) discuss amongst themselves matters relating to Growers' discussions and negotiations with Tegel (whether collective or otherwise) on the matters referred to in (a)(i)-(iii) above;
- (c) without limiting subparagraph (b), exchange information between themselves concerning Growers' discussions and negotiations with Tegel (whether collective or otherwise) on the matters referred to in (a)(i)-(iii) above, including offers or proposed offers made or to be made to Tegel by or on behalf of a grower or growers, offers made by Tegel to a grower or growers, and acceptances or proposed acceptances by any party of any such offers;
- (d) enter into agreements collectively negotiated between Tegel and the Applicant (or a Regional Association) and/ or negotiated between Tegel and the Growers containing common terms, relating to the matters described at subparagraph (a)(i)-(iii) above; and
- (e) give effect to provisions of agreements collectively negotiated between Tegel and the Applicant (or a Regional Association) and/ or negotiated between Tegel and the Growers containing common terms relating to the matters described at subparagraph (a)(i)-(iii) above, including provisions:
- (i) setting growing fees;
 - (ii) providing for the adjustment or review of growing fees;
 - (iii) providing for payments to be made by Tegel to growers, or by growers to Tegel, in connection with the resolution of disputes between Tegel and a grower or growers.

1.20 Any Grower or Future Grower may choose not to participate in collective negotiations and will be free to negotiate directly with Tegel individually.

Public Benefits and Detriments of the Proposed Arrangements

1.21 This application is supported by an independent report written by Emma Ihaia at Castalia Advisors (**Castalia Report**) attached as Appendix D. The Castalia Report concludes that the benefits of the proposed arrangements are highly likely to outweigh the detriments. The key findings in the Castalia Report are that:

- (a) Collective bargaining between the Applicant and Tegel would result in transactional cost savings in the range of between \$1.4 million and \$3.1 million over the ten-year period of the proposed authorisation. These cost savings arise because collective negotiation avoids bilateral negotiations between each individual grower and Tegel including bilateral negotiations in relation to contractual disputes and contractual variations.
- (b) Collective bargaining is also likely to have other efficiency benefits.

1.22 In relation to such efficiency benefits, the Castalia Report found that:

- (a) Collective negotiation has resulted in a sophisticated agreement that is likely to have efficiency benefits. These types of efficiencies have been recognised by the ACCC.

- (b) In comparison to the relatively simple payment structure that was in place prior to collective bargaining, the Applicant introduced [] agreement which included the concepts of []].
- (c) [] and the inclusion of [] reduces the risk to growers associated with making a significant specialised investment. For a new “greenfield” farm, a chicken grower would need to invest around [] plus land costs to build an [] farm to house the chickens. The sheds are built according to Tegel’s specifications. By reducing the risk associated with this upfront investment, the agreement that has resulted from collective bargaining would reduce the cost of providing the grower service while providing Tegel with the incentive to maintain or expand demand.
- (d) [] included in the agreement have the effect of motivating growers to deliver high-quality growing services []. The [] in the collective agreement also provide growers with the incentive to compete with the Applicant’s other members on service quality levels and beneficial outcomes.
- 1.23 The limited number of chicken processors and the need to make significant long-term investments that conform to the specific shed requirements of Tegel all create an imbalance of bargaining power between individual chicken growers and Tegel (in favour of Tegel). Collective bargaining shifts the imbalance of bargaining power to some extent by enabling growers to pool resources and engage specialised staff to negotiate with Tegel.
- 1.24 Any wealth transfer from Tegel to growers that results from collective bargaining constitutes a public benefit because Tegel is foreign owned. Although there are difficulties in estimation, Castalia estimates that the authorisation would lead to a public benefit of up to [] through a wealth transfer to growers. (This is perhaps more correctly viewed as the prevention of a wealth transfer from growers to Tegel’s shareholders that would otherwise occur in the counterfactual).
- 1.25 The public benefits identified by Castalia will likely be obtained regardless of whether Tegel agrees to collective negotiation. If the Commission authorises collective activity, Tegel may choose to continue to engage with the Applicant (as it has in the past) or it could instead choose to negotiate individually with growers. Regardless of which approach Tegel takes, Castalia finds that growers will act collectively, which will result in efficiencies. With growers working together to develop their positions and knowing what position each would be taking in bilateral negotiations, the outcomes would be similar, the cost of preparing them would be similar as under a collective negotiation approach and the contract sophistication would also be comparable with collective negotiations. Similarly, if the Commission authorises collective activity, efficiencies will result from growers acting collectively in respect of contractual disputes arising between Tegel and the growers []
- 1.26 Collective bargaining, or growers acting collectively and exchanging information, will not result in changes of output or changes in allocative efficiency losses in the grower services market. It is also highly unlikely to result in allocative efficiency losses in downstream retail markets for supply of chicken products. There are no other public detriments.
- 1.27 The public benefits from the authorised arrangements will exceed any public detriment from the arrangements.

2. Part 1: Details of Applicant and Other Parties

Applicant

2.1 This application is made by:

The New Zealand Tegel Growers Association Incorporated
C/- Bakertilly Staples Rodway
Level 2
329 Durham Street North
Christchurch 8440

Attention: John Hartnell
Secretary
john@hartnellnz.com
Mobile: 021 578 754

2.2 The Applicant requests that all correspondence in relation to this application is directed in the first instance to:

Lane Neave
141 Cambridge Terrace
Christchurch 8013

Attention: Anna Ryan
Partner
anna.ryan@laneneave.co.nz
DDI: 03 377 6395
Mobile: 021 117 4940

Other Parties

2.3 The other parties to the proposed restrictive trade practices are:

- (a) the current members of the Applicant, being Regional Associations;
- (b) the future members of the Applicant;
- (c) the Growers;
- (d) Future Growers; and
- (e) Tegel.

2.4 The names and contact details of the Regional Associations and the Growers are set out in a table in Appendix E.

2.5 All correspondence for Tegel in relation to this application should be directed in the first instance to:

[

]

Proposed Practices

- 2.6 Tegel has been producing chicken meat since the 1960s. It is difficult to obtain information regarding Tegel's early chicken growing practices however, the Applicant understands that Tegel has been outsourcing the growing of its meat chickens to contract growers for the past 40 years.
- 2.7 Since 2006 the negotiation of the Farm Management Agreement (and its predecessor contracts) has been conducted between Tegel and the Applicant on behalf of the contract growers. The Applicant understands that before this, Tegel negotiated grower contracts with each Regional Association and there were some regional differences in the agreements. Tegel currently negotiates, and in the past has negotiated, with some growers directly. At the date of this application the Applicant understands that [] growers are not members of a Regional Association and contract directly with Tegel.
- 2.8 The Applicant and the Growers have become aware that the collective negotiation of the Farm Management Agreement, and of variations of the Agreement, or of disputes under the Agreement, may constitute a breach of the Commerce Act.
- 2.9 To rectify this going forward, the Applicant seeks authorisation for itself, the Regional Associations and the Growers, together with the Future Growers for a period of 10 years to:
- (a) collectively discuss and negotiate with Tegel:
 - (i) growing fees and other terms and conditions of chicken growing contracts;
 - (ii) 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
 - (iii) resolution of disputes which from time to time arise under chicken growing contracts or otherwise arise between Tegel and a grower or growers;
 - (b) discuss amongst themselves matters relating to growers' discussions and negotiations with Tegel (whether collective or otherwise) on the matters referred to in (a)(i)-(iii) above;
 - (c) without limiting subparagraph (b), exchange information between themselves concerning growers' discussions and negotiations with Tegel (whether collective or otherwise) on the matters referred to in (a)(i)-(iii) above, including offers or proposed offers made or to be made to Tegel by or on behalf of a grower or growers, offers made by Tegel to a grower or growers, and acceptances or proposed acceptances by any party of any such offers;
 - (d) enter into agreements collectively negotiated between Tegel and the Applicant (or a Regional Association) and/or negotiated between Tegel and the Growers containing common terms, relating to the matters described at subparagraph (a)(i) – (iii) above; and
 - (e) give effect to agreements collectively negotiated between Tegel and the Applicant (or a Regional Association) and/or negotiated between Tegel and the Growers containing common terms, relating to the matters described at subparagraph (a)(i)-(iii) above, including provisions:
 - (i) setting growing fees;
 - (ii) providing for the adjustment or review of growing fees;

- (iii) providing for payments to be made by Tegel to growers, or by growers to Tegel in connection with the resolution of disputes between Tegel and a grower or growers.

in all cases as the representative of the Growers and Future Growers.

2.10 Growers and Future Growers who choose not to negotiate collectively will be free to opt out of the collective process and negotiate with Tegel individually.

2.11 Authorisation is sought for a period of ten years, on the basis that:

- (a) The need for authorisation is an industry structural issue and not a temporary or localised issue requiring authorisation for a limited period. This argument has been accepted by the ACCC in respect of the Australian chicken growing industry¹² (which is structurally very similar to the New Zealand chicken growing industry), which in most Australian States has operated under authorisations since the repeal of industry-specific regulation.
- (b) There is a general trend in the Australasian poultry industry towards contracts of a longer duration. This is partly because financiers wish to see lending arrangements underpinned by longer term commitments from processors.
- (c) While contracts are already in place between Tegel and the Growers, issues are likely to arise during the term of the contracts which will necessitate discussion and review of aspects of the contracts from time to time. This includes variation of the contracts, potential replacement of contracts and negotiation of disputes in relation to the contracts.
- (d) In December 2017 the Commission granted the Waitako-BoP Growers Association a ten year authorisation to bargain collectively with Inghams.

2.12 [

]

Jurisdiction

Collective negotiations (paragraph 2.9(a))

2.13 The collective negotiation of growing fees and other terms of contracts between Tegel and Growers, including the variation of contracts and negotiation of contractual disputes, amounts to an arrangement between the Applicant, Regional Associations and Future Growers which the Applicant considers:

- (a) would or may contain a cartel provision; and/or
- (b) section 27 of the Commerce Act would or might apply to.

2.14 There is therefore jurisdiction to authorise the entry into the arrangement for collective negotiation under section 65AA(2) and/or section 58(1).

¹² Australian Competition and Consumer Commission, *A91534: Victorian Farmers Federation* (16 June 2016); Australian Competition and Consumer Commission, *A91417: NSW Farmers' Association* (25 June 2014); and Australian Competition and Consumer Commission, *A91347: Queensland Chicken Growers Association* (24 January 2013).

Collective negotiation as a cartel provision

- 2.15 In particular, the collective negotiation of growing fees might be considered to have the likely effect of fixing or controlling price.
- 2.16 An arrangement between competitors with the likely effect of fixing or controlling price amounts to a cartel provision under section 30A(2). The Growers are competitors or potential competitors in relation to the provision of growing services for chicken processors.
- 2.17 Accordingly, the proposed arrangement for collective negotiation of growing fees is an arrangement which would or might amount to a cartel provision.
- 2.18 That provides jurisdiction for the Commission to authorise the arrangement in paragraph 2.9(a) pursuant to section 65AA(2). On the question of jurisdiction, section 65AB(4) also makes it clear that it is not necessary for the Commission to determine whether a provision is in fact a cartel provision, as long as there “*are reasonable grounds for believing it might be*”.

Collective negotiation as a provision of an arrangement that would or might have the likely effect of substantially lessening competition

- 2.19 Prior to the amendment of the Commerce Act in 2017, an arrangement with the likely effect of fixing or controlling price would have been deemed to substantially lessen competition under section 27.
- 2.20 However, even in the absence of the former deeming provision, it is well accepted that the fixing or controlling of price is a practise that might substantially lessen competition. It removes competition between market participants (in this case, the growers) on a critical aspect of trading (the price for growing services). The Applicant considers that this might lessen competition in a way that can be considered “*meaningful to the competitive process*”, and therefore “*substantial*”.¹³
- 2.21 The Applicant also considers that the extending of collective negotiations to all other terms and conditions of growing contracts, and the resolution of disputes relating to such contracts, might substantially lessen competition. This is for the reason that this removes competition between growers on any other contractual terms of competitive significance including provisions going to the nature and quality of the service provided.
- 2.22 The fact that for most growers Tegel is the only processor to whom growers can effectively provide growing services (i.e. Tegel is an effective monopsonist in Taranaki, Auckland and Canterbury) is also relevant to the overall competitive impact of the arrangement in the relevant markets for the purpose of section 27.¹⁴
- 2.23 The fact that the Applicant considers that collective negotiation would or might fall within section 27 (as an arrangement containing a provision which would or might have the effect or likely effect of substantially lessening competition in a market), provides jurisdiction for the Commission to authorise the arrangement in paragraph 2.9(a) pursuant to section 58(1).

Entry into contracts produced by collective negotiations (or containing common terms) (paragraph 2.9(d))

- 2.24 The entry into contracts produced by collective negotiations, or containing common terms between the growers (as a consequence of exchange of information between them), has the same consequence as collective negotiations.

¹³ *ANZCO Foods Waitara Ltd v AFFCO New Zealand Ltd* [2006] 3 NZLR 351 at [246] (CA).

¹⁴ See paragraphs 5.32-5.33 and 6.6-6.7 below.

2.25 Accordingly, for the same reasons as discussed above, the entry by Growers or Future Growers into such contracts would amount to the entry into contracts which the Applicant considers:

- (a) would or may contain a cartel provision; and/or
- (b) section 27 of the Commerce Act would or might apply to.

2.26 There is therefore jurisdiction to authorise the entry into the contracts under section 65AA(2) and/or section 58(1).

Giving effect to provisions in contracts produced by collective negotiations (or containing common terms) (paragraph 2.9(e))

2.27 Giving effect to the provisions of contracts produced by collective negotiations, or containing common terms between the growers (as a consequence of exchange of information between them), has the same consequences as collective negotiations.

2.28 In particular, this is true of provisions going to the price of growing services such as provisions:

- (a) setting growing fees;
- (b) providing for the adjustment or review of growing fees; and
- (c) providing for payments to be made by Tegel to growers, or by growers to Tegel, in connection with the resolution of disputes between Tegel and a grower or growers.

2.29 Such provisions are provisions which the Applicant considers:

- (a) would or may amount to cartel provisions, as provisions with the likely effect of fixing or controlling the price of growing services; and/or
- (b) section 27 would or might apply to.

2.30 Accordingly, there is jurisdiction to authorise the giving effect to such provisions under section 65AA(3) and/or section 58(2).

Discussions between growers and exchange of information between growers (paragraphs 2.9(b) and (c))

2.31 In paragraphs 2.9(b) and (c) above, the Applicant seeks authorisation for the Applicant, the Regional Associations, the Growers and Future Growers to:

- (a) in (b) discuss amongst themselves matters relating to growers' discussions and negotiations with Tegel (whether collective or otherwise) on the matters referred to in 2.9(a)(i)-(iii) above;
- (b) in (c) without limiting subparagraph (b), exchange information between themselves concerning growers' discussions and negotiations with Tegel (whether collective or otherwise) on the matters referred to in 2.9(a)(i)-(iii) above, including offers or proposed offers made or to be made to Tegel by or on behalf of a grower or growers, offers made by Tegel to a grower or growers, and acceptances or proposed acceptances by any party of any such offers;

2.32 The wording in 2.9(b) is wording in essentially the same formulation as found in authorisations granted by the ACCC such as for example in the *Port of Newcastle* decision.¹⁵

¹⁵ 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

- 2.33 The Applicant considers that the wording in 2.9(c) is implicit in the wording of 2.9(b) in any event. This can, for example, be inferred from the *Port of Newcastle* decision where the ACCC assumed that authorisation would cover the exchange of information between the relevant coal producers to the extent that this was reasonably necessary, and excluding only certain sensitive information.¹⁶ Paragraph 2.9(c) is added, however, by way of clarity.
- 2.34 The Castalia Report notes that even if Tegel does not agree to collective negotiation, the exchange of information between growers is likely to lead to similar outcomes as if Tegel had agreed to a collective negotiation.
- 2.35 Accordingly, the applicant considers that the proposed arrangements contemplated by paragraphs 2.9(b) and (c), for discussion between the growers and exchange of information between the growers, would amount to the entry into an arrangement which:
- (a) would or may contain a cartel provision; and/or
 - (b) section 27 would or might apply to.
- 2.36 There is accordingly, jurisdiction to authorise the arrangements for discussion and information exchange under section 65AA(2) or section 58(1) of the Commerce Act.
- 2.37 The Commission has in past guidelines and decisions indicated that the exchange of competitively sensitive information, including current pricing information, can fall within both sections 27 and 30.

Exchange of information as a cartel provision

- 2.38 The Commission has in guidelines indicated that the exchange of such information can amount to price fixing.¹⁷
- 2.39 The Commission qualified this statement by saying that:
- “In general terms, it is less likely that an inference of price fixing could be made if:*
- (a) the information gathered and/or exchanged is general rather than specific;*
 - (b) the members, producers or customers to which the information relates are not able to be identified in any way;*
 - (c) provision of information is on a voluntary basis and only relates to historical information; and*
 - (d) the information is gathered and collated anonymously and independently.”*
- 2.40 Those requirements are clearly not met in this case. The information gathered and exchanged:
- (a) would extend to specific pricing information (such as proposed prices and contractual terms in relation to growing services offered to or by Tegel or particular growers);
 - (b) would extend to proposed prices and contractual terms for identified growers;

to the export of coal from the Port of Newcastle (27 August 2020) (see second bullet point of definition of “*Proposed Collective Bargaining Conduct*” at paragraph 5.3).

¹⁶ 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) at paragraphs 4.69-4.77.

¹⁷ See Commerce Commission “*Guidelines for Trade Associations- 20 September 2010*”.

- (c) would extend to current and proposed prices and contractual terms, not just historical information; and
 - (d) would not be gathered anonymously.
- 2.41 On that basis, the arrangement for the exchange of information is an arrangement which would or might include a cartel provision, namely a provision which might be considered to have the effect of controlling price.
- 2.42 That provides jurisdiction for the Commission to authorise the arrangement in paragraph 2.9(a) pursuant to section 65AA(2). As mentioned above, section 65AB also makes it clear that it is not necessary for the Commission to determine whether a provision is in fact a cartel provision, as long as there “*are reasonable grounds for believing it might be*”.

Exchange of information as a provision of an arrangement which might substantially lessen competition

- 2.43 In 1988 and 1989 the Commission considered 2 applications for authorisation of arrangements for exchange of information.¹⁸ In each case, the Commission did not consider that the arrangements substantially lessened competition. In doing so, however, the Commission cited with approval in each case some guidelines issued in 1976 by the Trade Practices Commission in Australia (the previous name of the Australian Competition and Consumer Commission) on Market Information Agreements.¹⁹
- 2.44 The Commission said that it regarded the Australian guidelines as helpful and applicable to New Zealand. The Commission also said that an arrangement which complied with the principles in paragraph 4.3 of the Australian guidelines would not normally substantially lessen competition in terms of section 27. In each case before it, the Commission applied the principles to reach a view that the market information exchange arrangements did not substantially lessen competition.
- 2.45 However, those Australian Guidelines required (among other things) that:
- (a) the information exchange did not have the intent or effect of controlling or recommending prices;
 - (b) the information collected pursuant to the agreement is collected independently and with anonymity of records being preserved; and
 - (c) the information exchanged was historical only and did not extend to pre-notification of prices or trading terms.
- 2.46 Those requirements are clearly not met in this case. The information exchange would:
- (a) be intended to lead to agreements with Tegel on grower fees and/or the resolution of contractual disputes;
 - (b) involve the collection of information from specific identified growers; and
 - (c) the information collected would extend to current and proposed prices and trading terms.
- 2.47 Accordingly, there are good grounds on which the Applicant considers that the arrangements for discussion and information exchange between the growers would or might fall within section 27.

¹⁸ Decision 220, *New Zealand Medical Association*, 13 September 1988; Decision 240, *Insurance Council of New Zealand (Inc)*, 13 October 1989.

¹⁹ Trade Practices Commission Market Information Agreements Information Circular No 14 28 April 1976

- 2.48 The fact that the Applicant considers that the arrangements for discussion and information exchange between growers would or might fall within section 27 (as an arrangement containing a provision which would or might have the effect of likely effect of substantially lessening competition in a market), provides jurisdiction for the Commission to authorise the arrangement in paragraph 2.9(a) pursuant to section 58(1).

3. Part 2: The Industry

Introduction

- 3.1 This application relates to the chicken meat growing services industry.
- 3.2 The demand for chicken growing services is directly linked to consumer demand for chicken meat. Therefore it is useful to consider the chicken meat growing services industry in the context of the chicken meat industry as a whole.
- 3.3 The Commission will be familiar with this industry information from the Commission Waikato-BoP Growers Association Determination [2017] NZCC (**Waikato Growers Determination**).

Chicken Meat Industry

Overview

- 3.4 All fresh chicken meat sold in New Zealand is produced domestically due to biosecurity restrictions on the importation of fresh chicken meat.²⁰
- 3.5 Chicken is the most highly consumed meat in New Zealand with the OECD estimating that in 2019 New Zealanders consumed 41.1 kilograms per person of poultry.²¹ In 2020 approximately 90 million chickens were processed in New Zealand for domestic consumption and export.²²

Stages of production

- 3.6 The Commission examined New Zealand's chicken meat industry in *Decision 658*. In that decision, the Commission noted that the production of chicken products comprises a number of distinct steps that can be separated into upstream and downstream activities. Upstream activities include the production of breeding stock, day-old chickens and chicken feed, and the growing of broiler chickens. Downstream activities include the processing and supply of chicken products.²³

Vertical integration

- 3.7 There is a high degree of vertical integration in New Zealand's chicken meat industry. Most stages in the production and processing of chicken meat are undertaken by the processors, with the exception of the chicken meat growing phase which is in the majority outsourced to contract growers.

²⁰ Ministry of Business, Innovation & Employment website "Steps to importing poultry" (as at 28 April 2021) <<https://www.mpi.govt.nz/import/food/poultry/steps-to-importing/>>.

²¹ OECD Data – Meat Consumption < <https://data.oecd.org/agroutput/meat-consumption.htm>>, source OECD-FAO Agricultural Outlook (Edition 2020).

²² "Meat Chickens processed in New Zealand" graph published by Figure.nz <<https://figure.nz/chart/QzXp9lsqIAJr9v1x>>.

²³ *Re Tegel Foods and Brinks* [2008] NZCC 658 at [E5].

- 3.8 New Zealand's chicken meat industry structure reflects common characteristics found internationally. Processors in Australia,²⁴ the United States²⁵ and the European Union²⁶ typically operate vertically integrated business models, aside from contracting out growing services. Both in New Zealand and overseas, vertical integration has been a feature of the chicken meat industry for many decades.²⁷

Chicken Meat Processors

- 3.9 New Zealand's chicken meat industry has three major processors: Tegel, Inghams and Brinks.
- 3.10 Together, these processors produce almost all of the chicken meat for New Zealand's domestic and export markets.²⁸
- 3.11 Appendix F contains a map showing the locations of Tegel, Inghams and Brinks' processing facilities.

Tegel

- 3.12 Tegel is New Zealand's largest poultry processor, with over 50 percent market share.²⁹ It processes approximately 55 million birds per year, equating to approximately 20% of New Zealand's total meat protein.³⁰
- 3.13 Tegel's business is fully vertically integrated, with the exception of chicken growing services which are in the majority outsourced to growers.
- 3.14 Tegel's operations are based in Auckland, New Plymouth and Christchurch. In each region Tegel has a hatchery, a feedmill, breeder farms, a processing facility and a distribution centre. Outside of its these main geographic areas, Tegel operates a pullet rearing facility in Levin and satellite processing and small goods facility in Wellington.³¹
- 3.15 Tegel was acquired by H J Heinz in 1992 as part of its acquisition of Goodman Fielder and Watties. It was sold to Australian private equity fund Pacific Equity Partners in late 2005.³² In 2011, Tegel was acquired by Singapore-based Claris Investments Pte, which is owned by private equity firm Affinity Equity Partners.³³ In May 2016, Tegel was listed on the New Zealand

²⁴ Australian Chicken Meat Federation Incorporated "The Australian Chicken Meat Industry: An Industry in Profile" (2011) at 3.1.

²⁵ National Chicken Council "Vertical Integration" <<http://www.nationalchickencouncil.org/industry-issues/vertical-integration/>>.

²⁶ Association of Poultry Processors and Poultry Trade in the European Union (AVEC) *2016 Annual Report* (Brussels, Belgium, 2016) at 13.

²⁷ Economic Regulation Authority of Western Australia *Inquiry into the Chicken Meat Industry Act 1977: Final Report* (1 November 2010) at 10.

²⁸ In 2008, Michael Rozen, the Board chair of the Poultry Industry Association of New Zealand and representative for Inghams, stated that Tegel, Brinks and Inghams together represent 95% of the chicken meat industry in New Zealand, as in *Re Tegel Foods and Brinks* [2008] NZCC 658 at [398].

²⁹ David Jackson and Phil Hand *Tegel Annual Report 2018* (27 July 2018) at 2.

³⁰ Statement of Evidence from Robyn Maree Marshall in an application by Tegel Foods Limited for resource consent at 112 Carmen Road, Hornby Christchurch, dated 28 July 2020 at paragraph 4.

³¹ *Ibid* at paragraph 9.

³² Gareth Vaughn "Pacific Equity Partners, ANZ Capital sell Tegel Foods to Affinity Equity Partners in NZ\$600 million leveraged buyout" (25 January 2011) *Interest News* (online ed, 25 January 2011).

³³ *Ibid*.

stock exchange. In early 2018 Bounty Holdings New Zealand made a take over for all of the shares in Tegel. This offer was accepted and on 23 October 2018, Tegel delisted from the New Zealand stock exchange.

Inghams

- 3.16 Inghams is an overseas ASIC company owned by Inghams Enterprises Pty Limited (**Inghams Group**), an Australia-based processor. Inghams Group is the only processor with operations in both New Zealand and Australia.
- 3.17 In the prospectus issued by Inghams Group Limited dated 21 October 2016, Inghams Group describes itself as holding the “#1 market position in Australia for chicken with approximately 40% estimated market share” and the “#2 market position in New Zealand with approximately 34% estimated market share” based on chicken sales by value.³⁴
- 3.18 Inghams Group originated in New South Wales in 1918 and entered the New Zealand market in 1990 through the acquisition of Harvey Farms (in receivership). Inghams Group remained in family ownership until 2013, when it was sold to an American private equity firm, Texas Pacific Group Capital. Texas Pacific Group Capital subsequently sold 40% of its shares in Inghams Group via initial public offering. Those shares are now listed on the ASX (ASX:ING).
- 3.19 In both New Zealand and Australia, Inghams Group operates a vertically integrated business model, with the exception of chicken growing services which it outsources to growers.
- 3.20 Inghams’ operations in New Zealand are based in the Waikato area. Inghams’ website lists its facilities as comprising feedmills, breeding farms, a hatchery and processing and distribution centres.³⁵

Brinks

- 3.21 Brinks is the third largest processor in New Zealand. Based on the information published by Tegel and Inghams regarding their market shares, the Applicant estimates Brinks’ market share based on chicken sales by value to be approximately 10 percent.
- 3.22 Unlike Inghams and Tegel, Brinks is not fully vertically integrated. Its core business is contracting out the growing of broiler chickens, and processing and selling chicken products. Brinks does not operate hatcheries and instead sources its chicks from other processors.
- 3.23 Brinks’ operations are based in Karaka and Tuakau in South Auckland, and in Rolleston, near Christchurch.
- 3.24 Brinks has remained in private ownership since it was established in 1954. Tegel sought to acquire Brinks in 2008. The acquisition did not proceed after the Commission declined clearance pursuant to section 66(3)(b) of the Commerce Act.

Chicken Meat Growing Services Industry

- 3.25 As noted above, it is standard practice in New Zealand for processors to outsource the growing component of the chicken meat supply chain.
- 3.26 This system of outsourcing chicken growing services has the following characteristics:
- (a) *Processor control of inputs and rearing specifications:* The processors control the genetic material for breeding chickens. They supply contract growers with day-old chickens to be reared according to the processor’s desired specifications. The

³⁴ Inghams Group Limited “Ingham’s Prospectus: Initial Public Offering of Ordinary Shares” (12 October 2016) at 8.

³⁵ See <<https://ingham.co.nz/network/>>.

processor also provides other key inputs to the growing process including all feed, litter and medications.

- (b) *Processors outsource growing of chickens:* The processors contract with growers for the provision of growing services. Under these contracts, growers are independent contractors, not employees of the processor. Contract growers never own the chicks they rear. Under the contracts, growers provide specialist shedding and variable inputs such as labour together with management expertise.
- (c) *Capital investment:* The contract growing of chickens is capital intensive. [

]. A typical grower's farm today is a minimum of 25 hectares. Chicken growing sheds are highly specialised and have virtually no alternative use.

- (d) *The growing fee comprises a small component of the cost of chicken meat:* The Castalia Report estimates [

]. The Applicant is not aware of the wholesale price of chicken, but clearly this amount represents a small proportion of the retail price of chicken.

- (e) *Distance:* For reasons of animal welfare, growers' farms are located within a reasonably short distance from the hatchery from which the day-old chickens are supplied and the processor's processing plant. While in theory longer trips are possible, in practice, no grower's farm in New Zealand would be located more than two hours from the relevant processing facility. In consequence, the New Zealand chicken meat growing services industry is best understood as comprising a series of regional markets, with grower farms clustered around hatcheries and processing plants.

Growers' Associations

3.27 In New Zealand and in Australia³⁶ the providers of chicken growing services are typically represented by industry associations. The industry associations provide a range of services to their members, including:

- (a) negotiating contracts for the supply of broiler chicken growing services with the processor on behalf of members;
- (b) providing technical knowledge, advice and expertise in connection with chicken growing and related matters;
- (c) providing assistance with regulatory matters (such as obtaining resource consent);
- (d) the organisation of educational and social events; and
- (e) representing the growers in industry matters.

The Applicant

3.28 The Applicant represents the Regional Associations to Tegel in New Zealand. The Regional Association in turn represents the suppliers of chicken growing services in their relevant region.

³⁶ For example, New South Wales Farmers Poultry Meat Group; Queensland Chicken Growers Association; Victorian Federated Farmers Chicken Meat Group; South Australian Farmers Federation Poultry Meat Group; Western Australia Broiler Growers Association; and Tasmanian Farmers and Graziers Association.

- 3.29 The Applicant was formed in 2006 and is registered as an incorporated society (Registration No. 1822994).
- 3.30 The activities of the Applicant are undertaken by an Executive comprising of 2 members from each Regional Association and who each receive a small honorarium. The members of each Regional Association vote on the appointment of their representatives. The Applicant does not employ any staff.

Tegel Regional Growers' Associations

- 3.31 Tegel chicken growers are represented through three regional industry associations:
- (a) the Canterbury Poultry Meat Producers' Association Incorporated (Registration No. 220153, incorporated on 30 April 1968);
 - (b) the Auckland Meat Chicken Growers Association Incorporated (Registration No. 222228, incorporated on 30 July 1973); and
 - (c) the Taranaki Broiler Chicken Growers Association Incorporated (Registration No. 215254, incorporated on 10 July 1980).

Ingham Growers Association

- 3.32 Ingham chicken growers are represented by the Waikato-BoP Growers Association, formed in 1984 (Registration No.248290). Its activities are undertaken by an unpaid Executive comprising up to 10 of the Inghams growers, who are elected at the Association's annual general meeting.

Brinks Growers' Association

- 3.33 Brinks chicken growers are also represented through an industry association, the Brinks Growers Association Incorporated (Registration No. 2568580, incorporated on 25 October 2012). Membership of this association comprises suppliers of chicken growing services to Brinks.

Chicken Growers

Applicant's Growers

- 3.34 The Applicant understands that Tegel uses the services of approximately 90 grower farms located in close proximity to Tegel's three processing facilities. Nearly all farms are operated under contract, whereby the property is managed by the farmer or a third party. Throughout the growing period Tegel retains ownership of the chickens and supplies all feed requirements.
- 3.35 Aside from nine farms owned by [] growers, all the farms that supply chicken growing services to Tegel are owned and operated by the Growers. All of the Growers are members of the Regional Associations, who together are the sole members of the Applicant. Nine of the Growers own two farms each, meaning that there are approximately 75 Growers in total.

Ingham Growers

- 3.36 The Applicant understands that approximately 37 farms supply chicken growing services to Inghams. These farms are based within 75 kilometre radius of Inghams' processing plant in Ngarua, and are mainly family owned and operated.

Brinks Chicken Growers

- 3.37 The Applicant estimates that approximately 23 farms supply chicken growing services to Brinks. These farms are based within a 41 kilometre radius of Brinks' processing plants in South Auckland and Christchurch, and are mainly family owned and operated.

Mergers

- 3.38 The Applicant is not aware of any mergers relevant to this application that have occurred over the past three years.
- 3.39 As noted above, in 2008 Tegel attempted to acquire Brinks and sought clearance to do so from the Commission. The Commission declined this application pursuant to section 66(3)(b) of the Commerce Act.³⁷

4. Part 3: Market Definition

- 4.1 The Applicant submits that the markets relevant to this application are:
- (a) the market for broiler chicken growing services in the Auckland, Taranaki and Canterbury regions (each region is a separate geographic market); and
 - (b) one or more markets for the wholesale supply of primary and secondary processed chicken products.
- 4.2 These markets are considered in more detail below.

The Market for Broiler Chicken Growing Services in the greater Auckland, Taranaki and Canterbury Regions

- 4.3 The markets relevant to this application are the market for the provision of broiler chicken growing services in respectively the greater Auckland, Taranaki and Canterbury regions. The geographic boundary of each market is an area roughly two hours' driving distance of Tegel's processing facility in each region.
- 4.4 The Commission considered the market for the provision of chicken growing services in *Decision 658*. In that decision, the Commission held that the geographical dimension of the market for the provision of chicken growing services was a regional market. The Commission noted that:³⁸

"The Applicant submitted that it is necessary for growing facilities to be located in close proximity to processing plants. This is because of animal welfare concerns, meaning live fully-grown birds cannot be transported for long periods. Accordingly, most contract broiler growers tend to be located within approximately two hours drive from the primary processing plant, but it is possible for birds to be transported to the place of slaughter (by road) for up to four to six hours or longer.

Growers interviewed by the Commission agreed with Tegel's submission advising that they were only able to grow for processors within their particular region. The Commission therefore considers that the markets for the provision of chicken growing services are likely to be regional in scope."

- 4.5 The Commission found in the Waikato Growers Determination that the market for those broiler chicken growing services was a regional market.³⁹
- 4.6 The Applicant agrees with the Commission's conclusion in *Decision 658* and the Waikato Growers Determination that markets for the provision of chicken growing services are regional in scope. Aside from a small number of growers whose farms are located in such a location

³⁷ *Re Tegel Foods and Brinks* [2008] NZCC 658.

³⁸ *Re Tegel Foods and Brinks* [2008] NZCC 658 at [123] and [124].

³⁹ Waikato Growers Determination at paragraph 35.

that they are within a two hour drive of both Tegel's Auckland processing facility and Inghams' Waikato processing facility, the Growers have no realistic prospect of switching supply to a processor in a different region, primarily due to animal welfare concerns.

- 4.7 The transportation of animals is regulated under the Code of Welfare: Transport Within New Zealand dated 1 October 2018 (**Code**) issued under the Animal Welfare Act 1999. A copy of the Code is attached as Appendix **G**.
- 4.8 The Code applies to all live animals being transported within New Zealand. Minimum Standard No. 4, in Part 4 of the Code, governs 'Journey Planning and Documentation'. Minimum Standard No. 4(a) stipulates that *'Transport must be planned to minimise the risk of injury, fatigue or metabolic and nutritional disorders'*. Part 4.1 of the Code recommends a best practice for animal journey duration. All animals should be transported for the shortest possible time, especially animals which are young, pregnant, at peak lactation, or at the end of their production lives or cycles (such as end-of-lay hens or cull cows). Unnecessary transport should be avoided and if animals are to be killed, they should, if possible, be killed at the nearest facility. Under the Animal Welfare Act 1999, it is an offence for any person to transport an animal in a manner that causes the animal unreasonable or unnecessary pain or distress.
- 4.9 While the Applicant accepts that under the Code, it may theoretically be possible to transport live chickens that have reached maturity for more than two hours to reach a processing plant, in practice this does not occur. Growers' farms are located as short a distance as practicable from the processing plant, for reasons of animal welfare.
- 4.10 Tegel's chickens are processed at its processing plants in Auckland, Christchurch and New Plymouth. The farthest farm belonging to a Grower:
- (a) from the Auckland Tegel processing plant is 165 kilometres distance;
 - (b) from the Christchurch Tegel processing facility is 70 kilometres distance; and
 - (c) from the New Plymouth Tegel processing facility is 55 kilometres distance.
- 4.11 The location of the hatchery from which the processor sources day-old chickens equally points to the geographic dimension of the market for chicken growing services. The Code emphasis that while all animals should be transported for the shortest possible time, this is particularly important where young animals are concerned. Tegel sources its day-old chickens from its hatcheries in Auckland, Christchurch and New Plymouth. The greatest distance between a farm belonging to a Grower and a Tegel hatchery is approximately 115 kilometres.
- 4.12 In the table set out in Appendix **E**, each of the farms operated by the Growers is ascribed a number. These numbers correspond to the numbered stickers on the map set out in Appendix **H**, which show the location of the farms relative to Tegel's processing plants and the hatcheries.
- 4.13 All geographical markets for the provision of broiler chicken growing services are similarly influenced by animal welfare concerns. Geographically, the closest processor to Tegel is Brinks, which operates two processing plants in South Auckland, in Karaka and Tuakau. The Applicant estimates that no supplier of chicken growing services to Brinks would operate a farm more than 41 kilometres from one of these processing plants. Brinks does not have a hatchery. Rather, it sources day-old chickens from:
- (a) Tegel's hatchery in Tegel Road, Drury, Auckland;
 - (b) Bromley Park Hatcheries in Brown Road, Tuakau; and
 - (c) Tegel's hatchery in Christchurch.
- 4.14 Significantly, Tegel's hatchery is located approximately 15 kilometres from Brinks' processing plant in Karaka, and approximately 22 kilometres from its processing plant in Tuakau. Similarly, Bromley Park Hatcheries is located approximately 17 kilometres away from Brinks'

processing plant in Karaka, and approximately 35 kilometres away from its processing plant in Tuakau.

One or More Markets for the Supply of Processed Chicken Meat

4.15 The downstream markets for the supply of processed chicken meat could be impacted by this application.

4.16 The Applicant has limited information regarding the specific dimensions of the market(s) for the supply of processed chicken meat (the Applicant is an industry association representing the interests of the suppliers of chicken growing services).

4.17 However, the Applicant notes that the Commission has previously considered the market(s) for the supply of processed chicken meat in *Decision 658*. In that decision, the Commission reached the following conclusions regarding market dimensions:

(a) *Product dimension:*

- (i) Chicken was found to be in a discrete product market from other forms of animal protein.
- (ii) Primary processed chicken products (i.e. whole dressed chickens) and secondary processed chicken products (i.e. chicken which has been cut into pieces and/or deboned) were found to be sufficiently similar to be included in the same product market.
- (iii) Fresh and frozen chicken products were also found to be sufficiently similar as to fall within the same product market.
- (iv) Further processed chicken products and small goods were found to form a discrete market as they had significantly different product characteristics from primary and secondary processed chicken products. In particular:
 - (i) branding was more prevalent and important in respect of the sale of further processed and small goods products; and
 - (ii) further processed and small goods products could be differentiated from primary and secondary processed chicken products on the basis of price (with the Commission citing the example of the cost of one kilo of primary/secondary processed chicken meat being likely to cost far less than the price of a kilo of Chicken Kiev because of the value added to the Chicken Kiev).

(b) *Functional dimension:* The functional dimension of the market was found to be the wholesale supply of primary and secondary processed chicken products. The Applicant submits that this is also the primary functional dimension relevant to this application, as Tegel does not sell directly into the retail market for processed chicken products.

(c) *Customer dimension:*

- (i) Customers in the market for wholesale supply of primary and secondary processed chicken products could be divided into three categories, based on their buying behaviours:
 - (i) large retail (supermarkets and large butchery chains);
 - (ii) quick services restaurants (known as "QSRs"); and

- (iii) food service and small retail.
- (ii) Supermarkets formed the largest customer category. These customers were able to negotiate favourable prices by buying in bulk via centralised purchasing agreements.
- (iii) Fast food restaurant chains (termed 'quick service restaurants' or 'QSRs') formed a separate customer category as they required processors to meet very precise product specifications and service levels. Like supermarkets, these customers were also able to secure favourable prices because they purchased in high volumes.
- (iv) Food service customers also formed a separate customer category. Customers in this market included:
 - (i) manufacturers who purchase fresh whole dressed birds in bulk from the processors and carry out processing into a variety of value-added products, such as Santa Rosa;
 - (ii) distributors of a wide range of food products, including chickens, such as Gilmours; and
 - (iii) retailers, such as the Mad Butcher and Raeward Fresh.

In general, these customers ordered on a daily or weekly basis, and there were few fixed contracts. The Applicant notes that in Tegel's case, the export market is a fourth category of customer for wholesale chickens, which according to Tegel's 2018 Annual Report accounted for approximately 16% of Tegel's revenue.⁴⁰

(d) *Geographic dimension:*

- (i) In the Commission's investigation report of 8 July 1996 concerning Tegel and Pacifica Poultry Ltd, the Commission held that there was a national market for the processing and wholesale distribution of chicken meat products (both fresh and frozen).
- (ii) In *Decision 658*, Tegel argued that a narrower geographic distinction would be even less plausible in 2006 than it was in 1996, given that technological advances had increased the shelf life of fresh chicken meat to between eight and ten days depending on the cut of chicken, and chicken could be easily transported to the South Island within 24 hours. Tegel advised that Inghams and Brinks transported products to the South Island on a daily basis.
- (iii) However, the Commission concluded that the quantitative and qualitative evidence suggested that the North Island and the South Island formed discrete geographic markets in respect of the wholesale supply of primary and secondary processed chicken products to supermarkets and food service providers.
- (iv) By contrast, the geographic scope of the market for the supply to fast food restaurant chains was found to be national as the major chains such as KFC, McDonalds and Burger King required processors to be able to supply on a nationwide basis. To meet KFC's requirement for nationwide supply, the Commission noted that Inghams deep chilled the chicken products and operated a distribution centre in the South Island.

⁴⁰ Tegel Food Limited 2018 Annual Report at page 23.

- 4.18 In summary, in *Decision 658*, the Commission considered that there were separate markets for the wholesale supply of primary and secondary processed chicken products to:
- (a) North Island supermarkets;
 - (b) South Island supermarkets;
 - (c) North Island food service providers;
 - (d) South Island food service providers; and
 - (e) fast food restaurant chains throughout New Zealand.
- 4.19 The accompanying economic analysis shows that there is a vast difference between the price paid to growers (which may be reduced under individual contracting) and the retail price for chicken meat. It concludes that even if individual contract negotiations resulted in lower costs to Tegel, those costs will not necessarily be passed on through lower wholesale prices, and even if any hypothetical reduction in grower' charges were passed on to consumers, they would be so insignificant that it would not result in an expansion of consumer demand. The Applicant therefore submits that even under the most narrow definition of wholesale and retail markets for processed chicken there will be no price difference between the factual and counterfactual scenarios.

5. Part 4: Counterfactual

Status quo unlikely to continue

- 5.1 The Applicant considers that if the Commission declines to grant this authorisation the Farm Management Agreement would unlikely persist in its current form beyond the short to medium term and [] likely be replaced by a simpler agreement that is individually negotiated but based on a standard form agreement.⁴¹

5.2 [

5.3]

The Farm Management Agreement will likely need to be amended from time to time

- 5.4 Over the life of the Farm Management Agreement, from time to time circumstances are likely to arise that necessitate discussions between Tegel and the growers as to the ongoing suitability of certain provisions of the Farm Management Agreement. In some cases, these discussions are likely to result in amendments to the Farm Management Agreement.

⁴¹ [

]

5.5 The Farm Management Agreement specifically recognises that the grower and Tegel may need to engage in contractual negotiations from time to time and appoints the Applicant as the growers' representative for this purpose.

5.6 Variations to the Farm Management Agreement have already been negotiated and agreed between Tegel and the Applicant on behalf of the Growers. For example [

(a)

(b)

(c)

]

5.7 The sophistication, complexity [] of the Farm Management Agreement means that there is an increased likelihood of amendments being required over the life of the agreement compared to a [] simpler contract.

5.8 In the future, the need for contract amendments could be triggered by such matters as changes in economic and/or trading conditions, end customer preferences or requirements, further new Tegel shed standards or animal welfare considerations.

[]

5.9 [

(a)

(b)

5.10 [

]

[]

5.11 [

5.12

]

If the Farm Management Agreement is not renewed for some growers, any continued supply to Tegel by those growers would require individually negotiated agreements

5.13 [

5.14

(a)

(b)

5.15

5.16

5.17

5.18

]

Without an authorisation, necessary variations to the Farm Management Agreement, and any new contracts for growers coming off the Farm Management Agreement, and disputes between growers and Tegel, cannot be negotiated collectively

5.19 Because the collective negotiation of the fees and terms of supply for chicken growing services most likely constitutes an infringement of the Commerce Act, without the authorisation sought, it is unlikely that the Applicant will be able to continue to represent the Growers in contract negotiations with Tegel in the future.

5.20 Without the authorisation, bilateral negotiations between Tegel and each grower to agree on variations to the contract will be costly and time-consuming.

5.21 The Applicant believes that Tegel would have significant countervailing power in carrying out individual negotiations with growers. ACCC has repeatedly acknowledged that chicken growers have very little bargaining power compared with chicken processors. In *Decision 658*, which concerned the proposed acquisition of Brinks by Tegel, the Commission found that chicken processors “dictate the terms on which contract growers provide services”.⁴² This view is also supported by the accompanying Castalia Report.

5.22 [

5.23

5.24

5.25

5.26

]

Individually negotiated contracts based on standard form agreements

5.27 The Castalia Report finds that without an authorisation, the Farm Management Agreement will unlikely persist in its current form and would be replaced by a simpler agreement that is individually negotiated but based on a standard form agreement.

5.28 Chicken processors offering growers standard form contracts is the counterfactual that has been preferred by the ACCC in recent authorisations of collective bargaining in Australian markets for the supply of chicken growing services.

⁴² Decision 658, *Tegel Foods Limited / Brinks Group of Companies Limited*, 22 October 2008.

- 5.29 In a determination issued in 2005 concerning the collective negotiation of chicken growers' contracts in Victoria,⁴³ the ACCC made the following observations in respect of the likely counterfactual:

"As for what form any individual negotiations might take, this is somewhat difficult to speculate given that collective negotiations, in one form or another, have apparently been occurring for over 20 years.

Absent authorisation, the processors would have two options available to them in offering contracts to the growers. Either they could negotiate the terms and conditions of any contract arrangements individually with each grower or offer each grower a standard form contract with limited scope for variation of terms and conditions.

The ACCC has previously considered numerous applications for small primary producers to collective bargaining [sic] with the processors to whom they supply. In its past consideration of these applications the ACCC has generally found that the most common situation in the absence of an authorisation to collectively bargain, or some form of industry regulation, is one where primary producers offering a common good or service in similar circumstances are offered essentially standard form contracts with little capacity to negotiate variations on those standard terms or conditions.

In particular, where imbalances in bargaining power are observed, the result is, generally speaking, the offering of standard form contracts on terms likely to be to the advantage of the party offering the contract. That is not to say that the other party will always be at a disadvantage as a result, but rather that, as with any commercial arrangement, the party offering the contract will seek to ensure the most favourable deal for itself. Such contracts are generally offered on a 'take it or leave it' basis, with limited, if any, scope for the other party to have input into the terms of the contract.

In the current instance, as noted, there is very little capacity for growers to provide a different service which is mainly due to the specificity of their assets and the associated cost of adapting them for an alternative use. In addition, whilst growers do have some capacity to change processors, there are significant switching costs associated with doing this, costs which are generally borne by the grower.

These switching costs would significantly limit the ability for growers to do anything other than continue to provide their service to the processor, at least in the short-term, even where unfavourable terms and conditions were offered. That is to say, failure to negotiate a mutually satisfactory agreement with an individual grower would not place the processors' business at the same commercial risk as it would the growers.

In addition, the processors are generally large, well resourced businesses with significant commercial and negotiating expertise. In contrast, VFF member growers are, in general, small primary producers with often limited resources and expertise to engage in effective negotiation with businesses with the size and negotiating experience of the processors.

It could therefore be expected, in a situation where growers were required to negotiate contracts with processors individually, that the consequences of such an imbalance in bargaining positions would be the offering of standard form contracts by processors to

⁴³ Australian Competition and Consumer Commission, A40093 and A90931: *Victorian Farmers Federation* (2 March 2005) at [9.9] – [9.16]. See also Australian Competition and Consumer Commission, A90901, A90902, A90903, A90904 and A90905: *Bartter Enterprises Pty Ltd, La Ionica Operations Pty Ltd, Hazeldene Chicken Farm Pty Ltd, Inghams Enterprises Pty Ltd, Baiada Poultry Pty Ltd and consenting Victorian chicken growers* (2 March 2005) at [8.21] – [8.27].

each of their growers, with little input from the growers, or scope for them to vary the terms and conditions of such contracts.”

- 5.30 The Applicant notes that this decision concerned a situation where the ACCC noted that growers had the capacity to change processors (presumably because there was more than one processor in the relevant region). In the present situation, in the Taranaki region, there is no processor other than Tegel. This means there is an even greater imbalance in bargaining power between the Growers and Tegel in Taranaki than there was in the Victorian market described above: in the Victorian market the growers had at least some capacity to change processors, although there were significant switching costs associated with doing so. Tegel is effectively a monopsonist in the chicken growing services market in Taranaki.
- 5.31 The position of Growers in the greater Auckland and Canterbury regions, respectively, is similar to those of the growers in the Victorian market described above, in that while there is another processor in each region (Brinks), in reality it is difficult for the Growers to change processors. [

] In the Applicant’s view this makes Tegel an effective monopsonist in the Auckland and Canterbury regions as well.

- 5.32 [
- (a)
- (b)

- 5.33
- (a)
- (b)

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6. Part 5: Existing Competitors

The Market for Broiler Chicken Growing Services in the greater Auckland, Taranaki and Canterbury Regions

Supply side competition

- 6.1 The Growers are the suppliers of chicken growing services to Tegel. All are located within 165 kilometres, 55 kilometres and 70 kilometres respectively of Tegel's processing plants in Auckland, New Plymouth and Christchurch.
- 6.2 The Castalia Report notes that the current Farm Management Agreement is a sophisticated agreement in comparison to the relatively simple payment structure that was in place prior to negotiation in which the Applicant was involved. The Applicant introduced the concepts of the [] The [] reduces the risk to growers associated with making a significant specialised investment – a typical chicken grower would need to invest around [] plus land costs to build an [] farm on a greenfield site to house the chickens. The sheds are built according to Tegel's specifications. By reducing the risk associated with this upfront investment, the use of the [] that has resulted from the Applicant's involvement would reduce the cost of providing the grower service, while providing Tegel with the incentive to maintain or expand demand.
- 6.3 [] included in the Farm Management Agreement will have the effect of motivating growers to deliver high quality growing services. The Farm Management Agreement also contains [] Together, these incentivise Growers to perform better and compete with other Tegel growers on service quality levels and beneficial outcomes.

Demand side competition

- 6.4 Tegel is essentially a monopsonist in relation to the Growers.
- 6.5 There is no other chicken meat processor in Taranaki who the Growers can supply chicken growing services to. The animal welfare considerations described above prevent Taranaki based Growers from supplying processors outside this region.
- 6.6 In Christchurch and greater Auckland there are two processors (Tegel and Brinks), so Growers could in theory switch to Brinks, but in reality this is unlikely to occur as:
- (a) []
- (b)
- (c)
-]
- 6.7 []
-]

One or More Markets for the Supply of Processed Chicken Meat

- 6.8 As noted in Part 3 of this application, New Zealand's chicken meat industry is dominated by three major processors: Inghams, Tegel and Brinks. Together, these processors produce almost all of the chicken meat for New Zealand's domestic and export markets.
- 6.9 Further details concerning each processor, including their estimated market shares, are set out in Part 3 of this application.

7. Part 6: Potential Competition

The Market for Broiler Chicken Growing Services in the greater Auckland, Taranaki and Christchurch Regions

Demand side competition

- 7.1 There is a very low likelihood of another processor entering the market for broiler chicken growing services in any of the greater Auckland, Taranaki and Christchurch regions within the next two years.
- 7.2 There are significant barriers to entry into the processor market due to such matters as:
- (a) relatively high start up costs, including high land costs;
 - (b) long and uncertain lead times required to seek resource consents;
 - (c) the high levels of vertical integration in the processed chicken meat industry; and
 - (d) potential difficulties in establishing wholesaling contracts in a well-established market for the supply of processed chicken meat.
- 7.3 A new processor looking to enter the market for broiler chicken growing services in the greater Auckland, Taranaki and Christchurch regions would also have to address the challenge of gaining new growers and/or growers from another processor. This would involve either:
- (a) contracting new growers, who would need at least 2 years to obtain the necessary resource consents and construct new sheds; or
 - (b) convincing a sufficient number of Tegel growers (or Brinks' growers in Christchurch and greater Auckland) to switch processors. In Australia, where some switching does very occasionally occur, the ACCC has recognised that this comes at a substantial cost to the growers, as growing sheds are made to the particular specifications of each processor and typically need to be modified in order for the switch to occur.⁴⁴ Switching also tends to be difficult because processors in New Zealand generally favour long term exclusive supply contracts. [
-]
- 7.4 A new processor in the Taranaki region would also face the additional challenge of finding a site for a hatchery which would face the same challenges as set out above in paragraph 7.2. A new processor in greater Auckland or Canterbury may be able to source chicks from Tegel in Christchurch (assuming it is willing to supply a new market entrant) or Bromley Park

⁴⁴ See Australian Competition and Consumer Commission, *A90901, A90902, A90903, A90904, & A90905: Barter Enterprises Pty Ltd, La Ionica Operations Pty Ltd, Hazeldene Chicken Farm Pty Ltd, Inghams Enterprises Pty Ltd, Baiada Poultry Pty Ltd and consenting Victorian chicken growers* at [7.6] and [8.24]; Australian Competition and Consumer Commission, *A40093 and A90931: Victorian Farmers Federation* (2 March 2005) at [4.25] and [8.6].

Hatcheries in Auckland otherwise it too would face the same challenges in establishing a new hatchery.

Supply side competition

- 7.5 It would be virtually impossible for a grower to enter the broiler chicken growing services industry in the greater Auckland, Taranaki and Christchurch region without satisfying Tegel's (or in Auckland and Christchurch Brinks') start up requirements and entering into a growing contract with one of these processors. As the ACCC observed in an early authorisation for collective bargaining lodged by Inghams in respect of the Tasmanian chicken growing industry, *"Given the level of vertical integration within the market growers have a limited ability to vertically integrate upwards or downwards making entry into the market very difficult without an arrangement with the processor"*.⁴⁵
- 7.6 Even with the support of the processor, there are a number of barriers to market entry that new growers must overcome. For instance, the capital investment required in order to begin providing growing services is substantial. [

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- 7.7 In order to be able to carry out chicken growing activities on their properties, growers must also obtain the necessary resource consents and build their growing sheds. The Applicant estimates that a greenfield development on the scale contemplated above would take at least two years to complete.

One or More Markets for the Supply of Processed Chicken Meat

- 7.8 For the reasons outlined at paragraphs 7.2 and 7.3 above, the Applicant considers that new entry into the market for the supply of processed chicken meat in New Zealand is unlikely in the next two years.

8. Part 7: Public Benefits and Detriments

- 8.1 This application for authorisation is supported by an independent report written by Emma Ihaia from Castalia Limited. The Castalia Report concludes that the benefits of the proposed arrangements are highly likely to outweigh any public detriment.
- 8.2 The key findings in the Castalia Report are that:
- (a) Collective bargaining between the Applicant and Tegel would result in transactional cost savings in the range of \$1.4 million and \$3.1 million over the ten-year period of the proposed authorisation. These cost savings arise because collective negotiation avoids bilateral negotiations between each individual grower and Tegel including bilateral negotiations in relation to contractual disputes and contractual variations.
 - (b) Collective bargaining is also likely to have other efficiency benefits.
- 8.3 In relation to such efficiency benefits, the Castalia Report found that:
- (a) Collective negotiation has resulted in a sophisticated agreement that is likely to have efficiency benefits. These types of efficiencies have been recognised by the ACCC.

⁴⁵ Australian Competition and Consumer Commission, *A90659: Inghams Enterprises Pty Ltd* (17 March 1999) at p 19.

- (b) In comparison to the relatively simple payment structure that was in place prior to collective bargaining, the Applicant introduced a [] agreement which included the concepts of []].
- (c) [] and the inclusion of [] reduces the risk to growers associated with making a significant specialised investment. For a new “greenfield” farm, a chicken grower would need to invest around [] plus land costs to build an [] farm to house the chickens. The sheds are built according to Tegel’s specifications. By reducing the risk associated with this upfront investment, the agreement that has resulted from collective bargaining would reduce the cost of providing the grower service while providing Tegel with the incentive to maintain or expand demand.
- (d) [] included in the agreement will have the effect of motivating growers to deliver high-quality growing services []. The [] in the collective agreement also provide growers with the incentive to compete with the Applicant’s other members on service quality levels and beneficial outcomes.
- (e) The limited number of chicken processors and the need to make significant long-term investments that conform to the specific shed requirements of Tegel all create an imbalance of bargaining power between individual chicken growers and Tegel (in favour of Tegel). Collective bargaining shifts the imbalance of bargaining power to some extent by enabling growers to pool resources and engage specialised staff to negotiate with Tegel.
- (f) Any wealth transfer from Tegel to growers that results from collective bargaining constitutes a public benefit because Tegel is foreign owned. Although there are difficulties in estimation, Castalia estimates that the authorisation would lead to a public benefit of up to [] through a wealth transfer to growers.
- (g) The public benefits identified by Castalia will likely be obtained regardless of whether Tegel agrees to collective negotiation. If the Commission authorises collective activity, Tegel may choose to continue to engage with the Applicant (as it has in the past) or it could instead choose to negotiate individually with growers. Regardless of which approach Tegel takes, Castalia finds that growers will act collectively, which will result in efficiencies. With growers working together to develop their positions and knowing what position each would be taking in bilateral negotiations, the outcomes would be similar, the cost of preparing them would be similar as under a collective negotiation approach and the contract sophistication would also be comparable with collective negotiations. Similarly, if the Commission authorises collective activity, efficiencies will result from growers acting collectively in respect of contractual disputes arising between Tegel and the growers []
-] Collective bargaining, or growers acting collectively and exchanging information, is highly unlikely to result in allocative efficiency losses.
- (h) The public benefits from the authorised arrangements are highly likely to exceed any public detriment from the arrangements.

Public Benefits

Transaction costs

- 8.4 Even under conservative estimates, the proposed arrangements will result in substantially lower transaction costs than any other likely form of contracting.
- 8.5 In the absence of authorisation, the Applicant submits that it is likely that either:
- (a) each grower will negotiate an individual growing contract with Tegel; or
 - (b) Tegel may offer each grower a standard form contract, on a largely take it or leave it basis.
- 8.6 The Castalia Report uses the estimated costs associated with individual contracting to model the transaction costs absent authorisation. It concludes that under reasonable assumptions, the proposed arrangements would result in transaction cost savings of between \$1.4 million and \$3.1 million over the ten year period of the proposed authorisation. This shows collective bargaining is substantially less costly than individual bargaining.
- 8.7 The Applicant notes that in the ACCC's 2005 determination concerning the collective negotiation of chicken growers' contracts in Victoria (discussed at paragraph 5.29 above), the ACCC found that:
- (a) even if the processor were to adopt a standard form contracting model, this would not reduce transaction costs in the same manner in which it might otherwise be expected to, due to the fact that the growers were not used to negotiating their contracts directly with the processor; and
 - (b) when comparing collective bargaining and a standard form contracting model, collective bargaining would still result in cost savings as a result of a likely reduction in disputes.
- 8.8 Specifically, the ACCC held:⁴⁶
- "The ACCC is of the view that as Victorian chicken meat growers have not, in the past, been required to negotiate their own growing contracts they would be likely to incur expenses, regardless of whether they were offered a standard form contract or not, in an effort to understand the terms and conditions of the contracts and then in their efforts to negotiate some better deal with their processor. The ACCC considers that because growers would have no mechanism to discuss their contracts with their growing group or [Victoria Federated Farmers] as a common adviser, these costs would be borne by each individual grower, costs which would not occur with the proposed collective bargaining arrangements in place.*
- The ACCC also considers that there would be some savings in the form of reduced cost resulting from disputes. That is, because growers would not have the terms and conditions offered to them as standard form contracts by processors, as would likely be the case under the counterfactual situation, but instead would be able to have effective input into the construction of their contracts, the likelihood of a grower disputing a contract to which they have had a considerable contribution would be significantly reduced. This would result in a reduction in costly disputes by both parties."*
- 8.9 The Applicant considers that these comments are also applicable to the present application. [
-]

⁴⁶ Australian Competition and Consumer Commission, A40093 and A90931: *Victorian Farmers Federation* (2 March 2005) at [11.20] – [11.21]. See also Australian Competition and Consumer Commission, A90901, A90902, A90903, A90904 and A90905: *Bartter Enterprises Pty Ltd, La Ionica Operations Pty Ltd, Hazeldene Chicken Farm Pty Ltd, Inghams Enterprises Pty Ltd, Baiada Poultry Pty Ltd and consenting Victorian chicken growers* (2 March 2005) at [10.18] – [10.19].

- 8.10 The Applicant believes that even under a standard form contracting model, Tegel will still incur significant specific transaction costs in respect of each growing contract, due to the sheer number of growers.

Wealth transfers

- 8.11 The Castalia Report estimates that the authorisation would result in a wealth transfer to growers of up to []. Although described as a wealth transfer to growers, in reality what is under consideration is the *prevention of a wealth transfer from growers to Tegel's foreign shareholders* which would be caused by a reduction in growing fees in the counterfactual. That reduction in growing fees would be caused by an increase in Tegel's market power in the counterfactual involving individual negotiations.
- 8.12 The Commission's revised *Authorisation Guidelines* confirm that that "a transfer of wealth from another country to New Zealand may be a public benefit".⁴⁷ This would include increases in prices paid to NZ growers by Tegel, as suggested in the Castalia Report, given that Tegel is ultimately wholly-owned by Inoza Foods, Inc, a privately owned company registered in the Philippines.⁴⁸
- 8.13 The position might perhaps be different if the lower prices otherwise payable in the counterfactual were associated with conduct by Tegel that resulted in cost savings or innovation. The Commission has said that a price rise causing a transfer of wealth to foreign shareholders can be described as a *public detriment* where this can be described as "functionless economic rents".⁴⁹ This reference to functionless economic rents appears to be a reference to the High Court decision in *Telecom v Commerce Commission (AmpsA)*⁵⁰ cited with approval by the Court of Appeal in *Godfrey Hirst v Commerce Commission*⁵¹:
- "[I]f there are circumstances in which the exercise of market power gives rise to functionless monopoly rents, supranormal profits that arise neither from cost savings nor from innovation, and which accrue to overseas shareholders, we think it right to regard these as an exploitation of the New Zealand community and to be counted as a detriment to the New Zealand public."*⁵²
- 8.14 Therefore, if the increase in the price of chicken growing services that caused a transfer of wealth from Tegel's foreign shareholders to New Zealand growers prevented a counterfactual lower price that would have been the result of cost savings or innovation then it might not be appropriate to call that transfer a public benefit.
- 8.15 Here, however, the price increase (or prevention of price decrease in the counterfactual) is simply caused by an evening up of bargaining power (i.e. reduction in Tegel's market power). The wealth transfer caused by that price increase to be paid by Tegel as a foreign-owned firm can then properly be termed a public benefit in the same way that the Commission accepts that a wealth transfer to foreign shareholders from price rises can be termed a public detriment.

⁴⁷ Commerce Commission Authorisation Guidelines (December 2020) at [85].

⁴⁸ Inoza Foods is one of the companies in the Bounty Fresh Group, which produces and sells poultry-based products in the Philippines under the brand Bounty Fresh Chicken.

⁴⁹ Commerce Commission, *Authorisation Guidelines* (December 2020) at [85]. This is effectively discussing the reverse situation to the current case. In the *Authorisation Guidelines*, the Commission is discussing a price rise for goods and services supplied by a firm owned by foreign shareholders. In this case, the authorisation is likely to result in a firm owned by foreign owners paying more for services supplied to it (or avoiding a firm owned by foreign owners paying less than it would have done in the counterfactual of individual negotiations).

⁵⁰ (1991) 4 TCLC 473 (HC) at 531.

⁵¹ [2017] 2 NZLR 729 at [48].

⁵² See also *Godfrey Hirst NZ Ltd v Commerce Commission* [2017] 2 NZLR 729 at [50].

8.16 This is also consistent with the Commission's earlier acceptance in the *New Zealand Grape Growers Council* case that there would be a public benefit in "equalising bargaining power if the buyer was in a position of such strength as to be able to exercise monopoly power"⁵³. This public benefit argument was only not accepted in the *Grape Growers* case because Montana faced competition from other wineries. By contrast, in the present case, Tegel does have market power.

8.17 For completeness, the last time the New Zealand Courts dealt with the question of wealth transfers in an authorisation case was the Court of Appeal, very briefly, in *NZME Ltd v Commerce Commission*:⁵⁴

"Wealth transfers may be taken into account when benefits accrue to persons who are non-New Zealand shareholders: Godfrey Hirst NZ Ltd v Commerce Commission [2016] NZHC 1262, [2016] 3 NZLR 645 at [39]. We do not consider it necessary for us to re-examine the wealth transfers issue in this Court."

8.18 The High Court decision in *Godfrey Hirst* (cited by the Court of Appeal in the *NZME* quote above) deals with wealth transfers at paragraphs [20]-[39]. Paragraph [39], which was the paragraph specifically approved by the Court of Appeal in *NZME*, says:

"By contrast, the Commission discounted likely scouring price increases to the extent that these would flow to Cavalier's foreign shareholder. This was because the Commission expects these price increases to be absorbed by New Zealand farmers and merchants thereby constituting a wealth transfer from New Zealanders to foreigners without any corresponding exchange of value as set by a competitive market. In short, the Commission regarded these likely price increases as being a functionless monopoly rent. This treatment is also consistent with the authorities. "

8.19 That passage is consistent with the approach suggested above.

Contract price changes

8.20 The Applicant has represented growers in contract negotiations with Tegel since 2006.

8.21 The analysis in the Castalia Report illustrates that Tegel would incur extra costs under an individual contract negotiation model. Therefore, preferring this model would not be rational unless some other benefit were available to offset the additional cost.

8.22 Significantly, shifting to individual bargaining will increase the bargaining power that Tegel has over each of the Growers (a fact which is supported by the Castalia Report and has been consistently accepted by the ACCC in Australian authorisation applications concerning the collective negotiation of chicken growing contracts).⁵⁵

⁵³ *Re The New Zealand Grape Growers Council Inc* (1991) 2 NZBLC (Com) 104,573 at [35.3].

⁵⁴ [2018] 3 NZLR 715 at footnote 157.

⁵⁵ See Australian Competition and Consumer Commission, *A40093 and A90931: Victorian Farmers Federation* (2 March 2005) at [11.7] – [11.9] and [11.14]; *A90901, A90902, A90903, A90904, & A90905: Bartter Enterprises Pty Ltd, La Ionica Operations Pty Ltd, Hazeldene Chicken Farm Pty Ltd, Inghams Enterprises Pty Ltd, Baiada Poultry Pty Ltd and consenting Victorian chicken growers* [10.9] – [10.10] and [10.13] Australian Competition and Consumer Commission, *A90659: Inghams Enterprises Pty Limited* (17 March 1999) at [7.23] – 7.25]; Australian Competition and Consumer Commission, *A91527: Western Australian Broiler Grower Association* (31 May 2016) at [22]; Australian Competition and Consumer Commission, *A91417: NSW Farmers' Association* (25 June 2014) at [17]; Australian Competition and Consumer Commission, *A91294: South Australian Inghams Chicken Growers* (14 June 2012) at [3.2]; Australian Competition and Consumer Commission, *A91347: Queensland Chicken Growers Association* (24 January 2013) at [12].

Detriments

- 8.23 A potential detriment from arrangements that involve collective negotiation of price can in some cases be allocative efficiency losses if there a change in output.
- 8.24 However, in the grower services market itself there is no gain or loss in allocative efficiency because no change in the quantity of services/ number of chickens produced is expected when comparing the situation under collective negotiation with the position under the counterfactual.
- 8.25 In the counterfactual even if the price paid to growers is pushed too low by Tegel, the quantity supplied to Tegel will not change. Tegel is unlikely to push prices below marginal cost – with the lower prices, growers recover operating costs but earn less on their sunk investments than they did previously. Because existing growers are still better off supplying Tegel than shutting down operations, they will continue to supply the same volume of chickens.
- 8.26 The Castalia Report considers whether there may be allocative efficiency losses in downstream retail markets for the supply of processed chicken products.
- 8.27 The Castalia Report estimates that the maximum reduction in payments per bird in the counterfactual compared with the factual is []. Castalia considers that this level of price reduction is insufficient to result in a material expansion of demand. Tegel would have little incentive to pass lower grower fees on through lower wholesale prices. If wholesale prices are not reduced then there is no scope for allocative efficiency losses in the downstream retail markets.
- 8.28 The Castalia Report concludes that any allocative efficiency losses are likely to be low (if they exist at all). The Castalia Report comments that if lower grower fees caused by individual bargaining were passed on by Tegel in the form of lower wholesale prices (which Castalia considers is unlikely) then the effect on retail prices is likely to be very small.
- 8.29 The Applicant submits that the authorisation would not result in any detriment of losses in allocative efficiency resulting from higher consumer prices for chicken.
- 8.30 The arrangements do not result in any productive efficiency losses. Instead, for the reasons discussed above, the arrangements result in significant transactional costs savings and other efficiency benefits.
- 8.31 The arrangements also do not result in any dynamic efficiency losses. Instead, existing growers are less likely to innovate with the lower prices of the counterfactual so that the arrangements are likely to produce dynamic efficiency gains. (However, the incentives payments under the Farm Management Agreement may maintain some incentive to innovate, if they survive under the counterfactual.)

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8.53 Paragraph 3.3.2 of the Castalia Report considers the question of what the factual scenario might look like if authorisation is granted. The Castalia Report concludes that Tegel is likely to negotiate directly with the Applicant if authorisation is granted. It also notes that even if Tegel does not negotiate with the Applicant, many of the public benefits of collective bargaining could still be achieved through the granting of the authorisation without Tegel necessarily being required to engage with the collective.

9. Part 8: Identification of Interested Parties

9.1 Other parties who may be interested in this application include:

- (a) other New Zealand poultry processors;
- (b) other New Zealand chicken grower industry associations;
- (c) major customers of Tegel; and
- (d) financiers of Growers.

9.2 Their details are set out below:

(a) New Zealand Poultry Processors

Name of company	Address	Contact Person	Telephone	Email
Van Den Brink Poultry Limited ('Brinks')	652 Great South Road PO Box 63-007 Manukau City 2241		0800 BRINKS	service@brinks.co.nz

Inghams Enterprises (NZ) Pty Limited	624 Waiheke Road, Rd 1, Waitoa, 3380, New Zealand	[]	[]	
Tegel Foods Limited	Level 1, 33 Broadway, Newmarket Auckland Private Bag 99927 Newmarket Auckland	[]	[]	[]

(b) Chicken Grower Industry Associations

Name of company	Address	Contact Person	Telephone	Email
The New Zealand Poultry Meat Producers Society Incorporated	Unit 4, 634 Weedons Road, Rd 8, Rolleston, Rolleston, 7678, New Zealand	John Hartnell	[]	[]
Brinks Growers Association Incorporated	1482 Great South Road, Rd 3, Drury, 2579, New Zealand	[]		[]
The Waikato-Bay of Plenty Chicken Growers Association Incorporated	126 Pyes Pa Road, Pyes Pa, Tauranga, 3112, New Zealand	[]	[]	[]

(c) Major Chicken Retailers

Type of customer	Name of company	Address	Contact Person	Telephone	Email
Supermarkets	Foodstuffs (NZ) Limited	Foodstuffs (NZ) Limited 35 Landing Drive Mangere Auckland 2022			

		Foodstuffs North Island Limited 35 Landing Drive Mangere Auckland 2022		(09) 621 0600	
		Foodstuffs South Island Limited 167 Main North Road Christchurch 8051		(03) 353 8700	enquiries@f oodstuffs- si.co.nz
	Woolworths New Zealand Limited	80 Favona Road Mangere Auckland 0622		(09) 275 2788	customerinf o@countdo wn.co.nz
Food service providers	Foodfirst Limited	Level 5 5 Short Street Newmarket Auckland		(09) 3652000	admin@foo dfirst.co.nz
	Bidfood Limited	Level 1 1 Marewa Road Greenlane Auckland 1051		0800 243 3663	
	Provida Foods	138 Wiri Station Road, Manukau, Auckland, 2104		(09) 905- 3100	sales@provi dafoods.co. nz
	Gilmours Wholesale Limited	35 Landing Drive Mangere Auckland 2022		0800 270 414	orders@gil mours.co.nz
Quick service restaurants	KFC i.e. Restaurant Brands Limited	Level 3, Building 7 Central Park 666 Great South Road Penrose Auckland 1051		(09) 525 8700	info@rbd.co .nz

	McDonalds Restaurants (New Zealand) Limited	302 Great South Road Greenlane Auckland 1051		(09) 539 4303	
	Burger King	6 Antares Place Rosedale Auckland 0632		0800 425 464	contactus@ bknz.co.nz
	Subway North Island	Level 1 8 Clyde Road Browns Bay Auckland		(09) 475 5841	
	Subway South Island	Unit 8 Building A-1 Hamill Road Longhurst Christchurch		(03) 348 0690	

(d) Financiers of Growers

Name of company	Address	Contact Person	Telephone	Email
ANZ Bank Limited	[]	[]	[]	[]
Rabobank NZ Limited	[]	[]	[]	[]
ASB Limited	[]	[]	[]	
BNZ Limited	[]	[]	[]	[]
[]	[]	[]	[]	[]

10. Part 9: Confidentiality

- 10.1 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.
 - (b) the information is subject to an obligation of confidence between each Grower and their Financiers, and to make it public would be likely to prejudice the supply of similar information or information from the same source, and it is in the public interest that such information should continue to be supplied.
- 10.2 The Applicant waives confidentiality in respect of the information highlighted in green, in respect of Tegel.
- 10.3 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.
- 10.4 This applies equally in respect of any additional information that is expressed to be confidential subsequently provided to the Commission during the course of its consideration of this application.
- 10.5 Confidential and public versions of this application have been provided to the Commission.

Declaration

I, John Hartnell, have prepared, or supervised the preparation of, this notice seeking authorisation.

To the best of my knowledge, I confirm that:

- all information specified by the Commission has been supplied
- if information has not been supplied, reasons have been included as to why the information has not been supplied
- all information known to the applicant that is relevant to the consideration of this notice has been supplied, and
- all information supplied is correct as at the date of this notice.

I undertake to advise the Commission immediately of any material change in circumstances relating to the notice.

I understand that it is an offence under the Commerce Act to attempt to deceive or knowingly mislead the Commission in respect of any matter before the Commission, including in these documents.

I am a director/officer of the New Zealand Tegel Growers Association and am duly authorised to submit this notice.

Name and title of person authorised to sign:

John Graham Hartnell
Secretary – New Zealand Tegel Growers Association

Sign:

Date: 14 September 2021

Appendix A – Commerce Commission Correspondence

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Appendix B – Farm Management Agreement

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Appendix C – First and Second Variations to Farm Management Agreement

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Appendix D - Castalia Report

Appendix E – Names and Contact Details of Regional Associations and Growers

Part 1 – Names and Contact Details of Regional Associations

Auckland Meat Chicken Growers Association Incorporated
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Canterbury Poultry Meat Producers' Association Incorporated
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Taranaki Broiler Growers Association Incorporated
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Appendix F – Map of New Zealand Processing Facilities

Appendix G – Code of Welfare: Transport Within New Zealand

Appendix H – Map of Tegel’s Operations

Appendix I – []

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Appendix K – [
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Appendix L - []
