

**Confidential**

## MEMO

**TO:** Dr Ross Patterson, Minter Ellison Rudd Watts  
**DATE:** 11 October 2021  
**FROM:** James Mellsop and Barbara Kaleff  
**SUBJECT:** **NZTGA provisional authorisation application**

1. You have asked us to review the 23 September 2021 Castalia report titled, “Public Benefits and Detriments of a Provisional Authorisation for Collective Activity”. We refer to this as “Castalia Report 2”, as there is also an earlier Castalia report accompanying the original authorisation application by the New Zealand Tegel Growers Association (“**the NZTGA**”).
2. Page 8 of Castalia Report 2 states, “*provisional authorisation would enable the growers to engage collectively to [REDACTED]*”, which the report claims would result in a variety of public benefits.
3. The types of benefits being claimed in respect of collective dispute resolution appear to be the same as those claimed in respect of the broader (original) authorisation application. We are considering these as part of that broader authorisation process.
4. What we focus on here is a very important public detriment that would occur if the provisional authorisation was granted – the economic effect of erosion of contractual property rights.
5. One of the claims in both Castalia reports is that collective bargaining would lead to more efficient contracts. For example, referring to the existing farm management agreement between Tegel and each of its growers (“**the FMA**”), section 2.4 of Castalia Report 2 states:  
*Collective bargaining has resulted in a sophisticated agreement between Tegel and growers that is likely to have efficiency benefits.*
6. The irony of the provisional authorisation application is that the NZTGA is now seeking the Commerce Commission’s authorisation to [REDACTED].
7. Clause 14 of the FMA [REDACTED]. While Castalia Report 2 states that the FMA was collectively bargained, each contract is between an individual grower and Tegel. Clause 14 envisages that Tegel and each individual grower would [REDACTED]. This clause was the outcome of the collectively negotiated contract that, on the Castalia reports’ own argument, was efficient.
8. In other words, the growers *collectively* agreed that they [REDACTED].
9. [REDACTED].
10. Furthermore, Castalia Report 2 appears to envisage [REDACTED].
11. As already noted, Castalia Report 2 characterises the FMA as being “a sophisticated agreement between Tegel and growers that is likely to have efficiency benefits”.
12. We also note that the FMA:<sup>1</sup>

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<sup>1</sup> These points are based on our review of the Tegel submission to the Commission that this memo accompanies.

- A. [REDACTED];
- B. [REDACTED];
- C. [REDACTED]; and
- D. [REDACTED].

13. Accordingly, authorisation by the Commission would [REDACTED]. Such a public step by the Commission would erode the confidence of future negotiating parties (in all markets) in contractual property rights, with negative implications for dynamic efficiency (e.g., investment incentives).