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Commerce Commission
PO Box 2351
Wellington 6140

Dear James

NZTGA Provisional Authorisation Application - Cross-Submission

1. This cross-submission responds to:

   (a) submissions (with redactions) made by Tegel Foods Limited (**Tegel**) dated 12 October 2021 and NERA Economic Consulting (**NERA**) dated 11 October 2021 in response to the Provisional Authorisation Application submitted by the New Zealand Tegel Growers Association Incorporated (**NZTGA**)[1] (**Tegel Submission** and **NERA Submission**, respectively); and

   (b) MinterEllisonRuddWatts' (**Minters**) response to counsel-only information dated 18 October 2021 (**Minters Submission**).

Relevant history

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   (b)

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[1] The Provisional Authorisation Application was submitted by the NZTGA on behalf of itself, the Regional Associations (that is, the Auckland Meat Chicken Growers Association Incorporated, the Canterbury Poultry Meat Producers Association Incorporated and the Taranaki Broiler Growers Association Incorporated) and the current and future members of the NZTGA and the Regional Associations.

[2] [

Scope of section 65AD of the Commerce Act

4. The NZTGA disputes the submission made by Tegel that section 65AD of the Commerce Act 1986 (Commerce **Act**) is restricted to agreements that relate to or support a response to COVID-19 or its effects[3].

5. The NZTGA submits that section 65AD is clear on its face. Its wording is such that it is **not** restricted to COVID-19 related situations.

6. Tegel submits that the purpose of the COVID-19 Response (Further Management Measures) Legislation Act 2020 (**COVID-19 Legislation**) was to enable a provisional authorisation application to be made only in circumstances where the parties had been impacted by COVID-19 in some way. However, the actual wording of the relevant provisions of the Commerce Act as passed into law by Parliament does not contain any such restriction.

7. It does not matter whether a provisional authorisation application is a direct response to COVID-19, the only requirement in the Commerce Act is that the application is made "*during the epidemic period"*.[4] This is the clear wording of the legislation. Section 65AD(1) is very simple and clear in its terms:

   "*This section applies if the Commission receives an application under section 58(1) or (2) or 65AA(2) or (3) during the epidemic period*"

8. There is no limitation set out in the section as to the circumstances relevant to the application, and no restriction on the situations in which the application can be made other than the period in which it must be made.

9. Under section 65AD, a provisional authorisation application can be made *"during the epidemic period"* in respect of either:

   (a) a section 58 application (which form of application has been available since before the time of COVID-19); or

   (b) a section 65AA application.

10. The provisional authorisation can be granted by the Commerce Commission (**Commission**) for "*any reason*"[5].

11. Section 65AD(2) in full provides:

    "*The Commission may make a determination in writing granting a provisional authorisation for an application under section 58(1) or (2) or 65AA(2) or (3) if the Commission considers it is appropriate to do so-*

    (a) for the purpose of enabling due consideration to be given to the application; or

    (b) for any other reason."

12. No restriction is imposed in section 65AD(2), or elsewhere in the Commerce Act, on the circumstances in which a provisional authorisation can be granted. It would therefore be contrary to the terms of the legislation to impose any such restriction.

13. The purpose and policy of legislation must be taken primarily from the wording of legislation. That this is the correct approach to statutory interpretation has been clear for many years. The Courts will not

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3 Tegel Submission at paragraphs 3 and 4.

4 Section 65AA(2) and (3) of the Act.

5 Section 65AD(2)(b) of the Act.

rewrite the wording of legislation to achieve some perceived purpose not set out in the words of the legislation.

14. A well-known example is the House of Lords decision in the most famous of all company law cases, *Salomon v Salomon*. Section 6 of the Companies Act 1862 (UK) provided that any seven or more persons, associated for a lawful purpose, could form a limited liability company. The English Court of Appeal had held that it was contrary to the purpose of the Companies Act 1862 to incorporate a company with limited liability with seven shareholders when six shareholders (Mr Salomon's wife and children) held only one share each and were essentially nominees of Mr Salomon[6]. The House of Lords overturned the Court of Appeal judgment and held that the requirements and purpose of a provision in legislation is simply to be discerned by applying the clear terms of the legislation.

15. Relevantly, Lord Watson stated:

> *'Intention of the Legislature' is a common but very slippery phrase, which, popularly understood, may signify anything from intention embodied in positive enactment to speculative opinion as to what the Legislature probably would have meant, although there has been an omission to enact it. In a Court of Law or Equity, what the Legislature intended to be done or not to be done can only be legitimately ascertained from that which it has chosen to enact, either in express words or by reasonable and necessary implication*.[7]

16. And Lord Herschell:

> *I know of no means of ascertaining what is the intent and meaning of the Companies Act except by examining its provisions…*[8]

17. Also instructive is Kirby J's statement in the High Court of Australia in *Network Ten Pty Ltd v TCN Channel Nine Pty Ltd* that taking a purposive approach to statutory interpretation "*does not justify judicial neglect of the language of the statute, whether in preference for historical or other materials, perceived legal policy or any other reason.*"[9]

18. Further support for the proposition that a provisional authorisation application is not limited to COVID-19 related situations is found in the wording of the new provision for interim authorisations in section 65AAA of the Commerce Amendment Bill 2021 (**Amendment Bill**).

19. The proposed section 65AAA is largely in the same terms as section 65AD of the Commerce Act, with the exception that it is not limited to the duration of the *epidemic period*. Both provisions (i.e. section 65AAA of the Amendment Bill and section 65AH of the Act) therefore must have the same meaning and are not on their words limited to any particular circumstances such as COVID-19 or otherwise. If anything, section 65AD of the Commerce Act is wider than the new section 65AAA as it says that the Commission can grant a provisional authorisation "*for any other reason*"[10] which does not appear in section 65AAA.

20. If Tegel were correct in its submission, and what is key is not the wording of the legislation but some asserted purpose (unstated in the legislation but claimed by Tegel), then sections 65AD and 65AAA of the Commerce Act would apply in different circumstances despite their wording being the same.

21. That is an unacceptable approach to statutory interpretation. It would lead to great uncertainty as the public could not rely on statutory provisions meaning what they plainly say. It would also lead to more

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6 *Broderip v Salomon* [1895] 2 Ch 323 (CA) at 337 and 339 per Lindley LJ, 340-341 per Lopes LJ and 345 per Kay LJ .

7 *Salomon v Salomon* [1897] A.C 22 (HL) at 38.

8 Ibid at 45.

9 *Network Ten Pty Ltd v TCN Channel Nine Pty Ltd* (2004) 205 ALR 1 (HCA) at [87]. To similar effect is *Trust Co of Australia Ltd v Commissioner of State Revenue* (2003) 197 ALR 297 (HCA) at [68]-[69] per Kirby J.

10 Section 65AD(2)(b) of the Commerce Act.

litigation. It would result in the making of conflicting arguments that statutory provisions have different meanings based on their perceived purposes even when those purposes are not set out in the statute itself and even when the statutory provisions in question are clear on their face and unambiguous.

22. Here the only significant wording difference between sections 65AD and 65AAA relates to the time when the application is made (i.e. during the epidemic period or not). No further difference in meaning between the provisions is set out in the statute and no further difference should properly be inferred.

23. In addition, the Select Committee report on the Amendment Bill also seems to assume the ability to obtain a provisional authorisation applies simply during the *epidemic period* and sees the benefit of making the changes made by the COVID-19 Legislation permanent.[11]

24. In summary, the only requirement for a provisional authorisation to be granted is that it is made during the period of Covid. It is not necessary that the application be the result of circumstances caused by or exacerbated by the effects of Covid-19.

25. However, even if that was the case that would still be true of the current application.

Relevance of the Impact of Covid-19 on the Present Application

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[11] Commerce Amendment Bill as reported from the Economic Development, Science and Innovation Committee at pages 3-4.

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Overriding freely negotiated contractual rights

42. Tegel submits, supported by NERA, that granting the provisional authorisation would intrude on Tegel's contractual rights and is inconsistent with [ ]. In particular:

    (a) Tegel submits that *"[t]he authorisation sought is inconsistent with [ ] agreed by Tegel and the growers in the FMA*" (Tegel Submission, paragraph 7.4;

    (b) NERA contends that the growers have agreed in the FMA that they would individually [ ], and asserts as a consequence that "*authorisation by the Commission would effectively override the terms of a freely negotiated contract*" (NERA Submission, paragraphs 8 and 13).

43. However, there is in fact no intrusion on contractual rights.

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Urgency

55. At paragraph 5 of the Tegel Submission, Tegel disputes NZTGA's argument that there is an urgent need to carry out the conduct for which provisional authorisation is sought.

56. The primary need for urgency is [

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70. The granting of provisional authorisation in those circumstances can therefore be seen as essentially preserving the "*status quo*" or the previously normal position under which the parties had operated.

71. The preservation of the status quo is a factor that when present will often be relevant to a Court in deciding whether to grant or not grant interim relief.

72. The granting of provisional authorisation by the Commission is somewhat akin to the granting of interim relief by the Court. In both cases -the granting of a provisional authorisation by the Commission or the granting of interim relief by a Court- the Commission or Court is making a temporary order which allows the preservation of the position in the meantime pending the outcome of substantive decision-making by the Commission or Court.

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Benefits of Provisional Authorisation

87. Minters' Submission addresses at paragraph 5 the public benefits of provisional authorisation set out in NZTGA's application for provisional authorisation and the Castalia report dated 23 September 2021 submitted in support of the NZTGA's application for provisional authorisation (**Second Castalia Report**).

Transaction Cost Savings

88. The Second Castalia Report notes that collective bargaining would provide transaction cost savings through reducing the costs of [ ] This is discussed in detail in section 3.1 of the Second Castalia Report.

89. On the question of reduction in transaction costs, Minters at paragraphs 5.16 - 5.17 of the Minters Submission [

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96. The Second Castalia Report also addresses on pages 10-11 a second and much more important transactional cost saving of more than [ ].

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99. Accordingly, a substantial benefit from provisional authorisation is the potential savings of costs from [ ] which is more likely if collective negotiation is permitted. The Second Castalia Report concludes that total costs of more than [ ] could be avoided.

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More Efficient Contract Terms

105. The Second Castalia Report also claims (at paragraph 3.2) that collectively negotiated agreements are likely to be more efficient. With collective bargaining, growers can pool resources to fund specialist advisors and share information to develop more sophisticated and efficient contractual arrangements. This point is discussed further in paragraph 3.2 of the Second Castalia Report and in more detail in the first Castalia report dated 16 September 2021 (**First Castalia Report**).

106. Minters' response to this point is very brief [

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108. Both Castalia reports comment on the sophistication of the existing contracts and comment that this sophistication would not likely occur if contracts were individually negotiated.

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Avoidance of Wealth Transfer to Overseas Owners

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112. As Tegel's owners are overseas this effectively means that collective negotiation will likely prevent a wealth transfer from the growers to Tegel's foreign owners. Preventing that wealth transfer is a public benefit.

113. This public benefit and the case law supporting the claim of public benefit are discussed in more detail in NZTGA's application (see paragraphs 8.11-8.19).

114. At paragraphs 5.5- 5.6 of the Minters Submission, Minters suggests that a reduction in Tegel's growing costs should not be considered a wealth transfer to foreign owners.

115. However, it is exactly the sort of wealth transfer that the Courts and Commission have accepted as amounting to a public detriment or benefit (depending on whether the transfer is from New Zealanders to overseas parties or the reverse).

116. If the price for grower services is less because negotiations by growers with Tegel are individual negotiations rather than collective negotiations that is simply because *Tegel's market power is greater* in a situation where growers are required to negotiate individually. It is not because the cost of providing grower services has been reduced or because there is any innovation produced as the result of individual negotiation.

117. In a situation where it is solely because of a party's enhanced market power that there is a wealth transfer to that party (and its foreign shareholders) then that is exactly the sort of wealth transfer that amounts to a public detriment. It is equivalent to a "*functionless monopoly rent*" within the meaning of that term in the case law and Commission decisions discussed in paragraphs 8.11 to 8.19 of NZTGA's application.

118. The Castalia reports confirm that that is precisely what is occurring here.

119. Castalia notes that Tegel has greater bargaining power than the growers in all situations. However, Tegel's bargaining power/ market power is even *stronger* in the situation where growers are required to negotiate individually, and that in turn results in growers receiving lesser payments than they would under collective negotiations.

120. The transfer to Tegel (and its foreign owners) is the result purely of Tegel's greater market power, not any efficiency gain.

121. The Second Castalia Report notes:

(a) "*Collective bargaining shifts the imbalance of bargaining power by enabling growers to pool resources and engage specialised staff to negotiate with Tegel. Despite this Tegel is likely to retain significant bargaining power…*" (paragraph 2.2) In other words Tegel has significant power even in a situation where growers collectively negotiate but Tegel has even greater market power where growers negotiate individually.

(b) "*If grower payments are higher with collective bargaining than without, then any wealth transfer from Tegel to growers that results from collective bargaining constitutes a public benefit because Tegel is foreign owned.*" (paragraph 2.6)

122. These points are discussed in more detail in the First Castalia Report. See in particular paragraph 3.2 which discusses bargaining power in the relevant markets.

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Confidentiality

132. Confidentiality is requested for the information in this application that is contained in square brackets and highlighted in either yellow or green, on the basis that:

(a) the information is commercially sensitive and valuable information which is confidential to the Applicant and/or the Growers and the disclosure of which would be likely unreasonably to prejudice the commercial position of the Applicant and/or the Growers, or the person who is the subject to the information; or

(b) to make the information public would be likely to result in its disclosure or use for improper gain or advantage.

133. The Applicant waives confidentiality in respect of the information highlighted in green, in respect of Tegel.

134. 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.

135. Confidential and public versions of this cross-submission have been provided to the Commission.

Yours faithfully
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Partner

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Schedule 1 – [ ]

Schedule 2 – [ ]

Schedule 3 – [ ]