

Determination

New Zealand Tegel Growers Association Incorporated [2022] NZCC 30

The Commission:

Sue Begg
Dr Derek Johnston
Vhari McWha

Summary of application:

The New Zealand Tegel Growers Association Incorporated has applied for authorisation, on behalf of its members, to collectively negotiate with Tegel Foods Limited.

Determination:

The Commerce Commission's decision is to grant authorisation as it is satisfied that the proposed arrangements will in all the circumstances result, or be likely to result, in such a benefit to the public that the conduct should be permitted.

Date of determination:

2 August 2022

Confidential material in this report has been removed. Its location in the document is denoted by [].

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Introduction

1. On 16 September 2021, the Commerce Commission (the Commission) received an application from New Zealand Tegel Growers Association (TGA) seeking authorisation on behalf of its members to collectively negotiate the terms and conditions of its members' supply of chicken growing services to Tegel Foods Limited (Tegel) for a ten-year period (the Authorisation Application). As New Zealand is in an "epidemic period", TGA applied under section 65AA(2) and (3), and in the alternative section 58(1) and (2) of the Commerce Act 1986 (the Act).¹
2. On 30 September 2021, TGA applied to the Commission seeking provisional authorisation for the same collective negotiations outlined above, under section 65AD(2) of the Act, until the Commission declined or granted the Authorisation Application (the Provisional Authorisation). The Commission granted provisional authorisation on 19 November 2021 until the earlier of 25 March 2022 or the date determined by the operation of section 65AD(5) of the Act.²
3. On 15 March 2022 TGA sought a further provisional authorisation on the same terms through to the conclusion of the Commission's investigation in respect of the Authorisation Application. The Commission granted TGA a further provisional authorisation on 23 March 2022 until the date determined by the operation of section 65AD(5) of the Act (the Second Provisional Authorisation).³
4. TGA proposes to collectively discuss and negotiate with Tegel about the terms of, adjustments to and reviews of, and resolution of disputes arising from, its chicken growing contracts and other associated issues. The proposed arrangement for which TGA seeks authorisation is described at paragraph 26 below (the Proposed Arrangement).
5. On 13 April 2022 the Commission issued its draft determination to authorise the Proposed Arrangement for a period of ten years (Draft Determination).⁴

Determination

6. The Commission is satisfied that the Proposed Arrangement will in all the circumstances result, or be likely to result, in such a benefit to the public that it should be permitted.
7. Our view is based on our assessment of the likely benefits and detriments on the evidence available to us.

¹ The statutory timeframe in which the Commission had to complete its investigation was extended twice by agreement with TGA to 3 August 2022.

² [Provisional authorisation granted for New Zealand Tegel Growers Association to engage in collective bargaining with Tegel Foods.](#)

³ [Continuation of provisional authorisation for New Zealand Tegel Growers Association to collectively negotiate with Tegel.](#)

⁴ [Commission issues draft determination on TGA's application to engage in collective bargaining with Tegel.](#)

- 16.1 []; or
- 16.2 [].
17. During the Provisional Authorisation and Second Provisional Authorisation periods the TGA growers negotiated collectively with Tegel to [] and amend certain terms of the FMAs.
18. []:
- 18.1 [];^{8,9}
- 18.2 [];
- 18.3 [];¹⁰ and
- 18.4 []:¹¹
- []:
- (a) [];
- (b) []; and
- (c) [].
19. []:¹²
20. []:¹³

⁸ Tegel submission on Draft Determination dated 20 May 2022 at [3.6].

⁹ [].

¹⁰ []; and Email from MinterEllisonRuddWatts to Commerce Commission dated 31 March 2022 at 12:22pm.

¹¹ Tegel's submission on Draft Determination dated 20 May 2022 at [3.9].

¹²

[].

¹³ TGA's cross-submission on the Draft Determination dated 15 June 2022 at [39] and [86].

Assessment procedure

21. In making this Determination the Commission undertook a thorough investigation of the Proposed Arrangement.
22. During the course of our investigation we consulted at various stages and to that end reviewed submissions and correspondence including:
 - 22.1 the Provisional Authorisation and Authorisation Application, as well as TGA's cross-submissions dated 26 October 2021 and 23 December 2021;
 - 22.2 Van Den Brink Poultry Limited (Brinks)'s combined submission dated 7 October 2021 on the Provisional Authorisation and Authorisation Application;
 - 22.3 Tegel's submissions dated 12 October 2021 in response to the Provisional Authorisation and dated 5 November 2021 in response to the Authorisation Application;
 - 22.4 information received from TGA and Tegel about their negotiations pursuant to the provisional authorisations;
 - 22.5 Tegel's submissions dated 20 May 2022 and 6 July 2022 in response to the Draft Determination;
 - 22.6 TGA's cross-submissions in response to the Draft Determination dated 15 and 27 June 2022;
 - 22.7 Tegel's cross-submissions dated 5 and 6 July 2022 in response to the Draft Determination and TGA's reply dated 27 July 2022; and
 - 22.8 a submission from a submitter the Commission granted anonymity to.
23. Each of TGA and Tegel's submissions were accompanied by expert economic reports. Tegel instructed the economic consultancy NERA and TGA instructed Castalia and Link Economics. We refer to their economic findings as those of Tegel and TGA respectively.
24. We have also interviewed and received information from various interested parties during the stages of our authorisation process (eg, pursuant to voluntary requests for information and unsolicited submissions from affected parties (including Tegel and TGA)).¹⁴
25. Tegel and Brinks both opposed the Authorisation Application in their written submissions.

¹⁴ Public versions of TGA's application documents, parties' submissions and the Commission's Statement of Preliminary Issues (SOPI) can be accessed on our [case register](#).

Proposed Arrangement

26. TGA seeks for itself, the Regional Associations, and the growers, together with future growers, authorisation to:
- 26.1 collectively discuss and negotiate with Tegel:
 - 26.1.1 growing fees and other terms and conditions of chicken growing contracts;
 - 26.1.2 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
 - 26.1.3 resolution of disputes which from time to time arise under chicken growing contracts or otherwise arise between Tegel and a grower or growers;
 - 26.2 discuss amongst themselves matters relating to growers' discussions and negotiations with Tegel (whether collective or otherwise) on the matters referred to above;
 - 26.3 without limiting paragraph 26.2 above, exchange information between themselves concerning growers' discussions and negotiations with Tegel (whether collective or otherwise) on the matters referred to at paragraph 26.1 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;
 - 26.4 enter into agreements collectively negotiated between Tegel and TGA (or a Regional Association) and/or negotiated between Tegel and the growers containing common terms, relating to the matters described at paragraph 26.1 above; and
 - 26.5 give effect to agreements collectively negotiated between Tegel and TGA (or a Regional Association) and/or negotiated between Tegel and the growers containing common terms, relating to the matters described at paragraph 26.1 above, including provisions:
 - 26.5.1 setting growing fees;
 - 26.5.2 providing for the adjustment or review of growing fees; and
 - 26.5.3 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.
27. Together, the Commission refers to the above behaviour as the Proposed Arrangement.

28. TGA states that chicken growers may choose not to participate in collective negotiations and will be free to negotiate with Tegel individually, and as such have not previously engaged in a collective boycott.¹⁵
29. The Commission is not authorising any persons to engage in a collective boycott. A collective boycott includes but is not limited to any collective refusal to supply, or acquire goods or services to or from any person.

How we assess authorisations during an ‘epidemic period’

Statutory framework

30. A three-stage assessment is undertaken in any authorisation application under ss 65AA and 58 of the Act:¹⁶
- 30.1 First, confirming:
- 30.1.1 for s 58 applications, whether the applicant believes s 27 might apply to the agreement; or
- 30.1.2 for s 65AA applications, whether the applicant believes the agreement may contain a cartel provision;¹⁷
- 30.2 second, establishing whether the Commission has jurisdiction to authorise under s 61(6) (the ‘jurisdictional threshold’), and in addition, for s 65AA applications, whether the application has been made during the epidemic period;¹⁸
- 30.3 third, assessing whether the associated benefits mean that authorisation should be granted (the ‘public benefit test’).
31. The first stage of the assessment is generally assessed at the time the application is registered. We note TGA states at 2.13 of the Authorisation Application that it believes the Proposed Arrangement may contain a cartel provision or might breach s 27.

Jurisdictional threshold

32. The Commission has jurisdiction to grant an authorisation under s 58 only for arrangements that will, or are likely to, lessen competition. This is called the ‘competition threshold’. The competition threshold arises from the s 61(6) test which requires a “lessening in competition that would result, or would be likely to result” from the arrangement.

¹⁵ TGA’s cross-submission dated 26 October 2021 sets out at [75]
[

].

¹⁶ See generally our [Authorisation Guidelines, December 2020 \(Authorisation Guidelines\)](#).

¹⁷ Sections 58(1) and (2) and ss 65AA(1) and (2).

¹⁸ Noting that, in respect of section 65AA applications, s 61(6) is modified by s 65AB(3).

33. Usually, the Commission can only authorise cartel provisions to which s 27 would also apply, because s 58 does not make any express reference to cartel provisions. However, during the epidemic period, a person can also apply for authorisation under s 65AA of an arrangement containing a cartel provision.¹⁹
34. For the purposes of s 65AA, s 61(6) and the competition threshold are replaced by s 65AB(3) and (4). The Commission will have jurisdiction to grant authorisation under s 65AA if the application is made during the epidemic period,²⁰ and the Commission has reasonable grounds to believe the arrangement might contain a cartel provision. It is not necessary for the Commission to determine whether a provision is in fact a cartel provision.²¹

Public benefit test

35. Although the jurisdictional thresholds differ under ss 65AA and 58, the public benefit test is the same.²²
- 35.1 In relation to s 65AA, the Commission can authorise an arrangement that contains (or on reasonable grounds we believe might contain) a cartel provision if it is satisfied that the arrangement will in all the circumstances result, or be likely to result, in such a benefit to the public that it should be permitted.²³
- 35.2 In relation to s 58, the Commission can authorise an arrangement that may lessen competition if it is satisfied that the arrangement will be likely to result in a benefit to the public that would outweigh the lessening of competition.²⁴
36. While stated differently, there is no material difference between the two assessments of public benefit.²⁵
37. In each case the Commission needs to investigate the nature, likelihood and magnitude of any detriments and benefits that might arise from the proposed arrangement.²⁶

¹⁹ Our process for determining s 65AA applications, and applications under s 58 made during the epidemic period, is explained in our [Guidelines on Approach to Authorisations under the COVID-19 Response \(Further Management Measures\) Legislation Act](#) (COVID-19 Guidelines).

²⁰ Sections 65AA(2) and (3).

²¹ Section 65AB(4) of the Act.

²² COVID-19 Guidelines at [36].

²³ Sections 65AB(3) and (4) of the Act.

²⁴ Section 61(6) of the Act.

²⁵ COVID-19 Guidelines at [38]. See also *Air New Zealand and Qantas Airways Limited v Commerce Commission* (2004) 11 TCLR 347 (HC) at [33] and *Godfrey Hirst NZ Ltd v Commerce Commission* (2011) 9 NZBLC 103,396 (HC) at [88]-[90] where the two assessments of the public benefit test in relation to the authorisation of mergers and agreements generally were described as substantially the same.

²⁶ COVID-19 Guidelines at [38].

38. The detriments and benefits must arise from the proposed arrangement for which authorisation is sought.²⁷ To determine whether the detriments and benefits are specific to the proposed arrangement, we assess, in relation to a relevant market(s):
- 38.1 what is likely to occur in the future without the arrangement (the counterfactual);
 - 38.2 what is likely to occur in the future with the arrangement (the factual); and
 - 38.3 once identified, we then assess all likely detriments and benefits relevant to our assessment of the arrangement.²⁸
39. As a general principle, detriments and benefits will be considered likely if there is a “real and substantial risk” or “real chance” that they will happen if the arrangement proceeds.²⁹

Jurisdiction

Section 65AA – Has the Commission received an application during the epidemic period?

40. Section 65AA requires that the Commission receives an application during the epidemic period (and that the Commission believes on reasonable grounds the arrangement might contain a cartel provision). Given the application has been made during the epidemic period, the Commission considers that threshold has been met.
41. However, Tegel submits that: “It is self-evident from this history and context that the Authorisation Application does not relate to or support a response to COVID-19, and therefore authorisation cannot be granted under s 65AA(2) and (3).” Tegel refers to its submissions in relation to the Provisional Authorisation in support.³⁰
42. For the reasons set out in our Draft Determination we do not consider it appropriate to ‘read in’ any additional requirements to the plain wording of ss 65AA – 65AD.³¹
43. We note the Commerce Amendment Bill 2021 has passed into law as the Commerce Amendment Act 2022.³² Because the Commerce Amendment Act commenced in part before this determination, we have also considered whether our view should be different with the amendments to the Act effected by the Commerce Amendment Act 2022.
44. Our view has not changed given:
- 44.1 the amendment to s 65AA(1)(b), triggering its repeal at a time potentially earlier than s 65AE, would not occur until section 31 of the Commerce

²⁷ Authorisation Guidelines at [39].

²⁸ *NZME Ltd v Commerce Commission* [2018] 3 NZLR 715 (CA) at [83] and [86(a)].

²⁹ *Ibid.*

³⁰ Tegel Submission on the SOPI dated 5 November 2021 at [2.5] of section 2.

³¹ See Draft Determination at [37].

³² The Bill received Royal assent on 5 April 2022.

Amendment Act 2022 commences on the first anniversary of when Royal assent was given, being 5 April 2023;³³

- 44.2 the same amendments will not change the effect of Schedule 1AA, Part 3, subclause 12 of the Act in this case given they do not commence until 5 October 2022. That, for the purposes of an application made during the epidemic period, ss 65AA – AD continue to apply as if they remained in force despite their repeal; and
- 44.3 while it is generally accepted enacted provisions can be taken into account when interpreting legislation,³⁴ the general replacement of the ss 65AA – AD powers, which are tied to the epidemic period, with similar powers not tied to the epidemic period, does not in itself give rise to any reason to change our interpretation of the s 65AA power above.

Section 65AA – Does the Proposed Arrangement contain a cartel provision?

45. Any agreement between TGA, its members and Tegel will be a contract containing provisions.
46. We consider there are reasonable grounds to believe that:
- 46.1 as some of those provisions intend to set the price of chicken growing services; and
- 46.2 but for any arrangement those services are supplied to Tegel by growers in competition with each other,

those provisions might have the effect of fixing, controlling or maintaining price or restricting output. Therefore, there are reasonable grounds to believe that the Proposed Arrangement might contain a cartel provision.

Section 58 – Will the Proposed Arrangement lessen competition?

47. With the Proposed Arrangement TGA submits it would seek to collectively negotiate the relevant fees and charges that TGA could agree with Tegel on behalf of its members. TGA also submits collective negotiation of non-price terms that are of competitive significance may also lessen competition.
48. We consider that, when compared to individually negotiated supply contracts, collective bargaining would have the potential to raise the (quality adjusted) price paid by Tegel for chicken growing services and standardise non-price terms amongst the growers. Therefore, we agree with TGA that the Proposed Arrangement may lessen competition.³⁵

³³ Commerce Amendment Act 2022, s 2. The power to grant interim authorisations under s 65AAA commenced on 5 May 2022 (one month after the Bill received Royal assent) but as noted above this does not immediately trigger the repeal of s 65AA.

³⁴ *Burrows and Carter Statute Law in New Zealand*, 6th Edition, LexisNexis 2021 at [791 – 804].

³⁵ Authorisation Application at [2.20]. It is not necessary for any lessening to be substantial, see s (6A).

Authorisation of agreements with Tegel

49. In addition to taking part in collective negotiations, the Proposed Arrangement (described at paragraph 26 above) would permit growers to enter into and give effect to agreements with Tegel that result from those negotiations.
50. In part 2 of Tegel’s submission on the Draft Determination³⁶ Tegel submits:
- The Commission cannot give a “blank cheque” authorisation for the applicant to enter into contracts that have not yet been negotiated or to give effect to provisions which have not yet been drafted.
51. Rather, Tegel submits that any contract that results from authorised collective negotiations would need to be independently authorised.³⁷ Tegel’s position is that the public benefit assessment cannot be carried out for a contract that does not yet exist.³⁸
52. The Commission disagrees.
53. The Commission can authorise any contract, arrangement or understanding which it considers is likely to result in a benefit to the public.³⁹ In this case, the Proposed Arrangement for which authorisation is sought envisages entering into and giving effect to contracts which do not exist yet, but which are to be collectively negotiated.
54. The Act does not on a plain reading prevent the authorisation of an arrangement which includes entering into and giving effect to future contracts. The Commission does not believe it would be appropriate to read in such a limitation as it would limit the extent of potentially beneficial arrangements that can be authorised.
55. Rather, it is the applicant who chooses for what authorisation is sought. The proposed arrangement may be specific or it may leave open the possibility of development and evolution. An arrangement which leaves open how it will develop in the future may create an obstacle for the applicant since the applicant bears a practical burden of persuasion over its merits.⁴⁰ However, we do not see this as a limit on what may in principle be authorised.
56. The authorisation of contracts that may result from collective bargaining is not new. The Proposed Arrangement includes entering into and giving effect to such contracts

³⁶ Dated 20 May 2022.

³⁷ Tegel submission on the Draft Determination dated 20 May 2022 at [8.4] of Part 2.

³⁸ *Ibid.*

³⁹ Section 61(6) of the Act.

⁴⁰ See *NZME Ltd v Commerce Commission* [2018] 3 NZLR 715 (CA) at [86(b)]. We note uncertainty is not necessarily deleterious to the applicant - a contract, arrangement or understanding of broader discretion may give rise to greater potential benefits than one that is tightly constrained.

in similar terms to other collective negotiations that have been approved by the Commission and the ACCC.⁴¹

57. While we cannot predict the specific future terms that may be agreed through collective negotiation between TGA and Tegel, we do not consider this to be a 'blank cheque'. The Proposed Arrangement constrains the scope of authorisation to matters connected with growing chickens. While the potential specific provisions chicken growers and Tegel might enter into are numerous, these ultimately relate to commercially negotiated aspects regarding the price, quality, and volume of chicken growing services, which we have assessed.

Relevant markets

TGA's submissions

58. TGA submits that the relevant markets are:⁴²
- 58.1 Regional markets for broiler chicken growing services in each of the greater Auckland, Canterbury, and Taranaki regions. In support of its characterisation of the relevant markets, TGA cites animal welfare requirements for the transport of chickens,⁴³ the Waikato – Bay of Plenty Authorisation Determination,⁴⁴ and the Tegel Foods Authorisation Determination⁴⁵ in which the Commission has defined regional markets, and the specialised capital investment required to provide chicken growing services.
- 58.2 One or more markets for the wholesale supply of primary and secondary processed chicken products. In support of this definition, TGA references the Commission's conclusions in the Tegel Foods Authorisation Determination.

Our assessment

59. We consider that the relevant markets are the regional markets for both free-range and barn-raised chicken growing services in the greater Auckland, Canterbury, and Taranaki regions:
- 59.1 Animal welfare requirements limit the distance a grower's farm can be located from the processing plant it supplies. The Code of Welfare limits the transport of animals to "the shortest possible time".⁴⁶ The Society for the Prevention of Cruelty to Animals (SPCA) standards limit this duration so that "the time between the loading of the last bird, to the time of arrival at the

⁴¹ See *Waikato-Bay of Plenty Chicken Growers Association Incorporated* [2017] NZCC [37]; and Victorian Farmers Federation Authorisation Determination A91534 (16 June 2016); NZW Farmers' Association Authorisation Determination A91417 (25 June 2014); Queensland Chicken Growers Association Incorporated Authorisation Determination A91347 (24 January 2013); and South Australian Inghams Chicken Growers Authorisation Determination A91294 (14 June 2012) for recent Australian examples.

⁴² Tegel has not opposed these proposed relevant markets.

⁴³ Code of Welfare: Transport within New Zealand at section [4.1].

⁴⁴ *Waikato-Bay of Plenty Chicken Growers Association Incorporated* [2017] NZCC [37].

⁴⁵ See *Tegel Foods Limited and Brinks Group of Companies* (Commerce Commission Decision 658, 2008).

⁴⁶ Code of Welfare: Transport within New Zealand at section [4.1].

final destination, must be less than two hours”.⁴⁷ Supplementing TGA’s submissions on this point, the Commission heard at interview that the duration of travel limits growers’ ability to supply a processor located in another region.⁴⁸

59.2 The locations of farms currently supplying Tegel confirm that growers are located within a two-hour radius of Tegel’s processing facilities.⁴⁹

59.3 In the Waikato - Bay of Plenty Authorisation Determination, the Commission determined that specialised shedding and equipment for chicken growing services places it in a discrete market from other forms of farming.⁵⁰ The Determination further identified that growing free-range and barn-raised chickens are suitably similar to be included in the same market. This view was supported by a chicken processor who indicated that there are not large barriers to growers who wish to switch from barn-raised to free-range.⁵¹

60. The Commission further considers that there are downstream markets for the wholesale supply of chicken products. Our view is that there are likely to be separate product markets for the wholesale supply of primary and secondary processed chicken.^{52, 53} There may also be separate geographic markets for the North and South Islands in relation to primary processed chicken because of the cost and potential delays associated with transporting these products across the Cook Strait. As a precise definition of the relevant downstream markets is not required for our analysis, we have not sought to define these.

With and without the Proposed Arrangement

61. In reaching our view below we have considered all submissions and evidence received on the likely situations that would arise with and without authorisation being granted for the Proposed Arrangement.

The situation with the Proposed Arrangement

TGA’s submissions

62. TGA submits that if the Commission grants authorisation it would engage in the Proposed Arrangement – ie, it would engage in collective negotiations with Tegel as submitted.

⁴⁷ SPCA Certified Standards for Free Range Meat Chickens (version 1.1 – 2021) at [E64].

⁴⁸ Commerce Commission interview with Inghams (29 November 2021).

⁴⁹ See Appendix H of the Authorisation Application.

⁵⁰ See *Waikato-Bay of Plenty Chicken Growers Association Incorporated* [2017] NZCC [37] at [35.4].

⁵¹ Commerce Commission interview with Inghams (29 November 2021).

⁵² Primary processed chicken might include both whole birds and basic cuts (eg, breast, thigh, drumstick). Secondary processed chicken might include value-added products (eg, nuggets, burgers, skewers).

⁵³ This is consistent with a previous Commission Determination in which there was little supply-side or demand-side substitution between primary and secondary processed chicken. See *Tegel Foods Limited and Brinks Group of Companies* (Commerce Commission Decision 658, 2008) at [84].

63. TGA further submits that if Tegel chooses not to negotiate with TGA, the growers would discuss their positions as a collective before negotiating individually with Tegel.⁵⁴ In that way, TGA says, many of the benefits of the Proposed Arrangement (or similar benefits) are likely even if Tegel negotiates with growers individually.⁵⁵
64. TGA refers to these two scenarios in the situation with the Proposed Arrangement as Factual 1 and Factual 2 respectively.⁵⁶
- 64.1 According to TGA the FMAs would largely remain in place under Factual 1, and it speculates that some payment terms and terms unclear in their application are likely to be amended or removed [].⁵⁷
- 64.2 Under Factual 2, TGA anticipates similar outcomes to Factual 1.⁵⁸
65. For the purpose of TGA’s analysis of the Proposed Arrangement’s likely benefits and detriments in the scenario where the Commission approves the Authorisation Application, TGA adopts Factual 1.
66. [].⁵⁹ [].⁶⁰
[].⁶¹

Tegel’s submissions

67. Tegel disputes TGA’s submitted Factual 1 and Factual 2.
68. In October 2021 – shortly after the Commission registered TGA’s Authorisation Application – [].⁶²
- 68.1 [].⁶³
- 68.2 [].⁶⁴

⁵⁴ Authorisation Application at [1.25] and [8.3(g)].

⁵⁵ *Ibid.*

⁵⁶ Appendix D of the Authorisation Application at [3.4.1].

⁵⁷ *Ibid.* In its submission on the Draft Determination dated 15 June 2022 TGA describes some of the interpretational difficulties surrounding the [] from its perspective at [36].

⁵⁸ Appendix D of the Authorisation Application at [3.4.1].

⁵⁹ TGA’s cross-submission dated 23 December 2021 at [33].

⁶⁰ *Ibid.*

⁶¹ *Ibid* at [35].

⁶² Tegel’ submission in response to TGA’s Provisional Authorisation dated 12 October 2021 at [4.1].

⁶³ *Ibid* at [7.6].

⁶⁴ Tegel’s submission in response to the SOPI dated 5 November 2021 at [6.5].

69. Tegel’s submissions regarding the situation with the Proposed Arrangement are not, however, limited to []. It submits more broadly on the FMAs [].
70. According to Tegel:
- 70.1 []; and
- 70.2 as far as [] are concerned, it would continue to consult with TGA (which, it submits, falls within the scope of a ‘collaborative activity’ between Tegel and the growers).^{65, 66, 67}
71. [].⁶⁸

Our assessment

72. We consider it is likely negotiations seeking [],⁶⁹ and ultimately variations to the FMAs,⁷⁰ would continue on a collective basis with the Proposed Arrangement – ie, TGA’s submitted Factual 1.⁷¹
73. We also consider such negotiations are likely to result in an agreement, although the precise terms of any resulting agreement are unclear to us on the available evidence.
74. First, evidence preceding and following the Commission’s grant of provisional authorisation is not consistent with Tegel’s submissions. Tegel has historically and more recently collectively negotiated with TGA despite its various submissions.
- 74.1 We note in one of its submissions on the Provisional Authorisation Tegel said [].⁷²

⁶⁵ *Ibid* at [6.5] to [6.7].

⁶⁶ Tegel’s submission in response to TGA’s Provisional Authorisation dated 30 September 2021 at [5.9].

⁶⁷ We do not express any view on the existence or otherwise of a collaborative activity between Tegel and the growers in this Determination.

⁶⁸ [].

⁶⁹

[].

⁷⁰ Or to facilitate the conclusion of new agreements largely reflecting the current terms of the FMAs.

⁷¹ In addition to our finding on the likely factual, we note that there is authority for the position that, where authorisation is sought to collectively negotiate, it should be assumed that the party to be negotiated with will participate: see *Application by Port of Newcastle Operations Pty Limited (No 2)* [2022] ACompT 1 at [43]-[52]. This is because collective negotiation, involving participation by the relevant counterparty, is the conduct for which authorisation is sought.

⁷² Tegel’s submission in response to TGA’s Provisional Authorisation dated 30 September 2021 at [2.16].

74.2 During collective [] negotiations with TGA after the Commission's grant of the Provisional Authorisation and prior to the Second Provisional Authorisation:

74.2.1 [].⁷³

74.2.2 Tegel participated in [] collective negotiations with TGA.

75. Second, as discussed above, Tegel and the TGA [].

76. Lastly, we remain of the view expressed in the Provisional Authorisation that the parties are likely to enter into an agreement given:

76.1 The parties are in a 'symbiotic relationship': the growers are vested in Tegel's financial wellbeing and vice versa.
[].

76.2 [],⁷⁴
[].⁷⁵

76.3 the FMAs play an important role in the parties' operations, such that when there is uncertainty (or a dispute) the operation of the parties' businesses is affected. It is in the long-term interest of all the parties that their businesses operate smoothly.

76.4 And in relation to Tegel and TGA's ongoing negotiations [], we note parties have an incentive to reach an agreement in a manner that best limits their exposure to costs.

77. We also assessed TGA's Factual 2. In our view Factual 2 is not a likely situation with the Proposed Arrangement.

⁷³ Letter from Lane Neave to MinterEllisonRuddWatts dated 25 November 2021 at [1].

⁷⁴ Discussed below in our assessment of the likely benefits and detriments of the Proposed Arrangement.

⁷⁵ We note, by way of example, the following remarks made by Tegel at interview (Commerce Commission interview with Tegel (7 December 2021)):

[

].

78. Given the evidence before us we consider the probability that Tegel would not participate in collective negotiations – for the duration of the period authorisation is granted – is so low that we can exclude the real chance that Tegel would not do so.

78.1 Following provisional authorisation the parties collectively negotiated as contemplated by Factual 1; [].

78.2 We consider the reasons given above establishing the real chance of Tegel engaging in collective negotiations in fact support a much higher probability that Tegel would continue to collectively negotiate.

78.3 We believe Tegel's incentives to engage in collective negotiations with TGA are not likely to change during the period for which authorisation is granted.

78.3.1 As mentioned in paragraph 76, Tegel and the growers share a mutually beneficial relationship in which the parties are financially incentivised to cooperate in their commercial dealings. This is not likely to change with the Proposed Arrangement during the period of authorisation.

78.3.2 Based on the nature of the parties' relationship, and the terms of the FMAs that are seemingly in need of amendment now and potentially in future to respond to new regulation, we assess the parties' financial incentives mean we can exclude the real chance that Tegel would not engage in collective negotiations during the period of authorisation.⁷⁶

78.3.3 Our reasoning is informed by []. As set out at paragraph 18, [].

78.3.4 It is instructive that Tegel has advised TGA [] that:

(a) []; and

(b) [].⁷⁷

79. For these reasons we do not believe Factual 2 is a likely situation with the Proposed Arrangement.

⁷⁶ Which would otherwise risk the smooth operation of the parties' businesses and increase their exposure to transaction costs.

⁷⁷ At [4] of Annex 3 of Tegel's submission on the Draft Determination dated 6 July 2022.

The situation without the Proposed Arrangement

TGA's submissions

80. TGA submits the FMAs are complex [] contracts that necessitate ongoing negotiations between Tegel and the growers regarding the suitability of the terms of these contracts.⁷⁸ Such negotiations have, TGA notes, in the past resulted in amendments to the FMAs.⁷⁹
81. Because of the complexity [] of the FMAs, TGA considers that absent authorisation, [].⁸⁰
82. Other factors according to TGA that might necessitate changes to the FMAs include changes to:
- 82.1 economic and trading conditions;
 - 82.2 customer preferences or requirements;
 - 82.3 Tegel's shed standards; and
 - 82.4 animal welfare requirements,
- all of which would, in TGA's submission, be costly through individual negotiations.⁸¹
83. As a result, TGA says "simpler", [] contracts would result without the Proposed Arrangement.⁸²
84. Therefore, as regards the likely situation without the Proposed Arrangement, TGA submits:
- 84.1 the FMAs are unlikely to continue beyond the short to medium term []; and
 - 84.2 the FMAs are likely to be replaced by simpler, [] contracts that are negotiated with each grower based on a standard short form template.⁸³

Tegel's submissions

85. Tegel disputes the situation TGA considers likely without the Proposed Arrangement.

⁷⁸ Authorisation Application at [5.1].

⁷⁹ *Ibid* at [5.6].

⁸⁰ *Ibid* at [5.11]. In its submission on the Draft Determination dated 15 June 2022 TGA notes at [38] many of the issues related to [] are likely to arise again [].

⁸¹ *Ibid* at [5.8].

⁸² The Commission understands this to mean contracts that are less nuanced and less efficient compared to Factual 1.

⁸³ TGA's cross-submission dated 23 December 2021 at [41].

86. Tegel submits that without the Proposed Arrangement the FMAs would continue in force in accordance with their terms until expiry, unless a grower agrees to a variation.⁸⁴
- 86.1 Tegel submits further, if a grower agrees to vary its FMA the variation would be individually negotiated.⁸⁵
- 86.2 Tegel considers such variations unlikely, however, for two reasons.⁸⁶ First, Tegel has no ability to compel the growers to agree to variations of the FMAs. And second, the growers generally have no incentive to [].
87. Therefore, Tegel submits, growers are likely to negotiate on an individual basis as an alternative to the Proposed Arrangement, but only to the extent that renegotiations are required.⁸⁷
88. Tegel notes such individual negotiations are [].⁸⁸

Our assessment

89. Without the Proposed Arrangement the growers and Tegel would have no choice but to negotiate individually. By adhering to the FMAs without authorisation the parties would continue to give effect to provisions that may fix the price of chicken growing services to Tegel. Such provisions in the FMAs would be unenforceable under s 30C of the Act.
90. As the nature of the contracts in the counterfactual has some bearing on the benefits and detriments of the Proposed Arrangement, we consider the following scenarios are likely:
- 90.1 In the short term, we agree with Tegel's submissions that the contracts are likely to closely reflect the existing FMAs, albeit with minor but important variations [].⁸⁹ This is supported by [] practical considerations given the contractual uncertainty which would result if authorisation is declined.

⁸⁴ Tegel submission in response to the SOPI dated 5 November 2021 at [7.4].

⁸⁵ *Ibid.*

⁸⁶ *Ibid* at [7.7] and [7.13].

⁸⁷ Report by NERA dated 5 November 2021 at [8].

⁸⁸ Tegel's submission in response to the SOPI dated 5 November 2021 at [7.8].

⁸⁹

[

]; see Tegel's submission in response to the SOPI dated 8 October 2021 at Appendix 1 – Variation of Agreement.

[

]; see Commerce Commission Interview with [].

90.2 However, in the long term, we consider it most likely that these contracts would become increasingly divergent variations on the existing FMAs. Nevertheless, it is also likely that they are replaced by standard form, less efficient contracts as submitted by TGA, depending on the respective bargaining position of the parties in the future.

Our assessment of benefits and detriments

General observations

91. The Commission will grant authorisation if it is satisfied, on the evidence before it, that the proposed conduct will result, or will be likely to result, in a benefit to the public that would outweigh the lessening in competition and/or effect of any cartel provision.⁹⁰ In making this assessment, the Commission considers the quality of the evidence and makes judgements about how much weight to give to the evidence.
92. In *Godfrey Hirst*, the Court of Appeal observed that the Commission must consider a broad range of benefits and detriments in applications for authorisation. This may include efficiencies and non-economic factors.⁹¹
93. In particular, the Court of Appeal indicated that the Commission must have regard to efficiencies when weighed together with long-term benefits to consumers, the promotion of competition, and any economic and non-economic public benefits. The Court stated that “[w]here possible these elements should be quantified; but the Commission and the courts cannot be compelled to perform quantitative analysis of qualitative variables.”⁹²
94. The Commission’s approach is to quantify benefits and detriments to the extent that it is practicable to do so.⁹³ Regarding the weight that can be given to qualitative factors, the Court of Appeal said in *Godfrey Hirst* that “[q]ualitative factors can be given independent and, where appropriate, decisive weight”.⁹⁴
95. The Court of Appeal in *NZME* confirmed that the Act allows the Commission to apply a ‘modified total welfare’ approach but does not require us to do so. A modified total welfare approach can take into account the distributional effects of benefits and detriments within a community. In this case, no party has proposed to depart from the total welfare approach and the Commission does not propose to do so of its own motion given that it does not appear that it would affect our decision to grant authorisation.⁹⁵

⁹⁰ Authorisation Guidelines at [14.2]; and Covid-19 Guidelines at [36.1].

⁹¹ *Godfrey Hirst NZ Ltd v Commerce Commission* [2016] NZCA 560 (CA) at [24] and [31] (*Godfrey Hirst*).

⁹² *Godfrey Hirst* at [36].

⁹³ *Telecom Corporation of New Zealand Ltd v Commerce Commission* [1992] 3 NZLR 429 (CA) (AMPS-A CA) at 447; *Air New Zealand* at [319]; and *Ravensdown Corporation Ltd v Commerce Commission* High Court, Wellington API68/96 (16 December 1996) at [47] to [48].

⁹⁴ *Godfrey Hirst* at [38].

⁹⁵ *NZME Ltd v Commerce Commission* [2018] 3 NZLR 715 (CA) at [75]; and see Authorisation Guidelines at [84].

96. In general, collective bargaining has the potential to cause both public benefits and detriments. Collective bargaining can reduce the costs of negotiating contracts by reducing the number of negotiations and by allowing advisory costs to be shared.⁹⁶ Collective bargaining may also enable access to higher quality advice through the pooling of member's resources. It can also change incentives to obtain mutually beneficial gains from trade by allowing information to be shared and by rebalancing bargaining power. Consequently, collectively negotiated contracts may be more efficient in the sense that they are more nuanced and take account of more contingencies than might be the case if negotiated individually.
97. Detriments arise if a market experiences a loss in allocative, productive or dynamic efficiency, in this case within the relevant regional markets for chicken growing services.
- 97.1 Allocative efficiency is lost when inefficient (higher) prices result in less preferred alternatives for consumers or to the purchase of smaller quantities by consumers.
- 97.2 Productive efficiency is lost when resources are inefficiently employed in production, typically increasing costs above efficient levels. Consequently, costs or unit costs may increase, and capacity may be sub-optimally used.
- 97.3 Dynamic efficiency is typically lost when the incentive or the ability to innovate/invest is reduced.

Applying the public benefit test where benefits and detriments have occurred under provisional authorisation

98. In the course of assessing TGA's application to authorise the Proposed Arrangement, the Commission determined that the Proposed Arrangement should be provisionally authorised under section 65AD(2). This is reflected in the Provisional Authorisation dated 19 November 2021 and the Second Provisional Authorisation dated 23 March 2022.
99. As a result, the parties have already engaged in collective bargaining under the Proposed Arrangement. That activity has realised some of the potential benefits we identified were likely to occur when provisional authorisation was granted.
[].
100. Tegel has submitted that benefits arising under provisional authorisation before this final determination must be discarded:⁹⁷
[]. As the Commission rightly observes, benefits of collective bargaining prior to authorisation being granted cannot be counted as a benefit of the authorisation.

⁹⁶ Stephen King (2013) Collective Bargaining by Business: Economic and Legal Implications. *UNSW Law Journal*, 36(1), [107] – [138].

⁹⁷ Tegel's submission on the Draft Determination dated 20 May 2022 at [6.2].

101. We understand Tegel’s position to be that in the final balancing exercise for a full authorisation, the Commission can only consider future benefits and detriments. Accordingly, where a provisional authorisation brings forward the benefits of the arrangement (or realises benefits that would otherwise be unavailable), then those benefits should not be counted when considering the final determination.
102. The Commission disagrees.
103. In making its final determination for a full authorisation, the Commission is directed by section 61(6) to consider whether the conduct to which the authorisation application relates will in all the circumstances result, or be likely to result, in such a benefit to the public that it should be permitted despite the contravention (or potential contravention) of the Act.⁹⁸
104. In the present case, we consider that the benefits of collective bargaining during the period of provisional authorisation [] were clearly related to the conduct for which authorisation was sought and should be included in our assessment even though they are in the past and will not be affected by our final determination.
105. Provisional authorisation (or interim authorisation under s 65AAA) allows the participants to realise some of the potential benefits of authorisation while the Commission considers the matter fully.⁹⁹ It also assists the Commission to determine the full authorisation, in light of what has occurred during the provisional authorisation.
106. We are concerned that Tegel’s approach might disincentivise parties from entering into, or giving effect to, provisionally authorised conduct out of concern that the benefits arising from that conduct would not be counted and full authorisation not granted as a result. We consider that this would be inconsistent with the statutory purpose of provisional authorisation which is to allow those benefits to the public to be realised at any early stage.
107. We consider that our approach is consistent with our usual application of the factual and counterfactual. Our Authorisation Guidelines follow the test laid down by the High Court in *Godfrey Hirst NZ Ltd v Commerce Commission (No. 1)* (notwithstanding that case concerned an acquisition of a business, not an authorisation of an arrangement):¹⁰⁰

⁹⁸ See also section 65AB(3).

⁹⁹ Section 65AD(2).

¹⁰⁰ *Godfrey Hirst NZ Ltd v Commerce Commission* (2011) 9 NZBLC 103,396 (HC) at [119]. In its reasoning, the High Court in *Godfrey Hirst (No. 1)* cited *Areeda and Hovenkamp* (emphasis of the Court): “An efficiency is said to be ‘merger specific’ if it is a unique consequence of the merger – that is, if it could not readily be attained by other means or if the social cost of attaining it by other means is at least as high as the social cost of the merger. As a general proposition, the efficiency defence requires a showing that claimed efficiencies are ‘merger specific’.” The Court went on to say: “We agree that there is a need to consider only merger-specific efficiencies. A proper assessment of the factual as against the counterfactual should be doing just that...”. See also *NZME Ltd v Commerce Commission* [2018] 3 NZLR 715 (CA) at [86(d)].

It is well understood that any claimed public benefits must be causally connected to the proposed acquisition. That is to say, an applicant claiming public benefits (usually efficiencies) must show that they are public benefits that are likely to arise from the proposed acquisition (the factual) and that they would not be likely to occur if the acquisition does not proceed (the counterfactual)...

108. In our view, a proper assessment of the factual against the counterfactual where benefits and detriments have arisen following provisional authorisation does not exclude the counting of those benefits or detriments in the final balancing exercise for full authorisation. This is because the proper assessment of the factual against the counterfactual, as emphasised in *Godfrey Hirst*, focusses on what is likely with or without the proposed arrangement. In this case the assessment of the Proposed Arrangement occurs from the first Provisional Authorisation as that is when the conduct to which the authorisation application relates began.

Potential benefits and detriments

109. We have considered four main categories of potential benefits and detriments from the Proposed Arrangement:

109.1 potential benefits (or detriments) from reductions (or increases) in the transaction costs incurred in negotiations between Tegel and the growers;

109.2 potential benefits from the development of more efficient contract terms;

109.3 potential benefits and detriments from impacts on allocative, productive and dynamic efficiency. Various beneficial and/or detrimental impacts on efficiency may arise from the Proposed Arrangement to the extent that it would likely lessen competition between growers, consequently improving their bargaining position with Tegel.¹⁰¹ The potential efficiency impacts from such a change in the balance of bargaining power include:

109.3.1 productive and/or dynamic efficiency benefits from the more effective resolution of potential hold-up problems that might otherwise deter efficient investment by the growers;¹⁰²

109.3.2 allocative efficiency detriments arising from higher grower fees;

¹⁰¹ Because this range of efficiency impacts could arise from an increase in growers' bargaining power, brought about by the Proposed Arrangement and the likely subsequent lessening of competition amongst growers, we have considered these potential impacts in a single section rather than in separate benefit and detriment sections.

¹⁰² The hold-up problem arises when one party is required to make a sunk, relationship-specific investment and in the process of bargaining with another party, that other party can appropriate some of the gains from the sunk investment. Consequently, investment incentives may be distorted toward making too little investment or towards investments that are less subject to appropriation. See Katz, M. & Hermalin, B. (2009). Information and the hold-up problem. *The RAND Journal of Economics*. 40(3) 405-423.

109.3.3 other productive and dynamic efficiency detriments that could arise from any lessening of competition between the growers resulting from the Proposed Arrangement; and

109.4 potential benefits from any wealth transfers from Tegel’s foreign shareholders to domestic growers which could arise from higher grower fees.

110. Our overall assessment of this range of likely benefits and detriments is that the Proposed Arrangement is more likely than not to generate a net public benefit such that it should be authorised.

Avoided transactions costs

111. We have further categorised potential transaction cost savings into two categories:

111.1 avoided costs [], likely realised in the short term;

111.2 avoided costs associated with ongoing negotiations, likely realised over the long term.

Submissions on [] costs

112. TGA submitted that enabling collective bargaining has reduced the cost and timing of []. TGA’s view is []:¹⁰³

112.1 [];¹⁰⁴ and

112.2 [].

113. []¹⁰⁵
[]¹⁰⁶

114. []¹⁰⁷

¹⁰³ Provisional Authorisation at [4.19] to [4.20].

¹⁰⁴ Commerce Commission interview with TGA (15 December 2021); and Commerce Commission interview with [].

¹⁰⁵ []. Provisional Authorisation Application at [4.26 (a)].

¹⁰⁶ Provisional Authorisation at [4.7].

¹⁰⁷ Tegel’s Submission in response to the SOPI dated 5 November 2021 at [5.3] to [5.7]; Commerce Commission interview with Tegel (7 December 2021); and NERA – Review of Draft Determination in respect of NZTGA authorisation Application (20 May 2022) at [38].

115. []¹⁰⁸

116. Tegel had further claimed that a collectively negotiated contract does not provide for the unique needs and circumstances of individual growers, []¹⁰⁹

117. []

Our assessment of [] costs

118. As outlined above we consider that any benefits relating to [] provisional authorisation should be included in our analysis, notwithstanding the fact that these have arisen prior to our determination to grant full authorisation.

119. Absent authorisation we consider that Tegel would have likely continued in its attempts to [] by engaging in negotiations with growers on an individual basis.¹¹⁰ []¹¹¹
[]¹¹²

120. []¹¹³

121. []

122. We consider that if Tegel continued to engage with most, if not all, TGA members [] in the counterfactual, Tegel may have been able to reach individual [] agreements with at least some of these growers. If negotiations would have related only to the amendment of a few key terms, [], then the short-term transactions costs [] in the counterfactual may not necessarily be large.

123. However, we consider it is more likely that attempts to individually negotiate with most TGA growers [] in the counterfactual could have been time-consuming and ultimately unsuccessful, []
[] In this scenario, Tegel

¹⁰⁸ Commerce Commission interview with Tegel (7 December 2021).

¹⁰⁹ NERA – Submission on NZTGA SOPI (5 November 2021) at [19]; and Tegel’s Submission in response to the SOPI dated 5 November 2021 at [10.5].

¹¹⁰ []
[] Commerce Commission interview with Tegel (7 December 2021).

¹¹¹ []
[]

¹¹² []

¹¹³ Commerce Commission interview with Tegel (7 December 2021).

negotiating individually with all growers would likely have made it more difficult and costly to arrive at a satisfactory outcome for all parties.

124. As a result, we consider that it is likely that collective bargaining as provisionally authorised has led to a material saving in [] costs.
[]].
125. We consider that there is a real chance that without collective bargaining []. Consequently, our view is that provisionally authorising the Proposed Arrangement has eliminated the real risk of substantial [] costs being incurred by both parties, generating a material transaction cost saving. We estimate that this benefit is potentially in the order of \$[].¹¹⁴

Submissions on avoided ongoing transaction costs

126. TGA submits that, in addition to short term cost savings [], collective bargaining pursuant to the Proposed Arrangement would result in ongoing transaction cost savings in the range of \$1.4 million to \$3.1 million over the ten-year period for which authorisation is sought.¹¹⁵ Such cost savings, TGA submits, would arise because collective negotiations with Tegel are less costly than the sum of costs associated with Tegel negotiating with each individual grower.
127. While TGA does not consider Tegel's submitted counterfactual to be likely (that the FMAs would continue in their current form), they provided a further transaction cost saving analysis considering Tegel's submitted counterfactual. To this end TGA estimates that the transaction costs savings under the Proposed Arrangement would be in the range of \$1 million to \$1.5 million over the ten-year period.¹¹⁶
128. In its submission TGA stresses that transaction cost savings can be obtained due to the extent of commonality among growers. While growers differ with respect to [], the FMAs cover many factors that do not vary between growers.¹¹⁷
129. This includes the parties' rights and obligations generally under the FMAs, []].¹¹⁸ These terms are the same across growers, and so transaction cost savings can be obtained by discussing them collectively.

¹¹⁴ This figure is estimated as the cost [], as calculated by TGA, minus Tegel's estimation of negotiation costs []. [] minus []. The latter figure is calculated as Tegel's estimation of the total cost per grower under collective bargaining [] multiplied by [] farms. See [3.1.3] of Castalia – Public Benefits and Detriments of a Provisional Authorisation for Collective Bargaining; and Appendix B of NERA – Review of Draft Determination in Respect of NZTGA authorisation Application (20 May 2022).

¹¹⁵ Appendix D of the Authorisation Application at [3.5.1]; and Authorisation Application at [8.6].

¹¹⁶ TGA's cross-submission dated 23 December 2021 at [40] to [42] and at Schedule 2.

¹¹⁷ *Ibid* at [13] and [16].

¹¹⁸ *Ibid* at [17] to [18].

130. While uncertainty exists when estimating transaction costs over a 10-year period, TGA's view is that the economies of scale of negotiating once, rather than with approximately [] individual growers, means there are significant transaction cost savings to be gained from granting authorisation for the Proposed Arrangement.¹¹⁹
131. TGA further points to the Waikato Bay of Plenty Authorisation,¹²⁰ which involved Inghams Enterprises (NZ) Pty Limited (Inghams), and several chicken grower related authorisations in Australia.
132. Regarding the former, TGA submits the fact that Inghams is collectively negotiating with its growers post-authorisation is evidence of transaction cost savings existing regardless of similar variation in grower characteristics.¹²¹ With respect to the latter, TGA submits that the ACCC has consistently accepted claims of transaction cost savings for chicken grower authorisations even though greater heterogeneity exists among Australian growers.¹²² The authorisation, and subsequent engagement in, collective bargaining by chicken growers is commonplace in Australia.
133. At interviews, some TGA members claimed that negotiations with Tegel with TGA's assistance have been a quick process.¹²³ These growers submit that there is rarely disagreement among growers and that matters generally gain near full support at association meetings. These TGA growers also claim that authorisation would allow them to share the costs of negotiating with Tegel.¹²⁴ Absent authorisation, growers would pay advisory costs (largely legal and accounting costs) individually.
134. In contrast, Tegel submitted that transaction cost savings are at least overstated,¹²⁵ and in fact, based on recent negotiations, Tegel considers that collective bargaining would result in a transaction cost detriment.¹²⁶ This is because Tegel disputes TGA's factual and counterfactual assumptions. Tegel claims that the growers have no incentive [].¹²⁷
[]
].¹²⁸ This position is supported by a grower who individually negotiated with Tegel, [].¹²⁹

¹¹⁹ Link Economics – Comments on submissions on the Commerce Commission's Draft Determination (15 June 2022) at [33].

¹²⁰ *Waikato-Bay of Plenty Chicken Growers Association Incorporated* [2017] NZCC [37].

¹²¹ TGA's cross-submission dated 23 December 2021 at [19].

¹²² *Ibid* at [20] to [24].

¹²³ Commerce Commission interview with []; and Commerce Commission interview with [].

¹²⁴ Commerce Commission interview with []; Commerce Commission interview with []; and Commerce Commission interview with [].

¹²⁵ Tegel's submission in response to the SOPI dated 5 November 2021 at [10.2].

¹²⁶ NERA – Review of Draft Determination in respect of NZTGA authorisation Application (20 May 2022) at [53] and [57].

¹²⁷ Tegel's submission in response to the SOPI at [7.13].

¹²⁸ *Ibid* at [10.4] and [10.7] to [10.8]; and Tegel submission on the Draft Determination dated 20 May 2022 at [3.5] to [3.7].

¹²⁹ [] – Submission on NZTGA Authorisation Application [] at [6].

135. Tegel points to the costs incurred in recent individual and collective negotiations. Based on its experience Tegel considers that collective bargaining pursuant to the Proposed Arrangement would lead to higher transactions costs than individual bargaining.¹³⁰ Assuming there would be three rounds of significant contract negotiations over a 10-year period, Tegel estimates this would result in a transaction cost detriment of approximately \$3.6 million.¹³¹
136. Tegel claims that heterogeneity among growers would effectively substitute internal negotiating costs (within the TGA) for external negotiating costs (between the TGA and Tegel).¹³² Transaction costs would arise as the growers internally negotiate a collective position that aligns all members' interests but that is also acceptable to Tegel. Given differences in grower circumstances, this alignment would be difficult, says Tegel. Internal negotiations would be costly and lengthy, Tegel submits, shifting transaction costs to internal discussions rather than producing net savings.
137. One grower who resigned from TGA claims that the annual TGA membership fees do not provide real value,¹³³ and another former TGA grower claims that additional legal fees [] were larger than if they were negotiated individually.¹³⁴ These former TGA growers considered that TGA did not represent all growers' opinions, and poor communication from TGA made it difficult to quickly reach a collective view.
138. These growers claim their individual negotiations with Tegel were relatively short and straightforward. They claim [] and that additional costs were no different to that of any commercial negotiation.^{135, 136}
[]¹³⁷
[] This is consistent with Tegel's submissions on the counterfactual.

¹³⁰ NERA – Review of Draft Determination in respect of NZTGA authorisation Application (20 May 2022) at [53].

¹³¹ *Ibid* at [57].

¹³² NERA – Submission on the SOPI (5 November 2021) at [17] to [19].

¹³³ Commerce Commission interview with []. The Commission understands that the TGA []. Commerce Commission interview with TGA (15 December 2021).

¹³⁴ Commerce Commission interview with []. Former TGA growers also said TGA does not communicate well with growers. Commerce Commission interview with []; and Commerce Commission interview with [].

¹³⁵ [].

¹³⁶

[].

¹³⁷ [] – Submission on NZTGA Authorisation Application [] at [6].

139. In response, TGA claim that the most recent bilateral and collective negotiations [] are not representative of normal negotiations and cannot be used to estimate future negotiating costs.¹³⁸ In particular, TGA submits:

139.1 [].¹³⁹ Under the counterfactual, the FMAs would no longer be able to be used and new agreements would have to be reached requiring more substantive negotiations. Given the imbalance of bargaining power in the counterfactual, Tegel would likely impose significantly less attractive terms on growers. Growers are more likely to require additional support or expert advice before agreeing to the terms;

139.2 the growers [] negotiated in a context where the Authorisation Application had been lodged or was being prepared.¹⁴⁰ Collective bargaining was a potential future option or an actual option for these growers;

139.3 Tegel was strongly incentivised to provide examples of quick and low-cost individual negotiations to influence the Commission’s decision.¹⁴¹ Tegel was incentivised to []; and

139.4 [].^{142, 143}
[]

140. In response, Tegel submits:

140.1 [].¹⁴⁴
[];¹⁴⁵

140.2 [].¹⁴⁶
[];
and

¹³⁸ Link Economics – Comments on submissions on the Commerce Commission’s Draft Determination (15 June 2022) at [24].

¹³⁹ *Ibid* at [25] to [26].

¹⁴⁰ *Ibid* at [28].

¹⁴¹ *Ibid* at [29]b.

¹⁴² *Ibid* at [30].

¹⁴³

[]. Letter from Lane Neave to Commerce Commission dated 18 July 2022 at [3].

¹⁴⁴ Tegel’s cross-submission dated 6 July 2022 at [46].

¹⁴⁵ *Ibid* at [91].

¹⁴⁶ *Ibid* at [46].

140.3 []¹⁴⁷

Our assessment of avoided ongoing transaction costs

141. The Commission considers it likely that over time, elements of the FMAs are likely to require amendments, clarification, or renegotiation under both the factual and counterfactual. For instance, given their relevance to []¹⁴⁸
142. Given the detail and substantial nature of such negotiations, the Commission considers that collective bargaining is more likely to lead to lower transactions costs in comparison to individual negotiations. Specifically, collective bargaining pursuant to the Proposed Arrangement is more likely to reduce the duration and costs of any negotiations by allowing a single negotiation process, and removing the duplication of negotiations and advisory costs for both parties.
143. We do not consider that the heterogeneity across TGA growers would merely result in the shift of transactions costs from individual negotiations to internal TGA costs. There is a range of grower operations in terms of [], etc. However, we do not consider that these differences would necessarily lead to substantial transaction costs being incurred by TGA in the process of collective bargaining. This is because there is sufficient similarity in the services provided by growers such that the scope of negotiations is likely to be relatively narrow, []¹⁴⁹
144. In our view [] agreement between TGA and Tegel, and the speed at which TGA made [] offers on behalf of its members,¹⁵⁰ suggest that the heterogeneity across the growers was not an impediment to []. In particular, we consider that grower heterogeneity is unlikely to have resulted in relatively high internal transactions costs or delays. We consider existing heterogeneity across TGA growers would likewise not generate material internal transactions costs under collective bargaining so as to substantially offset other future transactions costs savings.
145. Furthermore, the growers have the choice of leaving TGA if they disagree with its negotiating strategy and positions, []. This reduces the

¹⁴⁷ *Ibid* at [47].

¹⁴⁸ TGA's cross-submission on the Draft Determination dated 15 June 2022 at [36] to [39].

¹⁴⁹ We note our view in this case is consistent with the ACCC's observations in its Determination A91007: Coalition of Major Professional Sports (13 December 2006) at [7.25] to [7.26]:

"... where the collective bargaining group supply very similar products or services (i.e. milk, chicken growing services) the potential scope of the negotiations are likely to be narrower than if the parties supply a wide-range of products requiring broader and more complex negotiations."

¹⁵⁰ []. Commerce Commission interview with TGA (15 December 2021); and Commerce Commission interview with [].

likelihood of internal disagreements amongst remaining members raising internal transaction costs.

146. Tegel has pointed to evidence that shows that the transaction costs of its recent individual negotiations to vary contracts with selected growers were relatively low while the costs of its most recent collective negotiation with TGA [] were relatively large. Tegel submits that this is indicative of the likely costs of future individual and collective negotiations under either the counterfactual or factual. We similarly acknowledge the submission by [] that the relative costs of negotiating individually with Tegel are less than via the TGA.¹⁵¹
147. The Commission has placed weight on this evidence in reaching its view that, although it is more likely that collective bargaining would reduce transaction costs, the outcome is not certain.
148. But equally, we consider that the evidence supports the view that TGA faces a form of ‘competitive constraint’ from the growers who can, and in some cases do, seek to lower their costs by negotiating directly with Tegel. The ability for the growers to leave TGA and negotiate directly with Tegel likely disciplines TGA to negotiate in a timely and cost-effective manner with Tegel in the factual.¹⁵²
149. Additionally, while we acknowledge that some growers have recently individually re-negotiated specific parts of their contractual arrangements with Tegel in a relatively quick and low-cost manner, this does not necessarily reflect the time or cost that it would take for TGA’s members to bargain with Tegel bilaterally in the counterfactual.
150. Those growers who are better positioned to negotiate individually with Tegel will likely have done so already.¹⁵³ In contrast, the vast majority of remaining growers have either not chosen to bargain individually with Tegel despite the opportunity [].¹⁵⁴
151. TGA submitted that Tegel was incentivised to reach re-negotiated agreements with selected individual growers quickly and at low-cost, [] to support its opposition to the Authorisation Application. We do not come to a view on this submission. This is because, as outlined above, we consider that the inferences

¹⁵¹ [] – Submission on NZTGA Authorisation Application [] at [17] to [18].

¹⁵² This constraint may be weaker in relation to some of the growers who may be especially reluctant to leave TGA because they have a strong preference not to negotiate with Tegel on an individual basis. However, we consider a material constraint on TGA to moderate transactions costs for the growers nevertheless exists.

¹⁵³ Link Economics – Comments on submissions on the Commerce Commission’s Draft Determination (15 June 2022) at [29]; and Commerce Commission interview with [].

¹⁵⁴ Commerce Commission interview with []; and TGA’s cross-submission on the Draft Determination dated 15 June 2022 at [168].

that can be drawn from the costs of [] for potential future transactions costs under the counterfactual and factual are limited.

152. Similarly, we do not consider that the costs incurred by TGA and Tegel [] during the period of provisional authorisation necessarily reflect the costs that would be incurred in future collective negotiations pursuant to the Proposed Arrangement. [].¹⁵⁵ In contrast, TGA states that in previous collective negotiations significant expenses relating to external legal advice were not incurred.¹⁵⁶
153. We agree that similar legal costs to those incurred [] are unlikely to be incurred in future collective bargaining pursuant to the Proposed Arrangement, because there would not be the same need for [].
154. Consequently, we consider that Tegel's estimate of the future transactions costs of collective bargaining (\$[] over 10 years) likely overstates the actual transaction costs that would be incurred in the factual.¹⁵⁷ In particular, we consider that the circumstances [] are relatively unusual and complex. Therefore, the likelihood that negotiations of a similar magnitude, complexity and legal consequence would be required again three times over the next 10 years in the factual as assumed by Tegel, appears low.
155. On the other hand we also consider that there is a high likelihood that Tegel's estimate of the transaction costs from individual bargaining (\$[] over 10 years) understates the actual transaction costs that would be incurred in the counterfactual.¹⁵⁸
156. As outlined above, our view is that the contracts with growers in the counterfactual would be likely to closely reflect the existing FMAs in the short to medium term, albeit with minor but important variations [], in particular []. We consider that the terms that Tegel would likely seek to amend would be those for which growers are likely to seek financial and/or legal advice.
157. We consider the same is likely to apply over the long-term insofar as grower contracts are likely to increasingly diverge from the current FMAs in the counterfactual as Tegel would likely seek to simplify the agreements with terms

¹⁵⁵ Link Economics – Comments on submissions on the Commerce Commission's Draft Determination (15 June 2022) at [30].

¹⁵⁶ *Ibid* at [30].

¹⁵⁷ NERA – Review of Draft Determination in respect of NZTGA Authorisation Application (20 May 2022) at Table 1.

¹⁵⁸ *Ibid*.

more advantageous to Tegel. We would expect that individual growers would typically seek financial and/or legal advice in response to such changes.

158. Additionally, we consider that ongoing changes to the industry are likely. These include changes to environmental or animal welfare requirements which may require minor amendments of various terms within the FMAs on an ad hoc basis.¹⁵⁹ Tegel's estimate does not include provision for the transactions costs likely to be associated with such ongoing developments.

[]
160

159. For these reasons, while we cannot exclude the real chance that the 'worst-case' factual scenario from authorisation could be a net detriment in terms of avoided long-term transactions costs, we consider that even such a worst-case would likely generate a significantly lower detriment than Tegel's \$3.6 million estimate. We consider any transaction cost detriment would likely be limited by the fact that the growers can negotiate individually with Tegel if negotiating with TGA's assistance becomes relatively costly.
160. In contrast, TGA's long-term transaction costs savings estimate of between \$1 million to \$3 million appears to be a reasonable estimate of the likely upper bound of these potential benefits.
161. On balance, we place greater weight on the likelihood that collective bargaining would produce a material benefit in the form of avoided transactions costs over the 10-year period of authorisation. However, because of the inherent uncertainty regarding the transactions costs that would be incurred in both the factual and counterfactual, we have not been able to estimate a precise quantitative range.
162. Nevertheless, our view is that material benefits in the form of reduced transactions costs are more likely than not to arise from collective bargaining. This is primarily because of the underlying economies of scale available from collective bargaining. Additionally, we consider that the growers' interests are more likely than not to be aligned on many elements of the FMAs, and [] serves to evidence that the heterogeneity across growers has not been an impediment to agreement consequent upon the provisional authorisation of the Proposed Arrangement.

More efficient contract terms

163. Collective bargaining can lead to more efficient contract terms. This can occur if it enables the resolution of marginal issues that would otherwise be too costly to resolve within individual negotiations between Tegel and the growers, or if it enables

¹⁵⁹ Commerce Commission interview with Tegel (7 December 2021); Authorisation Application at [8.52]; Appendix D of the Authorisation Application at [3.3]; and TGA's cross-submission on the Draft Determination dated 15 June 2022 at [41].

¹⁶⁰ Link Economics – Comments on submissions on the Commerce Commission's Draft Determination (15 June 2022) at [29.a].

the sharing of information amongst the growers and the subsequent development of more nuanced contractual provisions that are more efficient.¹⁶¹

Submissions on more efficient contract terms

164. TGA submits that collective bargaining would allow growers to share information and pool together resources to fund specialist advisors so that they can develop more efficient contract terms.¹⁶² TGA argues this can be observed in the difference between the FMAs and the relatively simple payment structure that was in place prior to collective bargaining.¹⁶³
165. TGA submits further that these efficient terms are unlikely to persist absent authorisation.¹⁶⁴ In TGA's view, detailed bilateral negotiations would be too complex and costly for Tegel and, when combined with the greater bargaining power it would possess in individual negotiations, Tegel would have a reduced incentive to retain the current agreements, rendering the FMAs unstable.
166. Tegel disputes these submitted efficiencies, claiming that in the counterfactual the FMAs would continue in their current form [],¹⁶⁵ and that individual bargaining would not produce simpler [] contracts where the efficiencies in the FMAs are lost.¹⁶⁶
167. Tegel claims that the outcome of the individual negotiations it has had with (former) TGA members has resulted in []. Tegel claims that the efficiencies of the collectively negotiated FMAs would continue in the counterfactual.
168. We note a recent submission supports Tegel's argument. A grower with whom Tegel negotiated directly told us [].¹⁶⁷
169. Tegel also claims that the heterogeneity among growers would negate any efficiency benefit of collective bargaining that arises through economies of scale.¹⁶⁸ Tegel¹⁶⁹ refers to King in support of its argument to say a "one-size-fits-all" contract can be inefficient if it does not respond to differences in the costs faced by members of a

¹⁶¹ Collective bargaining can also impact on the overall efficiency of the contractual arrangements between Tegel and the growers because it can affect the balance of bargaining power. These potential impacts are discussed further below in our discussion of the balance of bargaining power between the Tegel and the growers and assessment of the overall economic efficiency of the Proposed Arrangement.

¹⁶² Appendix D of the Authorisation Application at [3.5.3].

¹⁶³ Authorisation Application at [8.3(b)].

¹⁶⁴ Appendix D of the Authorisation Application at [3.3].

¹⁶⁵ Tegel's submission in response to the SOPI dated 5 November 2021 at [7.8]; Commerce Commission interview with []; and Commerce Commission interview with [].

¹⁶⁶ Tegel's submission on the Draft Determination dated 20 May 2022 at [3.7].

¹⁶⁷ [] – Submission on NZTGA Authorisation Application [] at [6].

¹⁶⁸ *Ibid* at [11] to [15].

¹⁶⁹ NERA – Review of Draft Determination in respect of NZTGA authorisation Application (20 May 2022) at [11].

grower group.¹⁷⁰ Tegel also refers to the Australian Competition Tribunal's recent decision in *Port of Newcastle* where the Tribunal observed the presence of divergent requirements and preferences among a collective could reduce the likelihood of more efficient terms.^{171, 172}

170. On the other hand, TGA argues that the FMAs are not one-size-fits-all contracts. []¹⁷³

171. TGA argues that the facts of *Port of Newcastle* differ from those of the Authorisation Application. It emphasises that:¹⁷⁴

[T]he reasoning behind the Tribunal's decision is primarily that many, if not all, of the nine coal producers would want to be represented at meetings with the Port, would want to consider the contractual terms within their own management teams and potentially take their own advice, and that the Port would likely continue to meet individually with the coal producers even in the presence of collective bargaining. The Tribunal therefore considered that there would not be substantial transaction costs savings from collective negotiation.

172. Conversely, TGA says in this case the Commission is confronted with a large number of growers with relatively common interests of whom Tegel requires a largely homogenous product from.¹⁷⁵ The fact that [] indicates, according to TGA, the commonality of interests amongst the growers.

173. TGA argues further that []¹⁷⁶ TGA notes:

173.1 []¹⁷⁷

173.2 []¹⁷⁸

¹⁷⁰ Stephen King (2013) *Collective Bargaining by Business: Economic and Legal Implications*. *UNSW Law Journal*, 36(1), [107] – [138].

¹⁷¹ *Application by Port of Newcastle Operations Pty Limited (No 2)* [2022] ACompT 1.

¹⁷² NERA – Review of Draft Determination in respect of NZTGA authorisation Application (20 May 2022) at [12].

¹⁷³ Link Economics – Comments on submissions on the Commerce Commission's Draft Determination (15 June 2022) at [14].

¹⁷⁴ *Ibid* at [15].

¹⁷⁵ *Ibid* at [16].

¹⁷⁶ *Ibid* at [8].

¹⁷⁷ *Ibid* at [9].

¹⁷⁸ *Ibid* at [10].

174. []:179

174.1 []; and

174.2 [].

175. On the other hand, Tegel claims that TGA's statement, that the collectively negotiated [] is more efficient, is subjective.¹⁸⁰ It is quite possible, says Tegel, that the parties are better off under the individually negotiated contracts. Tegel claims that collective bargaining produced less efficient terms, as evidenced by [].

176. Tegel further claims that it did not refer to Port of Newcastle because of its facts, rather because of the economic framework it adopted, which is similar to that set out by King.^{181, 182}

Our assessment of efficient contract terms

177. Collectively negotiated contracts can more efficiently resolve marginal issues compared to contracts concluded by bilateral negotiations. This is because, absent the transaction cost savings arising from collective negotiations, it may be too costly to resolve such issues through individual negotiations.¹⁸³ In contrast, by allowing negotiation and transaction costs to be shared across parties, collective bargaining can make it relatively less expensive for parties to effectively negotiate and resolve marginal issues.

178. Collective bargaining can also facilitate the sharing of information that can enable the more efficient resolution not only of marginal issues, but more substantive matters, such as fee structures or investment incentives.¹⁸⁴ This may enable more sophisticated, efficient, and mutually beneficial contracts to be reached.¹⁸⁵

179. We consider that, consistent with the economic theory outlined above, the evidence in relation to this authorisation application shows that the efficient resolution of marginal issues is more likely with collective bargaining.

180. A previous example of collective bargaining leading to more efficient contract terms occurred [].¹⁸⁶
[]

¹⁷⁹ *Ibid* at [11].

¹⁸⁰ NERA – Response to New Material in 15 June 2022 Link Economics Report in response to Link Economics at [11].

¹⁸¹ *Ibid* at [15].

¹⁸² Stephen King - Collective Bargaining by Business.

¹⁸³ *Ibid* at [114].

¹⁸⁴ *Ibid* at [116] to [117].

¹⁸⁵ *Ibid* at [119].

¹⁸⁶ Commerce Commission interview with [].

]. In our view, such issues are more likely to be efficiently resolved in a similar manner in the future pursuant to the Proposed Arrangement.¹⁸⁷

181. Furthermore, although collective bargaining may require members of the collective to forgo individual preferences in order to reach a unified position, the risk of diverging incentives is lessened when participation in the bargaining group is voluntary.
182. In any event, we consider that collective bargaining does not necessitate a ‘one-size-fits-all’ approach.
183. We consider this is evidenced by the existing FMAs that are the result of collective bargaining which already accounts for heterogeneity amongst growers.
[

].

184. While we consider collective bargaining would be more likely to reduce transactions costs so as to enable marginal issues to be resolved more efficiently, it is not clear that the magnitude of this specific benefit would necessarily be large.¹⁸⁸ This is because such outcomes may address relatively moderate innovations to growing methods or technologies, or relatively minor future regulatory changes (eg, animal welfare and environmental) which would precipitate amendments to the FMAs.¹⁸⁹
185. However, although it is not certain, we also consider that there is a real chance that the sharing of information amongst growers and the development of more complex, nuanced contract terms by TGA, which is better resourced than any individual grower, could produce substantial efficiency gains. For this reason we have placed a moderate weight on this potential benefit.

Potential impact on the balance of bargaining power

186. By lessening competition between growers, collective bargaining has the potential to alter the balance of bargaining power between suppliers and buyers. Any such change in the balance of bargaining power can give rise to detrimental and/or beneficial impacts on overall economic efficiency. To determine the likely efficiency impacts, it is necessary to first consider whether, and how, collective bargaining would impact the balance of bargaining power.

¹⁸⁷ To be clear, we do not consider that collective bargaining is necessary to ensure the efficient resolution of all such issues. Rather, we consider such issues are more likely to be efficiently resolved, and more efficient contract terms are more likely to be widely disseminated across growers, with collective bargaining.

¹⁸⁸ We discuss the potential effect of collective bargaining on the balance of bargaining power between growers and Tegel, which may be likely to have more substantive impacts on overall economic efficiency, further below.

¹⁸⁹ [].

187. Notwithstanding the fact that growers would not be entitled to arrange or participate in a collective boycott, and that Tegel would not be compelled to negotiate with TGA in the factual, enabling growers to collectively bargain can nevertheless improve growers' bargaining position. This could, at least partially, redress what might otherwise be an imbalance of bargaining power in favour of Tegel in the counterfactual.

Submissions on bargaining power imbalance

188. TGA submits that there is an imbalance of bargaining power between Tegel and individual growers, such that Tegel possesses strong buyer (monopsony) power.¹⁹⁰ This is primarily because of the limited customer options that growers face for supplying growing services says TGA. TGA argues that the need for growers to make significant investments in shedding specifically designed to raise broiler chickens generates a risk that these assets could become stranded, creating the potential for a hold-up problem. It claims that this risk is currently particularly acute because Tegel has reduced its output, which would enable it to play growers off against each other for supply arrangements.
189. TGA also argues that [redacted].¹⁹¹ TGA also claims that [redacted].¹⁹²
190. The TGA growers we interviewed indicated that, in their view, many growers are not confident negotiating with a large commercial entity such as Tegel.¹⁹³ These growers consider that greater bargaining power would allow Tegel to obtain more favourable terms at the expense of growers [redacted]. Supplying Tegel is the only realistic option for most growers to earn a return on their investments in shedding and other equipment.
191. Tegel takes a different perspective of the balance of bargaining power between the parties. The processor submits there is no imbalance of bargaining power between Tegel and growers that favours Tegel.¹⁹⁴ Instead, Tegel urges the Commission the relationship should be categorised as one of 'mutual dependence', and authorisation will lead to an imbalance in favour of the growers.
192. Tegel claims that it only has a large network of substitutable growers in times of excess growing capacity. In times of strong demand, it would typically take two to three years to add a new grower because of the time to find suitable land and obtain

¹⁹⁰ Authorisation Application at [5.21]; and Appendix D of the Authorisation Application at [3.2.1].

¹⁹¹ Authorisation Application at [5.23] to [5.25].

¹⁹² *Ibid* at [5.26].

¹⁹³ Commerce Commission interview with [redacted]; and Commerce Commission interview with [redacted]; and Commerce Commission interview with [redacted].

¹⁹⁴ Tegel's submission on the Draft Determination dated 20 May 2022 at [2.5]; NERA – Review of Draft Determination in respect of NZTGA authorisation Application (20 May 2022) at [49].

196.2 Some other former TGA members have also suggested that

[
[

].²⁰⁴
].²⁰⁵ Another grower was of the view that because of the symbiotic relationship between Tegel and its growers, Tegel must be sustainable for the growers to be sustainable.²⁰⁶

197. In response, TGA submits:

197.1 Growers are entirely dependent on Tegel to recover their sunk investment, while Tegel is not entirely dependent on any individual grower.²⁰⁷ Authorisation would only partially offset this bargaining power imbalance.²⁰⁸

197.2 The *Port of Newcastle* decision is clearly distinguishable from this case because unlike the growers, the coal producers were often larger in size than the Port; and because the Port depended on the coal producers for the bulk of its revenue – which is not so for Tegel in relation to the growers.²⁰⁹

197.3 The Australian Competition Tribunal’s decision in *VFF Chicken Growers* and the ACCC’s determination in *Perishable Agricultural Goods Inquiry* demonstrate that although collective bargaining can provide growers with some degree of countervailing power, collective bargaining does not eliminate a chicken processor’s substantial monopsony power in dealings with its growers.^{210, 211}

197.4 Tegel has options if it faces a shortage of capacity including building new farms, sponsoring new sheds on existing farms, approaching Inghams’ growers in the Waikato, reducing the time between runs, or raising prices.²¹²

198. In its cross-submission, Tegel submits:

²⁰⁴ [

]. Commerce Commission interview with []; and Commerce Commission interview with [

].

²⁰⁵ Commerce Commission interview with [].

²⁰⁶ Commerce Commission interview with [].

²⁰⁷ Link Economics – Comments on submissions on the Commerce Commission’s Draft Determination (15 June 2022) at [23].

²⁰⁸ TGA’s cross-submission on the Draft Determination dated 15 June 2022 at [5a].

²⁰⁹ *Ibid* at [5b].

²¹⁰ *Ibid* at [5c].

²¹¹ *VFF Chicken Meat Growers’ Boycott Authorisation* [2006] ACompT 2; and ACCC *Perishable Agricultural Goods Inquiry*- Final Report published 10 December 2020.

²¹² TGA’s cross submission on the Draft Determination dated 15 June 2022 at [26].

- 198.1 Mutual dependence can arise in different ways.²¹³ Even if *Port of Newcastle* is distinguishable from this case, the key factual finding stands.
- 198.2 The facts of this case differ from the *VFF* decision.²¹⁴ Tegel cannot exercise monopsony power as it “cannot easily switch to alternative suppliers, sponsor new entry or self-supply, and any attempt to do so would incur substantial sunk costs.”^{215, 216}
- 198.3 None of the options which TGA suggests are available for Tegel to respond to a shortage of capacity are viable.²¹⁷

Our assessment on the imbalance of bargaining power

199. While there is clearly a degree of mutual dependence between Tegel and growers,²¹⁸ we consider that in the counterfactual, in which existing FMAs would likely be invalid, there would likely be an imbalance of bargaining power in favour of Tegel. This is because most, if not all, growers are unlikely to have an effective alternative demand for their growing services or alternative use for many of their assets (sheds). Such an imbalance is likely to be particularly acute at the present time given the recent negative demand shocks which have resulted in excess capacity in Tegel’s growing network.
200. Up to [] of growers’ farm values can be derived from the FMAs.²¹⁹ This demonstrates growers’ dependence on Tegel, and the asset stranding risk growers face given the lack of substitutability of chicken growing sheds to other uses.²²⁰ Additionally, geographic constraints typically limit the ability of Tegel’s growers to supply other processors.²²¹ No other processor is located in the Taranaki region, and although Brinks could theoretically contract with Tegel growers in Auckland and Canterbury, we understand Brinks already has sufficient supply from its own contracted growers in these regions.²²² Additionally,

²¹³ Tegel’s response to TGA’s cross-submission dated 6 July 2022) at [5 & 6].

²¹⁴ *Ibid* at [11].

²¹⁵ *Ibid*.

²¹⁶ Tegel submits, based on figures provided by TGA, that it would cost [] *Ibid* at [26 & 27].

²¹⁷ *Ibid* at [26 & 27].

²¹⁸ Recall we believe the parties stand in a mutually beneficial relationship in their commercial dealings.

²¹⁹ Commerce Commission interview with [].

²²⁰ See Appendix D of the Authorisation Application at [3.2]; Commerce Commission interview with []; Commerce Commission interview with [].

²²¹ Code of Welfare: Transport within New Zealand at section [4.1]; SPCA Certified Standards for Free Range Meat Chickens (version 1.1 – 2021) at [E64].

²²² See Authorisation Application at [3.23] and [5.30]. We note that over time if market conditions change Brinks could seek further supply from Tegel’s growers. However, even in this situation [] may continue to make Brinks an unattractive alternative for Tegel’s growers. We further note that in our interview with Brinks (23 November 2021), [].

[
[]].²²³

201. In contrast, because of its network of substitutable individual growers, in the absence of the existing FMAs Tegel would be able to credibly threaten to cease purchasing growing services from any given grower. This is especially true at the present time given []. This would provide Tegel with a strong bargaining position in bilateral negotiations.
202. Tegel's level of available resources would further enhance its bargaining position over individual growers in the counterfactual. Tegel is substantially larger and more commercially sophisticated than individual growers.
203. The time and investment required to either add or replace a grower, particularly in times of strong demand, could reduce Tegel's bargaining power by some degree.²²⁴ Similarly, growers who have not made substantial investments recently, and have effectively recovered most of their sunk costs, may face less harm from losing a contract with Tegel. The bargaining power imbalance may be less pronounced for these growers. Nevertheless, while these factors may place outer limits on the bargaining power of Tegel and growers, we do not consider that these factors would substantially change the balance of bargaining power from favouring Tegel in its negotiations with individual growers in the counterfactual.
204. In the factual, in which the existing FMAs would continue to apply (subject to any amendments negotiated between Tegel and the TGA), the balance of bargaining power is less clear.
205. On the one hand, Tegel points to its estimates that, under the existing FMAs agreed pursuant to collective bargaining,
[]]. Tegel considers that this is evidence that collective bargaining has provided, and would continue to provide, growers with the stronger bargaining position.
206. On the other hand, Tegel is not compelled to negotiate with the TGA even if collective bargaining is authorised, and authorisation would not allow the TGA to organise a collective boycott by growers. This means that Tegel can cease engagement in collective negotiations if the balance of bargaining power tilts in favour of the TGA.
207. Regarding Tegel's submission that
[]], we disagree.²²⁵
[]

²²³ See Appendix D of the Authorisation Application at [3.2.1].

²²⁴ NERA – Review of Draft Determination in respect of NZTGA authorisation Application (20 May 2022) at [46] – [49].

²²⁵ Tegel's response to TGA's cross-submission dated 6 July 2022 at [47].

].²²⁶ This means that Tegel retains a degree of control over these contracts.

208. In any event, we do not consider that it is necessary for us to reach a definitive position on the relative bargaining strength of the two parties in the factual. It is sufficient to identify that authorising collective bargaining would be likely to increase the bargaining power of growers relative to the counterfactual. The potential efficiency impacts of this likely change in bargaining power from the resulting negotiations are discussed below.
209. We also agree with TGA's cross-submission that *Port of Newcastle* is distinguishable on the facts. This is primarily because of the relative importance of individual coal producers to the Port compared to the importance of individual growers to Tegel. The Port is significantly more dependent on individual coal producers than Tegel is on any one grower. This means that individual growers possess significantly less bargaining power in negotiations with Tegel, than the individual coal producers have in negotiations with the Port:
- 209.1 The Port faces a smaller number of counterparties: it relies on eleven coal producers.²²⁷ Conversely, Tegel is supplied by approximately [] growers of which [] are members of TGA.^{228, 229}
- 209.2 Furthermore, many of the coal producers are large multinational companies whose Australian coal mining operations are larger in financial terms than the Port.²³⁰
- 209.3 In contrast, most TGA growers are small family-owned businesses that are likely less capable of negotiating with Tegel themselves.²³¹

Efficiency impacts of increased bargaining power for growers

210. By lessening competition between growers, collective bargaining can increase their bargaining power with Tegel because it reduces Tegel's ability to play growers off against each other.
211. Increased bargaining power could enable growers and TGA to exert a greater influence on the terms of any supply agreements that are ultimately agreed with Tegel. This in turn could impact the overall economic efficiency of the supply arrangements in several ways:

²²⁶ Consequently, regarding Tegel's submission that it would likely face substantial sunk costs, this appears to primarily relate to any potential future self-supply of growing services by Tegel.

²²⁷ *Application by Port of Newcastle Operations Pty Ltd (No 2)* [2022] ACompT 1 at [99].

²²⁸ NERA – Review of Draft Determination in respect of NZTGA authorisation Application (20 May 2022) at Appendix B.

²²⁹ Link Economics – Comments on submissions on the Commerce Commission's Draft Determination (15 June 2022) at [16].

²³⁰ *Application by Port of Newcastle Operations Pty Ltd (No 2)* [2022] ACompT 1 at [105].

²³¹ Authorisation Application at [5.25]; TGA's cross submission on the Draft Determination dated 27 June 2022 at [6]b; and see Commerce Commission Interview with [].

- 211.1 Allocative efficiency detriments could arise if collective bargaining by growers were to lead to higher growing fees and/or lower quality services. Such detrimental impacts could ultimately be passed on to final consumers in downstream retail markets.
- 211.2 Productive efficiency detriments could arise if a reduction in competition between growers were to result in the less efficient use of resources in the growing process.
- 211.3 Dynamic efficiency detriments could arise if reduced competition leads to decreased innovation in products and/or production processes.
212. Alternatively, improving the bargaining power of growers through collective bargaining could also have efficiency enhancing impacts. For instance, collective bargaining could potentially redress a bargaining power imbalance that might otherwise enable Tegel to reduce fees or other supply terms to growers below competitive levels and create the risk of ‘hold up’ problems. In so doing, collective bargaining can improve overall economic efficiency if it helps ensure that growers have appropriate incentives to invest in chicken growing operations and the certainty that they will be able to recover sunk costs, such that there is a greater level of output that ultimately benefits end consumers.

Submissions on efficiency impacts

Hold-up problems and efficient investment by growers

213. TGA claims that the enhanced bargaining power that Tegel would have without the Proposed Arrangement would result in Tegel [].
214. TGA claims that bargaining power and risk would be better balanced with the Proposed Arrangement, so that growers could obtain more favourable terms relative to if they faced Tegel alone.²³² Such rebalancing could help address potential ‘hold-up’ problems. That is, without [] contractual certainty, growers would be less likely to invest in their farms out of fear of becoming too reliant on Tegel, with the result being that Tegel could capture a substantially large share of the benefits from growers’ investments.
215. This is because the capital equipment used for chicken growing is specialised and cannot be readily put to alternative use. This means growers risk being left with large debts and stranded assets if they fail to obtain sufficiently secure supply arrangements with Tegel.²³³ Without [] contractual certainty Tegel would have strong bargaining power over growers, leaving little incentive for growers to invest in their farms. TGA points to the lack of [] certainty which existed under the

²³² Authorisation Application at [8.3 (e)] and [8.15] to [8.16].

²³³ Authorisation Application at [1.21 (c)]. See also [3.1.2] and [3.2.2] of Appendix D of the Authorisation Application.

- [] contracts prior to the FMAs, and claims that []²³⁴
216. TGA claims that the current FMAs minimise this risk by being [] agreements with the result that []. [] further incentivise investment, grower performance and competition among growers. These changes were driven by TGA to improve contractual certainty []²³⁵ TGA argues that both changes demonstrate how collective bargaining can facilitate a resolution to the hold-up problem.
217. TGA submits that the consequence of the bargaining power imbalance that would arise without collective bargaining is that efficiencies within the FMAs, which are [] pages long and were negotiated over a [] period, would likely be lost absent authorisation.²³⁶
218. The TGA growers we interviewed supported TGA's claims. These growers said the [] nature of the FMAs are essential for []²³⁷ This contrasts with the [] fee payment structure that was typical of the contracts prior to the FMAs. Therefore, TGA submits that collective bargaining has resulted in the current FMAs and has enhanced dynamic efficiency.
219. In contrast, Tegel submits that grower payments under the FMAs are:
- 219.1 Inefficiently structured, []²³⁸ and
- 219.2 inefficiently high, []²³⁹
220. Regarding the structure of grower fees, []²⁴⁰

²³⁴ TGA's cross submission on the Draft Determination dated 15 June 2022 at [135].

²³⁵ *Ibid* at [135].

²³⁶ See Appendix B of the Authorisation Application; and Tegel's submission in response to TGA's Provisional Authorisation dated 12 October 2021 at [2.5] to [2.7].

²³⁷ Commerce Commission interview with []; and Commerce Commission interview with [].

²³⁸ Tegel's submission in response to the SOPI dated 5 November 2021 at [5.2] to [5.7]; and Commerce Commission Interview with Tegel (8 December 2021).

²³⁹

[]

[] Commerce Commission Interview with Tegel (8 December 2021); and Tegel's submission in response to the SOPI dated 5 November 2021 at [5.4] to [5.7].

²⁴⁰ Tegel's submission in response to the SOPI dated 5 November 2021 at [5.1].

[]].

221. Tegel submits that the FMAs [] effectively insulated growers from the negative shocks arising from the Infectious Bursal Disease (IBD) outbreak and COVID-19, both of which have adversely affected domestic and export demand.²⁴¹ []].
222. Similarly, a grower who signed an individual agreement with Tegel claims []²⁴².

Higher growing fees and allocative efficiency detriments

223. Tegel submits that authorisation could lead to less allocatively efficient outcomes. If the counterfactual would result in lower grower fees and reduce Tegel's losses, then collective bargaining would likely be less allocatively efficient.²⁴³
224. TGA submits that any subsequent downstream price change resulting from authorisation would be sufficiently insignificant so that it would not materially affect demand for chicken products.²⁴⁴ TGA estimates that if there is an increase in grower fees because of collective bargaining, it would be equivalent to no more than around [] cents per bird. An increase in fees of this magnitude would generate approximately \$[] per year of additional cost to Tegel.²⁴⁵ In comparison, Tegel's current grower costs are in the order of \$[]²⁴⁶ and Tegel's total revenue from chicken products are in the order of \$[]²⁴⁷.
225. TGA claims that even if grower fees were lower with individual bargaining, downstream wholesale and retail chicken prices would be no lower than if collective bargaining were authorised. This is because of the small difference between growing fees in the factual and counterfactual, and because of Tegel's current losses.
226. []²⁴⁸
[]]. For instance, Tegel has

²⁴¹

[]

[] Commerce Commission interview with Tegel (7 December 2021).

²⁴² [] – Submission on NZTGA Authorisation Application [] at [16].

²⁴³ NERA – Submission on NZTGA SOPI (5 November 2021) at [44].

²⁴⁴ Appendix D of the Authorisation Application at [3.5.4].

²⁴⁵ 55 million birds multiplied by the [] cent per bird increase in price. Authorisation Application at [3.12]; and Appendix D of the Authorisation Application at [3.5.4].

²⁴⁶ []]. See Tegel's submission in response to the SOPI dated 5 November 2021 at Table 5.

[] Tegel's submission in response to the SOPI dated 5 November 2021 at [5.1(a)].

²⁴⁷ Tegel's poultry revenues are estimated based on figures at [2.13] of Tegel's submission in response to TGA's Provisional Authorisation dated 12 October 2021.

²⁴⁸ Tegel's submission in response to the SOPI dated 5 November 2021 at [11.4].

recently announced that it would increase its downstream prices by approximately 10%.²⁴⁹ []²⁵⁰
[]²⁵¹

227. Tegel claims that [] of grower fees would not mitigate the effect on allocative efficiency.²⁵² Tegel submits that:
- 227.1 competition occurs on more dimensions than just price, and higher fixed costs will prevent Tegel from making the necessary investment to compete on other dimensions,²⁵³
- 227.2 all costs [] over a longer period and so should be assessed as such over a ten-year period,²⁵⁴ and
- 227.3 in the real-world firms do not follow short-term economic theory exactly; firms aim to recover [] costs in their pricing decisions.²⁵⁵
228. Tegel further claims that because the Commission has already granted authorisation for Inghams' growers to collectively negotiate, Inghams faces a similar cost increase to Tegel in the factual.²⁵⁶ Granting authorisation to a second processor's growers to engage in collective bargaining would set a precedent and so it should be assumed that growers supplying other processors would similarly seek authorisation. The result would be that competition is less likely to constrain the pass-through of increased grower costs if such increases are faced by other processors.
229. Brinks also submits that TGA could exert inappropriate price pressure on Tegel if collective bargaining is authorised.²⁵⁷ Brinks considers that Tegel would have no option but to pass any cost increase on to its customers, who would in turn increase prices to final consumers.

Other productive and dynamic efficiency impacts

230. TGA claims that authorisation would not produce any productive or dynamic efficiency detriments because a collectively negotiated agreement is more

²⁴⁹ See [‘Tegel announces chicken prices to be bumped up 10 percent’](#).

²⁵⁰

[

] Commerce Commission interview

with Tegel (7 December 2021).

²⁵¹

[

]

Commerce Commission interview with Tegel (7 December 2021)

²⁵² NERA – Review of Draft Determination in respect of NZTGA authorisation Application (20 May 2022) at section [3.1].

²⁵³ *Ibid* at [23]A.

²⁵⁴ *Ibid* at [23]B.

²⁵⁵ *Ibid* at [23]C.

²⁵⁶ *Ibid* at section [3.2].

²⁵⁷ Van Den Brinks Poultry Limited – Submission on NZTGA SOPI (7 October 2021).

sophisticated and efficient.²⁵⁸ TGA submits that the current collectively negotiated FMAs are [] that did not exist prior to collective bargaining. These terms incentivise innovation, capital investment, and performance producing outcomes which are both productively and dynamically efficient.²⁵⁹ It also enables grower collaboration relating to the development of innovative growing techniques.²⁶⁰

231. TGA also claims that growers are less likely to innovate and make new investment if they are being paid less in the counterfactual.²⁶¹
232. Tegel submits that collective arrangements would not incentivise individual innovation or competitiveness. For instance, the current collectively negotiated FMAs pay growers a [] and so do not adequately incentivise competition among growers.²⁶² Furthermore, if a grower were to innovate or provide Tegel with some additional service, this would not be captured in a collective agreement.²⁶³ This grower must vary the contract for all growers or leave the collective to enable appropriate recognition for any individual innovations. This would be costly, and so would reduce dynamic and productive efficiency.
233. Additionally, Tegel submits that higher grower fees in the factual would impact upon its own ability to innovate and invest.²⁶⁴ This would reduce dynamic efficiency downstream at the processor level.
234. Both TGA and non-TGA growers we interviewed considered that []²⁶⁵ []²⁶⁶ []²⁶⁷ []²⁶⁶].
235. Tegel also claims that there is not a risk in the counterfactual that it would terminate otherwise high performing growers []. It claims that

²⁵⁸ Authorisation Application at [8.31].

²⁵⁹ Link Economics – Comments on submissions on the Commerce Commission’s Draft Determination (15 June 2022) at [19].

²⁶⁰ Link Economics provides the example of [].

²⁶¹ Authorisation Application at [8.31]; and TGA’s cross-submission dated 23 December 2021 at [45] to [46].

²⁶² Tegel’s submission in response to the SOPI dated 5 November 2021 at [5.1].

[]²⁶²

²⁶³ NERA – Submission on TGA’s SOPI (5 November 2021) at [40] to [41]; and NERA – Review of Draft Determination in respect of NZTGA authorisation Application (20 May 2022) at [35].

²⁶⁴ NERA – Review of Draft Determination in respect of NZTGA authorisation Application (20 May 2022) at [37].

²⁶⁵ Commerce Commission interview with [].

²⁶⁶ Commerce Commission interview with [].

²⁶⁷ Commerce Commission interview with TGA (15 December 2021); and Commerce Commission interview with [].

instead it would make rational decisions in relation to retaining typically high performing growers.²⁶⁸

[
].²⁶⁹

Our assessment of efficiency impacts

236. There is uncertainty regarding the efficiency impacts that are likely to arise from the lessening of competition between growers, and resulting increase in bargaining power, that is likely to result from the Proposed Arrangement. In particular, collective bargaining could generate:

236.1 efficiency benefits, particularly to the extent that it reduces the exercise of buyer (monopsony) power and better ensures that growers obtain competitive growing fees and avoids the hold-up problem leading to improved incentives for growers to invest and operate efficiently, resulting in higher output than otherwise; and

236.2 efficiency detriments, to the extent that the lessening of competition between growers enables them to exercise increased bargaining power, resulting in grower fees above competitive levels with the consequent loss of allocative, productive, and/or dynamic efficiency.

237. There is uncertainty about whether collective bargaining would likely result in overall efficiency benefits or detriments. This arises, at least in part, because of the combination of the recent (likely temporary) negative demand shocks that have resulted in [] for Tegel, the current FMAs [], and the uncertainty surrounding the outcome of future negotiations under both the factual and counterfactual.

238. Because of this uncertainty we cannot rule out the real chance of there being a net detriment in overall efficiency with collective bargaining. However, we consider that collective bargaining is more likely to result in a net benefit from overall efficiency than individual bargaining in the counterfactual. This is because of several reasons, including the fact that Tegel would not be compelled to negotiate with the TGA, and growers would not be permitted to arrange a boycott. This would limit the ability of growers to exercise collective bargaining power that is detrimental to efficiency.

239. Further, we also consider that the experience of collective bargaining between Tegel and TGA is instructive, in particular the establishment of the current FMAs and also, during the provisional authorisation period, []. We consider that these examples illustrate that collective bargaining is more likely to resolve potential

²⁶⁸ NERA – Review of Draft Determination in respect of NZTGA authorisation Application (20 May 2022) at [41].

²⁶⁹ Link Economics – Comments on submissions on the Commerce Commission’s Draft Determination (15 June 2022) at [22].

issues and is more likely to result in mutually beneficial, efficient outcomes than to cause substantial efficiency detriments.

240. We note that Tegel growers are some of the most efficient in the world when measured by what is commonly known as a 'Feed Conversion Ratio'.²⁷⁰ It is efficient for Tegel to import feed from Australia, raise and process chickens in New Zealand, and export chicken products back to Australia. While it is unclear whether Tegel's growers would have been more efficient without collective bargaining, and the Commission places limited weight on this point, it does provide some support that collective bargaining has not previously had significantly adverse effects on efficiency outcomes.
241. Furthermore, Tegel itself has indicated that it does not object to negotiating collectively with the TGA concerning amendments to the FMAs [].²⁷¹ We consider that this is indicative of Tegel's expectation that collective bargaining is unlikely to result in an inefficient outcome in relation to the negotiation of these relatively complex and important aspects of the FMAs.

Potential efficiency benefits from avoiding hold-up problems

242. We consider that in the counterfactual there is an increased risk to growers of hold-up problems because of a likely imbalance of bargaining power in Tegel's favour. We consider that collective bargaining is more likely to lead to an efficient solution to any such hold-up problems than individual bargaining in the counterfactual because it is more likely to improve growers' bargaining power, and as a result lead to the development of more efficient contract terms.
243. Although Tegel may be incentivised to exercise buyer (monopsony) power to reduce its grower costs [], we consider this situation is likely to be temporary.²⁷²
244. Nevertheless, we cannot exclude the real chance that Tegel could use its strong bargaining position in the counterfactual to cease obtaining growing services from those growers that it did not wish to continue purchasing growing services from,²⁷³ and/or use the threat of ceasing supply to negotiate lower growing fees from a larger group of growers.

²⁷⁰ This is the amount of feed to create 1kg of chicken. Commerce Commission interview with TGA (15 December 2021). Supported in Commerce Commission interview with []. See also Tegel Annual Report 2018.

²⁷¹ Tegel submission on the Draft Determination dated 20 May 2022 at [1.6].

²⁷² Authorisation Application at [8.41]; Link Economics – Comments on submissions on the Commerce Commission's Draft Determination (15 June 2022) at [34]; Commerce Commission interview with Tegel (7 December 2021); Commerce Commission interview with TGA (15 December 2021).

²⁷³ Noting a reduction in the number of growers does not necessarily involve a reduction in the volume of chickens grown as other growers could increase their production.

245. An effect of Tegel exercising its bargaining power in this way in the counterfactual would be a reduction in the [] costs of growing services for Tegel.²⁷⁴ As discussed further below, because this reduction in costs [] would have no material impact on bird numbers, we would not expect that this would result in a substantial change in Tegel’s downstream wholesale prices in the short term. Instead, most of this impact would constitute a transfer to Tegel from the growers compared to the current FMAs.²⁷⁵
246. However, while such an outcome would generate short term benefits to Tegel, any threat or actual stranding of grower assets could disincentivise future grower investment in growing operations for Tegel. This could make it more difficult, and/or more costly, for Tegel to increase its growing capacity in the future if demand for its products increases, as expected.
247. To the extent that such hold-up problems would effectively be reduced by authorising the Proposed Arrangement, longer-term dynamic efficiency benefits would be generated in the factual.
248. The magnitude of any such benefit is difficult to estimate, however. There are also some potential reasons as to why such hold-up problems in the counterfactual may not be substantial.
249. For instance, in the event Tegel requires additional growing services in the future, it would have the ability to offer growers sufficiently attractive terms to entice them to invest in additional growing capacity and/or increase output, for example by offering sufficiently [] contracts.
250. More generally, Tegel may be incentivised to ensure an efficient (competitive) level of growing capacity is maintained, and to this end may wish to avoid a reputation for dealing in an unfair manner with growers.²⁷⁶ If so, Tegel may not seek to further negotiate growing fees below current levels in the counterfactual.
251. However, there is insufficient evidence for the Commission to conclude these factors would necessarily prevent hold-up problems from arising. Consequently, we consider that there is a real chance that enabling collective bargaining would significantly improve the likelihood that any hold-up problems would be resolved efficiently.

Potential efficiency detriments from higher grower fees

252. In general, when the price of a product increases, the quantity of that product demanded by customers will decrease, as some customers switch to less preferred alternatives or merely purchase less. Where the price increase is a result of the exercise of market power, the result is that resources are allocated less efficiently.

²⁷⁴ []].

²⁷⁵ []].

²⁷⁶ NERA – Submission on NZTGA SOPI (5 November 2021) at [6].

253. The size of this allocative efficiency loss largely depends on the magnitude of the price increase and the responsiveness of demand to price changes (price elasticity of demand). All else being equal, the higher the expected price increases and the more responsive (elastic) demand is to price changes, the larger the allocative efficiency loss. Conversely, small or negligible price increases, or less responsive demand to price changes, tend to reduce the potential for a material loss in allocative efficiency.
254. The Commission considers that by acting collectively growers could use greater bargaining power to extract more beneficial terms from Tegel than they would obtain in the counterfactual. This could include higher growing fees and/or contract durations that are longer than needed to ensure the recoupment of capital investments. Tegel may then pass some, or all, of these higher growing costs through to its downstream customers in the form of higher wholesale chicken prices. These wholesale customers may in turn pass at least some proportion of this increase through into higher retail prices for final consumers.
255. The magnitude of any difference in grower fees between the factual and counterfactual is uncertain, as is the impact that any such difference would ultimately have on downstream retail prices and the subsequent purchasing choices of consumers. Despite this uncertainty, our view is that any potential allocative efficiency detriments from higher grower fees resulting from authorisation of the Proposed Arrangement are likely to be relatively small. This is because:
- 255.1 Tegel faces competition in wholesale markets from other poultry processors who are likely to have some ability to expand to constrain Tegel should it seek to pass on cost increases that are not also incurred by its rivals.²⁷⁷ The level of competitive constraint provided by other processors on Tegel is not affected by this application, meaning this constraint would be the same in both the factual and the counterfactual;²⁷⁸
- 255.2 grower fees comprise a relatively small portion of Tegel's total costs and revenues, so even if higher grower fees were passed on by Tegel in its chicken prices, any increase in downstream wholesale and retail prices is likely to also be relatively small;²⁷⁹

²⁷⁷ Tegel faces direct competition from Inghams, Brinks, and Turks for primary processed chicken in the North Island, faces direct competition for primary processed chicken from Brinks in the South Island, and faces direct competition for value-added chicken from Inghams nationwide. See Authorisation Application at [7.5]; Commerce Commission interview with Tegel (7 December 2021); Commerce Commission interview with Inghams (29 November 2021); and Commerce Commission interview with Brinks (23 November 2021).

²⁷⁸ The impacts that the authorisation previously granted to Inghams' growers to collectively bargain will have already been factored into Inghams' operations and resulting pricing. The degree of competitive constraint provided by Inghams would not change if authorisation is granted for Tegel growers to collectively bargain.

²⁷⁹ []. Tegel's poultry revenue is estimated based on figures at [2.13] of Tegel' submission in response to the Provisional Authorisation dated 12 October 2021.

255.3 downstream retail demand for chicken products does not appear to be especially elastic.²⁸⁰ Therefore, even if there is an increase in Tegel's retail prices, we consider that a relatively large demand response by consumers is unlikely;²⁸¹

255.4 [

].²⁸² Further discussion

of this aspect is included in Attachment A.

Other potential productive and dynamic efficiency detriments

256. We consider that the risk of material productive or dynamic efficiency detriments from the Proposed Arrangement are low. In particular, we consider that any lessening of competition between growers from the Proposed Arrangement is unlikely to materially inhibit the development or widespread adoption of any innovations or productivity enhancing advancements in the provision of growing services.
257. In any event, the industry is relatively mature and stable, and the likelihood of substantially disruptive technological advancements appears significantly lower than other more dynamic sectors.²⁸³ Although higher grower costs for Tegel as a result of collective bargaining could also weaken Tegel's ability to invest to some degree,²⁸⁴ we nevertheless consider that Tegel would continue to play a key role in ensuring ongoing productivity enhancements in the sector, flowing from its own vertical integration throughout much of the supply chain and direct relationships with the growers.²⁸⁵ In this regard, we note that the growers and Tegel's incentives to ensure that individual growers operate efficiently are broadly aligned.

²⁸⁰ Tegel Foods Limited and Brinks Group of Companies (Commerce Commission Decision 658, 2008) at [62] to [76].

²⁸¹ The relatively moderate demand elasticity for chicken products likely reflects the fact that chicken is generally the lowest priced meat protein available in New Zealand. Long term trends suggest an increase in chicken consumption coinciding with a decrease in the consumption of red meat. Commerce Commission interview with Tegel (7 December 2021); Commerce Commission interview with Woolworths (2 December 2021); and Commerce Commission interview with Foodstuffs North Island (1 December 2021).

²⁸² In general, profit maximising firms produce a level of output where marginal cost equals marginal revenue. See Greenlaw, S., & Shapiro, D. (2011) *Principles of Microeconomics* 2nd edition. *OpenStax*. pages 194, 225, and 240.

[

].

²⁸³ We consider that industry changes that may require alterations to growing services are more likely to be incremental rather than disruptive in nature, such as changes to environmental or animal welfare requirements.

²⁸⁴ Where higher grower costs could be the result of higher individual grower fees and/or a higher number of contracted growers in the factual.

²⁸⁵ Commerce Commission interview with Tegel (7 December 2021).

Submissions on wealth transfers

265. TGA claims that if collective bargaining were to result in growers receiving higher growing fees, this would constitute a beneficial wealth transfer from Tegel's foreign shareholders to New Zealand resident TGA growers.²⁸⁸
266. TGA claims that Tegel possess significantly greater bargaining power compared to individual growers and so collective bargaining would, at least partially, redress this imbalance.²⁸⁹ Therefore, TGA argues that the extent to which grower fees would be lower in the counterfactual would be a product of Tegel's bargaining position and buyer power, and not a reflection of efficient prices.²⁹⁰
267. TGA estimates that any wealth transfer from authorisation would be at most \$[] per annum.²⁹¹ This estimate is based on TGA's assumption that the [].
268. In relation to the losses that Tegel has experienced in recent years and whether this is relevant to the assessment of any foreign wealth transfers, TGA considers that Tegel's current financial position is immaterial to this assessment.²⁹² Because the FMAs are [], TGA considers that short term fluctuations in Tegel's financial position are irrelevant. Rather, what is important is the significant buyer power that chicken processors possess.²⁹³ []²⁹⁴
269. In contrast, Tegel claims that if [] fees paid to growers were lower under the counterfactual, this would not constitute a public detriment, and so higher fees under the factual would not be a benefit.²⁹⁵
- 269.1 First, Tegel claims that []^{296, 297} [].
- 269.2 Second, Tegel claims that any transfer does not amount to the transfer of a "functionless monopoly rent".²⁹⁸ Tegel considers that it [], while it is being squeezed between

²⁸⁸ Authorisation Application at [8.11].

²⁸⁹ *Ibid* at [8.15].

²⁹⁰ *Ibid* at [8.15] to [8.16].

²⁹¹ Appendix D of the Authorisation Application at [3.5.2]

²⁹² TGA's cross-submission dated 23 December 2021 at [50] to [55].

²⁹³ *Ibid* at [53].

²⁹⁴ TGA's cross-submission on Draft Determination dated 15 June 2022 at [127].

²⁹⁵ NERA – Submission on NZTGA SOPI (5 November 2021) at [24].

²⁹⁶ Tegel's Submission in Response to SOPI dated 5 November 2021 at [10.12] to [10.13].

²⁹⁷ NERA – Submission on NZTGA SOPI (5 November 2021) at [31].

²⁹⁸ Tegel's Submission in Response to TGA's Provisional Authorisation dated 30 September 2021 at [10.14].

[] and downstream chicken prices that have steadily declined in New Zealand over the last five years.^{299, 300} Tegel experiencing [], combined with the operating losses it faced since May 2018, does not support the claim that Tegel is earning supra-competitive returns.³⁰¹

269.3 Third, even if a benefit were to exist, Tegel claims that TGA’s assumption of a [] overestimates any likely difference in factual and counterfactual prices.³⁰² Tegel claims [], and by extension, reducing TGA’s \$[] wealth transfer estimation.³⁰³

Our assessment of wealth transfers

270. Wealth transfers under the total welfare standard may be relevant where the transfer is between New Zealanders and non-New Zealand residents, such as in this case where Tegel is foreign owned and the chicken farms are largely domestically owned. This is because the public benefit test focuses on benefits to the New Zealand public. However, as the Court of Appeal outlined in *Godfrey Hirst*, the Commission must also take into account feedback effects in the long term. Specifically on the matter of transfers to foreign shareholders the Court of Appeal found that “without evidence the New Zealand public will be exploited, gains to foreign shareholders” should be treated consistently with New Zealand shareholders to encourage foreign investment.³⁰⁴
271. The investment (and continued reinvestment) of substantial funds in a business that operates, and adds value, in New Zealand and produces goods sold to New Zealand consumers in competition with other domestic companies, appears to be the kind of “trade and investment which, from a long-run perspective, benefits the New Zealand public”.³⁰⁵
272. Although we do not entirely discount the possibility, the Commission does not consider there is evidence to suggest any wealth transfers that might arise from higher fees to growers in the factual would most likely be sourced from “functionless monopoly rents” derived by Tegel’s foreign shareholders.

²⁹⁹ NERA – Submission on NZTGA SOPI (5 November 2021) at [25].

³⁰⁰ “Functionless monopoly rents” are “supranormal profits” that arise neither from cost savings nor from innovation, where “supranormal profits” refer to profits above a normal (competitive) rate of return. See NERA – Submission on NZTGA SOPI (5 November 2021) at [26].

³⁰¹ Tegel’s Submission in Response to TGA’s Provisional Authorisation dated 30 September 2021 at [2.15].

³⁰² NERA – Submission on NZTGA SOPI (5 November 2021) at [33].

³⁰³ []. Commerce Commission interview with TGA (15 December 2021).

³⁰⁴ *Godfrey Hirst* at [50]. The Court went on to note the benefit of allowing a domestic competitor in an international market, which is not the case here, though an analogy may be drawn to the benefits of allowing an international competitor to compete in a domestic market.

³⁰⁵ *Godfrey Hirst* at 27, citing *Telecom Corporation of New Zealand Ltd v Commerce Commission* (1991) 4 TCLR 473 (HC) [“AMPS-A”].

273. Tegel’s recent financial performance is not consistent with deriving supranormal profits,³⁰⁶ although much of these losses are likely the result of the ongoing COVID-19 pandemic and IBD outbreak market shocks, combined with Tegel’s previous decision to accept [].³⁰⁷ Additionally, although the downstream wholesale and retail markets in which Tegel supplies its products are relatively highly concentrated,³⁰⁸ Tegel also faces a degree of direct competition from other poultry processors.³⁰⁹
274. Based on this evidence, our view is that any wealth transfer from Tegel’s foreign shareholders to New Zealand growers would most likely constitute a neutral transfer and not a public benefit.³¹⁰ Given this, we have not placed any weight on this potential benefit and have not attempted to quantify any such potential beneficial impacts.

Balancing of benefits and detriments

275. Based on the evidence we consider that authorising collective bargaining by TGA is more likely than not to lead to a net public benefit. We consider the likely benefits would comprise of reduced transactions costs, a greater likelihood of more efficient contract terms, and the reduced risk of hold-up problems which improves investment incentives for growers. We consider that these benefits would more likely than not outweigh any allocative, productive, or dynamic efficiency detriments arising from the lessening of competition, and associated increased bargaining power, from collective bargaining.
276. There is significant uncertainty regarding how collective bargaining would influence the outcomes of future negotiations. This is especially the case given the relatively unusual circumstances, []. Accordingly, the extent to which the Commission has been able to meaningfully quantify the effects of collective bargaining has been limited. Therefore, we have relied more on our qualitative assessment of the evidence in our determination.

³⁰⁶ “Tegel made an operating loss of \$12.5 million before a goodwill write down of \$30.9 million, followed by an operating loss of \$29.2million (and goodwill write down of \$50 million) for the 2019 financial year. In 2020 it made an operating loss of \$17.1million.” See Tegel’s submission in response to TGA’s Provisional Authorisation dated 30 September 2021 at [2.15].

³⁰⁷ Authorisation Application at [8.39]; Tegel’s Submission in response to TGA’s Provisional Authorisation dated 30 September 2021 at [2.14]; and Commerce Commission Interview with Tegel (7 December 2021).

³⁰⁸ Tegel accounts for approximately 50% of chicken sold in New Zealand. Authorisation Application at [3.12] referencing Tegel Annual Report 2018 (27 July 2018) at page 2.

³⁰⁹ Commerce Commission interview with Tegel (7 December 2021); Commerce Commission interview with Inghams (29 November 2021); Commerce Commission interview with Brinks (23 November 2021); Commerce Commission interview with Foodstuffs North Island (1 December 2021); and Commerce Commission interview with [].

³¹⁰ Noting that in *Godfrey Hirst* the wealth transfers at issue were savings arising from the transaction and therefore the question was whether those savings, accruing to foreign shareholders, could be counted as benefits. In this case the transfers are revenue arising from business-as-usual operations that will occur in both the scenario with and without the transaction and are neutral.

277. We have also incorporated in our balancing of the benefits and detriments the likely impacts of [] during the provisional authorisation period. We consider such a wide-ranging [] would have been unlikely without collective bargaining. We also consider that [] is indicative of the benefits possible from collective bargaining more generally.
278. Regarding the specific impacts of the Proposed Arrangement, we consider that it is more likely than not to generate substantial benefits in the form of avoided transactions costs. This includes both the costs avoided by [], arising during the provisional authorisation period, and the costs that would be avoided during likely future negotiations. We consider the former is likely to be in the order of \$[]. We consider the latter is likely to be of a broadly similar magnitude, albeit we consider the impact could be within a wider range of a \$3 million benefit at best, or a detriment no more than, and most likely significantly less than, \$3 million at worst. On balance, we consider that the effect of the Proposed Arrangement is more likely than not to generate a substantial benefit from avoided transactions costs.
279. We consider that the Proposed Arrangement is also more likely than not to generate a benefit in the form of more efficient contract terms. We consider that this benefit may be relatively moderate, to the extent that it may only increase the likelihood of the efficient resolution of relatively marginal contractual issues. However, we consider there is also a real chance that this benefit could be significantly larger if collective bargaining enables the development of more efficient contract terms relating to more substantive contractual matters, (eg, fee structures, performance and investment incentives, etc).
280. We also consider that there is a real chance that the Proposed Arrangement would give rise to efficiency benefits to the extent that it prevents hold-up problems which may deter otherwise efficient investment by growers.
281. Notwithstanding the relatively unusual current circumstances [], we consider the Proposed Arrangement is unlikely to generate any large efficiency detriments. While the Proposed Arrangement is likely to increase the grower costs that Tegel faces, we assess that any allocative efficiency detriment is unlikely to be any larger than relatively minor. Similarly, our assessment is that any other productive and dynamic efficiency detriments are also more likely than not to be minor.
282. We have not placed weight on the potential for wealth transfers from Tegel's foreign shareholders to TGA growers to generate public benefits. The Commission considers that there is insufficient evidence to suggest that Tegel is likely to derive profits that are in excess of those necessary to incentivise efficient foreign investment in New Zealand.
283. Our assessment is therefore that the likely benefits from the Proposed Arrangement would be more likely than not to exceed the likely detriments, such that the most likely outcome from authorisation would be a net public benefit.

Attachment A: Impact of higher [] grower fees

288. In addition to the other factors outlined in 255.1 to 255.3, the Commission considers that the fact that grower fees are [] also reduces the risk of higher growing fees from collective bargaining causing a large allocative efficiency detriment, particularly in the short term. In general, firms' prices are heavily influenced by their marginal costs, which are unaffected by [].³¹³
289. We consider the risk of significant allocative efficiency detriments is relatively low in wholesale markets for primary processed chicken in particular. To the extent that these markets have some features that are akin to commodity markets, such as competing suppliers selling unbranded, homogenous products, often to sophisticated, well-informed buyers with reasonable levels of bargaining power (ie, supermarkets), we expect that changes in Tegel's prices are more likely to be influenced by short-run marginal costs [].³¹⁴
290. However, higher grower fees are likely to have some impact on Tegel's overall profitability. This has the potential to affect its long-term investment and operational decisions, [].
291. Additionally, higher grower fees could be more likely to have an impact on prices for secondary processed chicken, particularly for the supply to QSR customers.³¹⁵ To the extent that Tegel bids or negotiates supply contracts and prices with these customers, increases in costs for Tegel could lead it to bid/negotiate higher prices. Given Tegel's share of sales of secondary processed chicken as one of only two processors capable of supplying QSR customers, we consider that there is a higher risk of an increase in grower costs being passed through into prices to these customers.³¹⁶
292. The result is that there may be a risk of (allocative and/or dynamic) efficiency detriments from higher grower fees, even if these fees []. Nevertheless, we consider that the combination of factors outlined in 255.1 to 255.3 means that the overall risk of large efficiency detriments from higher grower fees is relatively low.

³¹³ In general, profit maximizing firms produce a level of output where marginal cost equals marginal revenue. See Greenlaw, S., & Shapiro, D. (2011) Principles of Microeconomics 2nd edition. *OpenStax*.

³¹⁴ Commerce Commission interview with Tegel (7 December 2021); Commerce Commission interview with Inghams (29 November 2021); Commerce Commission interview with Brinks (23 November 2021); Commerce Commission interview with Foodstuffs North Island (1 December 2021).

³¹⁵ QSR refers to Quick Service Restaurants.

³¹⁶ See Authorisation Application at 3.12; Commerce Commission interview with Brinks (23 November 2021); Commerce Commission interview with Tegel (7 December 2021); Commerce Commission interview with []; Commerce Commission interview with [].