IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2009-404-004392

UNDER	the Declaratory Judgments Act 1908
AND UNDER	the Commerce Act 1986
BETWEEN	TURNERS & GROWERS LIMITED First Plaintiff
AND	TURNERS & GROWERS HORTICULTURE LIMITED Second Plaintiff
AND	ENZA LIMITED Third Plaintiff
AND	ZESPRI GROUP LIMITED First Defendant
AND	ZESPRI INTERNATIONAL LIMITED Second Defendant
AND	NEW ZEALAND KIWIFRUIT GROWERS INCORPORATED First Intervener
AND	THE ATTORNEY-GENERAL Second Intervener

Hearing: 20-23 July 2010

Appearances: C T Wallker and M C Smith for Plaintiffs
D J Goddard QC and L A O'Gorman for Defendants
P Crombie for First Intervener
B Keith and M Carambas for Second Intervener

Judgment: 13 August 2010

JUDGMENT (NO 2) OF WHITE J

This judgment was delivered by me on 13 August 2010 at 4.30 pm
pursuant to Rule 11.5 of the High Court Rules.
Registrar/Deputy Registrar

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Introduction

[1] Under the Kiwifruit Export Regulations 1999 (the Regulations) no one may export kiwifruit from New Zealand, other than for consumption in Australia, apart from Zespri Group Limited (Zespri). Turners & Growers Limited and the other plaintiffs (Turners & Growers) challenge the validity of the export ban and Zespri's monopsony under the Regulations on the ground that the Regulations also ought to

have included provisions enabling the New Zealand Kiwfruit Board (KNZ) to permit other persons to export kiwifruit. Turners & Growers claim that the Kiwifruit Industry Restructuring Act 1999 (the Restructuring Act) did not empower Regulations to be made that:

a) omitted provisions enabling KNZ to permit other persons to export kiwifruit;

b) created a monopsony contrary to the purpose of the Commerce Act 1986; and

c) infringed the right to freedom of association contrary to ss 2 and 17 of the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act).

[2] Zespri, New Zealand Kiwifruit Growers Incorporated (NZKGI) and the Attorney-General all dispute Turners & Growers' claim. The first principal issue therefore is whether the Regulations were validly made under the Restructuring Act.

[3] Zespri has also applied for orders that the Court should not determine two of Turners & Growers' other claims, which seek declarations that Zespri has breached "non-discrimination" and "non-diversification" provisions in the Regulations and that certain contracts are illegal contracts, on the ground that the Court does not have jurisdiction to make these declarations. Zespri claims that KNZ has exclusive jurisdiction to determine in the first instance whether the "non-discrimination" and "non-diversification" provisions in the Regulations have been breached. The second principal issue therefore is whether the Court should hear and determine these claims.

[4] The preliminary issues raised at this stage are issues of law relating to the first three causes of action in Turners & Growers' substantive proceeding. They are to be determined by interpreting the relevant statutory and regulatory provisions on the basis of well-established principles. The remaining issues in the other two causes of action under the Commerce Act 1986 are to be determined following the six week trial scheduled to commence on 2 May 2011: judgment (No 1) dated 5 May 2010 and minute dated 20 May 2010.

The regulation making power

[5] The statutory power to make regulations governing the export of kiwifruit is contained in s 26 of the Restructuring Act, which provides:

> **Regulations**
>
> (1) The Governor-General may from time to time, by Order in Council made on the recommendation of the Minister, make regulations—
>
> *New Board*
>
> (a) providing for the establishment, functions, powers, membership, funding, and other matters relating to the new Board:
>
> *Regulation of Export of Kiwifruit*
>
> (b) restricting the export of kiwifruit otherwise than for consumption in Australia:
>
> (c) providing for the new Board to grant to Zespri Group an authorisation to export kiwifruit:
>
> (d) providing for the new Board to permit other persons to export kiwifruit:
>
> (e) providing for the new Board to require Zespri Group to export kiwifruit in collaboration with other persons approved by the Board:
>
> (f) providing for the terms and conditions or other requirements that may or may not be part of the authorisation, permit, or collaborative marketing approval:
>
> *Mitigation Measures*
>
> (g) restricting discrimination among suppliers of kiwifruit for export to commercial grounds:
>
> (h) restricting certain diversification of business:
>
> (i) Imposing requirements in respect of the corporate form and governance of the company and the tradeability of its shares, including any rules about maximum share holding:
>
> *Information Disclosure*
>
> (j) requiring Zespri Group to make publicly available prescribed financial statements that follow generally accepted accounting principles:

(k) requiring Zespri Group to publish in the prescribed manner information which may include (without limitation)—

(i) prices, terms, and conditions:

(ii) pricing policies and methodologies:

(iii) costs:

(iv) cost allocation policies and methodologies:

(v) performance measures, or information from which performance measures may be derived, or both:

(l) prescribing the form and manner in which the financial statements are to be made available:

(m) requiring, in respect of the statements or information so required,—

(i) the adoption, in the preparation or compilation of those statements or that information, of such methodology as is prescribed in the regulations or in any document published by or under the authority of the responsible chief executive and referred to in the regulations:

(ii) the disclosure, in the prescribed manner, of the methodology adopted in the preparation or compilation of those statements or that information:

(iii) the inclusion of any matters prescribed in the regulations or in any document published by or under the authority of the responsible chief executive and referred to in the regulations:

(n) requiring that the statements or information so required, or information from which those statements or that information is derived (in whole or in part), be certified, in the prescribed form and manner, by persons belonging to any specified class of persons:

(o) setting rules about when and for how long information must be disclosed:

(p) requiring persons other than Zespri Group who are permitted to export kiwifruit by the new Board, and the new Board, to disclose information relating to kiwifruit so exported:

(q) requiring collaborative marketers and the new Board to disclose information relating to kiwifruit exported under any collaborative marketing arrangement:

(r) exempting or providing for exemptions (including providing for the revocation of exemptions) from all or any of the

disclosure requirements of any regulations made under paragraphs (j) to (q):

General

(s) providing for offences for a contravention of the regulations and for penalties—

(i) of up to $50,000 in respect of a contravention of any restriction on exports:

(ii) of up to $5,000 in respect of any other contravention of the regulations:

(t) providing for the exclusion of Crown liability in relation to export authorisations, permits, and collaborative marketing approvals and the operation of Zespri Group and collaborative marketers:

(u) providing for Ministerial directions to be given to the company in respect of international obligations of New Zealand:

(v) providing for the supply of information for the purpose of administration and enforcement of this Act and regulations made under this Act:

(w) providing for the dissolution of the new Board and for all matters related to the dissolution:

(x) providing for transitional provisions:

(y) providing for such other matters as are contemplated by or are necessary for giving full effect to this Act and for its due administration.

(2) In this section, **Zespri Group** means the company and its subsidiaries.

(3) For the avoidance of doubt, regulations made under subsection (1) may apply to transactions within any group of companies of which Zespri Group Limited is a member, or between business activities within a specific Zespri Group Limited group company.

The exercise of the power

[6] Regulations under s 26 were made on 20 September 1999 by the Governor-General on the recommendation of the Minister for Food, Fibre, Biosecurity and Border Control (the Minister). The Regulations contain provisions relating to all of the matters mentioned in the paragraphs of s 26(1) of the Restructuring Act other than the following paragraphs or aspects of them:

(d) providing for the new Board to permit other persons to export kiwifruit:

(f) providing for the terms and conditions or other requirements that may or may not be part of the ... permit [referred to in paragraph (d)]...

(p) requiring persons other than Zespri Group who are permitted to export kiwifruit by the new Board, and the new Board, to disclose information relating to kiwifruit so exported:

(r) exempting or providing for exemptions (including providing for the revocation of exemptions) from all or any of the disclosure requirements of any regulations made under [paragraph (p)]...

(s) providing for offences for a contravention of the regulations and for penalties–

(i)...

(ii) of up to $5,000 in respect of any other contravention of the regulations.

(v) providing for the supply of information for the purpose of administration and enforcement of this Act and regulations made under this Act [relating to the matters in the preceding paragraphs]:

(w) providing for the dissolution of the new Board and for all matters related to the dissolution.

[7] In accordance with the other paragraphs of s 26(1) of the Restructuring Act, the Regulations include provisions that impose an export ban contravention of which is an offence (regulation 3), require KNZ to authorise Zespri to export kiwifruit on specified terms and conditions (regulations 4–7), mitigate the potential costs and risks arising from Zespri's monopsony by imposing duties on Zespri not to discriminate unjustifiably and not to carry out activities that are unnecessary for its core business (regulations 8–11), require disclosure of Zespri's financial statements and its kiwifruit purchase conditions (regulations 12–14, 20 and 46), and empower KNZ to require Zespri to enter into collaborative marketing arrangements (regulations 24–29).

[8] For present purposes the relevant regulations are regulations 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 20, 24, 32, 33, 36, 42, and 46:

Part 1

Restrictions on export of kiwifruit

3 Export ban

(1) No person may export kiwifruit otherwise than for consumption in Australia except as authorised or approved by the Board in accordance with these regulations.

(2) Every person commits an offence, and is liable on summary conviction to a fine not exceeding $50,000, who knowingly and without lawful excuse contravenes subclause (1).

Part 2

ZGL's [Zespri's] export authorisation

4 Board must authorise ZGL to export kiwifruit

(1) The Board must authorise ZGL to export kiwifruit.

(2) The terms and conditions of the authorisation must be in accordance with regulations 5 to 7 and must be in writing.

5 Requirements of authorisation

The export authorisation must—

(a) have no expiry date:

(b) contain provisions to ensure that the Board will not incur any liabilities in respect of the export ban or anything done or omitted to be done by ZGL:

(c) require the point of acquisition of title to kiwifruit purchased for export to be at FOBS (or, at ZGL's discretion, later in the supply chain than FOBS).

6 Matters that must not be included in authorisation

(1) The export authorisation must not provide for any of the following:

(a) a limit on the percentage of the kiwifruit crop that is available to ZGL to export (other than via collaborative marketing):

(b) a requirement that ZGL purchase any particular proportion of the kiwifruit crop:

(c) the basis on which ZGL is to purchase and pay for kiwifruit (other than in connection with the non-discrimination rule):

(d) an assertion of rights by the Board over any of ZGL's assets, including intellectual property:

(e) the Board to have any right or obligation to approve any transactions entered into by ZGL (other than in respect of collaborative marketing):

(f) the Board to have any rights or powers in respect of kiwifruit pool administration or control (other than in respect of collaborative marketing):

(g) the Board to have any right or power to receive any of ZGL's revenue or income whatsoever (except the fees referred to in regulation 7(1)(c)):

(h) any events on which the export authorisation is to terminate (except in the case of ZGL's insolvency):

(i) compensation for any person if the export ban is revoked:

(j) any matters other than those reasonably necessary for the effective implementation of the requirements in regulation 5 or the discretionary requirements in regulation 7:

(k) any variation of the provisions of Part 3.

(2) **Insolvency** means—

(a) the appointment of a receiver; or

(b) the appointment of a liquidator or interim liquidator under Part 16 of the Companies Act 1993; or

(c) the removal of ZGL from the register of companies kept pursuant to section 360(1)(a) of the Companies Act 1993; or

(d) the appointment of a statutory manager under Part 3 of the Corporations (Investigation and Management) Act 1989.

7 Discretionary requirements of authorisation

(1) The export authorisation must—

(a) provide for an enforcement regime to ensure reasonable compliance with the matters referred to in regulation 33(1)(b):

(b) provide for the Board to make determinations on, and administer, the exemptions in respect of the information disclosure requirements under regulation 21:

(c) provide for ZGL to pay to the Board—

(i) the reasonable costs incurred by the Board in administering ZGL's export authorisation, including

monitoring and enforcement under regulation 33(1)(b); and

(ii) the reasonable costs of the Board's communications with producers; but

(iii) no other fees:

(d) require ZGL to enter into collaborative marketing arrangements approved by the Board:

(e) provide for any other matters reasonably necessary for the effective implementation of the requirements in this regulation or regulation 5.

(2) The enforcement regime must include provisions for—

(a) the identification of enforcement events:

(b) procedures which comply with natural justice:

(c) remedies, including provisions enabling affected persons to initiate, by way of complaint to the Board, an action through the enforcement regime and to receive an appropriate remedy if their claim is made out.

(3) The Board may decide, following consultation with ZGL, how these terms are specified in the authorisation.

(4) However, the Board must—

(a) submit to the Minister for approval, in sufficient time to enable the implementation of the first authorisation on 1 June 2000, the range of enforcement options to be included in the enforcement regime; and

(b) submit to the Minister for approval any proposed variation in that range of enforcement options; and

(c) comply with any request made by the Minister arising from the submission for approval.

(5) This regulation is subject to regulation 6.

Part 3

Mitigation measures

8 Purpose of Part

The purpose of this Part is to mitigate the potential costs and risks arising from the monopsony, by—

(a) encouraging innovation in the kiwifruit industry while requiring that providers of capital agree to the ways in which their capital is used outside the core business; and

(b) promoting efficient pricing signals to shareholders and suppliers; and

(c) providing appropriate protections for ZGL's shareholders and suppliers; and

(d) promoting sustained downward pressure on ZGL's costs.

Non-discrimination rule

9 Duty not to discriminate unjustifiably

ZGL, and its directors and managers, must not unjustifiably discriminate among suppliers and potential suppliers in respect of—

(a) a decision on whether to purchase kiwifruit; or

(b) the terms of the purchase contract.

10 Justifiable discrimination

(1) Discrimination (or the extent of the discrimination) is justifiable if it is on commercial grounds.

(2) A commercial ground includes, but is not limited to, matters relating to product features, quality, quantity, timing, location, risk, or potential returns.

Non-diversification rule

11 Non-diversification rule

(1) ZGL must not carry out activities, and must not own or operate assets, that are not necessary for the core business unless—

(a) the providers of capital used or to be used for those activities have been asked and have agreed to the use of their capital for those activities; and

(b) the shareholders and suppliers who have not agreed are not exposed to more than a minimal risk from those activities.

(2) Subclause (1) does not apply to sales of New Zealand-grown kiwifruit in New Zealand where the level of sales is incidental to the size of the total New Zealand market provided that the incidental sales are not more than 300,000 trays of kiwifruit sold by ZGL in the New Zealand market.

(3) Subclause (1) does not apply to sales of New Zealand-grown kiwifruit in Australia.

(3A) Subclause (1) does not apply to procuring the supply and marketing, before 1 April 2001, of non-New Zealand-grown produce that is underwritten by Kiwifruit International Limited (**KIL**) in accordance with the Annual Business Plan for 1 April 2000 to 31 March 2001 agreed to by Zespri International Limited (**ZIL**) and KIL under the

agreement relating to the management of KIL and any funding of ZIL made between KIL and ZIL and dated 10 August 1999.

(4) In this regulation, use of capital includes, for the avoidance of doubt,—

(a) the use of any resources that are or would be represented on ZGL's balance sheet as shareholders funds:

(b) the entering into of any arrangements that provide, directly or indirectly, for recourse to shareholders or suppliers funds or that would otherwise expose those funds to risk:

(c) the use of any funds that would be available for payment to suppliers or distribution to shareholders.

Information disclosure

12 Financial statement disclosure

(1) Within 4 months after the end of each financial year (beginning with the 2000/01 financial year), ZGL must publicly disclose financial statements for that financial year in respect of each of the business activities defined in the Handbook.

(2) Those financial statements must—

(a) be prepared in accordance with the allocation methodology in the Handbook; and

(b) disclose the information specified in the Handbook.

...

14 Disclosure of kiwifruit purchase conditions

(1) ZGL must publicly disclose, 1 month before coming into effect,—

(a) its terms and conditions, and any amendments to those terms and conditions, for the purchase of kiwifruit grown in New Zealand; and

(b) the period for which each set of terms and conditions, including amendments, is applicable.

(2) If it is not practicable to make the disclosure under subclause (1) 1 month before coming into effect, ZGL must make that disclosure as soon as practicable and no later than the date of coming into effect.

(3) ZGL must publicly disclose, within 3 months after the end of each financial year (beginning with the 2000/01 financial year),—

(a) the number of suppliers to which each set of terms and conditions were applied; and

(b) the volume of kiwifruit to which each set of terms and conditions were applied.

(4) ZGL must publicly disclose,—

(a) within 3 months after the beginning of each financial year, the methodology used at the beginning of that financial year to determine the payments for kiwifruit; and

(b) any change in the methodology, or adoption of a different methodology, within 1 month of the change or the different methodology taking effect.

(5) Every disclosure under subclause (4) must include key details of the methodology including—

(a) the relationship between purchase prices and selling prices; and

(b) the key costs (including cost of capital incurred by ZGL) and other factors that explain the differences between purchase prices (paid to suppliers) and selling prices; and

(c) any other information on which ZGL is relying to justify discrimination amongst suppliers.

...

Miscellaneous provisions relating to information disclosure

...

20 Information to be supplied to Board

(1) ZGL must supply to the Board—

(a) a copy of all statements and information required to be publicly disclosed under this Part within 1 week after the statements and information are first required to be made so available:

(b) any further statements, reports, agreements, particulars, and other information requested in writing by the Board for the purpose of monitoring ZGL's compliance with these regulations.

(2) ZGL, on receipt of a request made under subclause (1)(b), must comply with that request within 1 month after receiving the request or within such further period as the Board in any particular case may allow.

(3) All statements, reports, agreements, particulars, and information supplied to the Board under subclause (1)(a) must be certified by a director of ZGL as a true copy of the information that has been publicly disclosed by ZGL.

(4) All statements, reports, agreements, particulars, and information supplied to the Board under subclause (1)(b) must be accompanied by a certificate from a director of ZGL that—

(a) declares that the statements, reports, agreements, particulars, and information are the statements, reports, agreements, particulars, and information requested by the Board; and

(b) to the best of the director's knowledge, contain all the statements, reports, agreements, particulars, and information in the possession of ZGL which relate to the request.

...

Part 4

Collaborative marketing

24 Purpose of Part

The purpose of this Part is to enable the Board to require ZGL to enter into collaborative marketing arrangements for the purpose of increasing the overall wealth of New Zealand kiwifruit suppliers.

...

Part 5

Establishment of New Zealand Kiwifruit Board

32 New Zealand Kiwifruit Board

(1) The New Zealand Kiwifruit Board (known as "Kiwifruit New Zealand") is established.

(2) The Board is a body corporate with perpetual succession and a common seal.

(3) The Board is not a Crown entity for the purposes of the section 7 of the Crown Entities Act 2004.

33 Functions

(1) The functions of the Board are—

(a) to authorise the export of kiwifruit at FOBS, and to set the terms of the authorisation in accordance with Parts 1 and 2:

(b) to monitor and enforce—

(i) the non-discrimination rule, the non-diversification rule, the information disclosure requirements, and the collaborative marketing requirements; and

(ii) the requirement that the point of acquisition of title to kiwifruit purchased for export be in accordance with regulation 5(c); and

(iii) any other terms and conditions of the authorisation:

(c) to determine collaborative marketing applications in accordance with Part 4.

(2) The Board must carry out its function under subclause (1)(b) to best achieve the purpose in regulation 8.

...

36 Membership

The Board consists of 5 members of which—

(a) 3 members are to be elected by producers in accordance with regulation 37:

(b) 1 member is to be appointed by New Zealand Kiwifruit Growers Incorporated or its successor:

(c) 1 member is to be appointed by the other members, who is fully independent of the kiwifruit industry and who is to act as the chairperson of the Board.

...

Part 6

Miscellaneous Provisions

42 Alteration or review of authorisation

(1) The Board may alter the authorisation if it is necessary or desirable to do so to ensure the effective enforcement of the authorisation.

(2) The Board must review the effectiveness of the enforcement regime set out in regulation 7(1)(a) at intervals of no more than 3 years apart and change the authorisation as necessary to ensure the effectiveness of the regime.

(3) If these regulations are amended in a way that necessitates a change to the export authorisation, the Board must change the authorisation to ensure consistency with the regulations as amended.

...

46 Supply of information

(1) The Board may from time to time, for the purpose of the administration and enforcement of these regulations, require ZGL to make available to the Board information in its possession or over which it has control.

(2) ZGL must make that information available promptly to the Board in a form in which it can be readily understood.

(3) This regulation is not limited by regulation 20(1)(b).

Turners & Growers "no power" case

[9] The case for Turners & Growers is that the Minister had no power to recommend and the Governor-General had no power to make Regulations under s 26(1) of the Restructuring Act that impose a ban on the export of kiwifruit other than by Zespri, which was to be authorised to export on its own or in collaboration with other approved persons, without also making Regulations that enabled KNZ "to permit other persons" to export kiwifruit too. Accepting that the Court has no power to grant a declaration that Regulations must be made permitting other persons to export, Turners & Growers seek a declaration that regulations 3 (the export ban) and 4 (Zespri's authorisation) are ultra vires and of no effect.

[10] For Turners & Growers, Mr Walker submitted first that when s 26(1) was interpreted in light of its text and purpose it was clear that Parliament had intended the Regulations to comprise a complementary scheme whereby Zespri's export monopsony would be constrained not only by a requirement to export in collaboration with others and to comply with mitigation measures and information disclosure obligations but also by other persons permitted by KNZ to export independently of Zespri. Regulations enabling KNZ to permit the independent export of kiwifruit were an essential and mandatory requirement under s 26(1) of the Restructuring Act. The paragraphs in s 26(1), especially paragraphs (b) to (f), did not constitute a "buffet" from which the Minister and the Governor-General were entitled to pick and choose.

[11] In Mr Walker's submission, Parliament's intentions in respect of the mandatory nature of the complementary scheme for the Regulations were established by:

a) the principal feature of the Restructuring Act, which turned the old New Zealand Kiwifruit Marketing Board into a company, rather than a co-operative, with responsibilities to its shareholders rather than to growers, and with no ongoing obligation to purchase all kiwifruit;

b) as a corollary, the clear need, implemented by reading paragraphs (b) to (f) of s 26(1) together, to ensure that Zespri's monopsony was properly constrained by independent exporters and collaborative marketing; and

c) the absence of any indication in the text of the Restructuring Act that both independent exporters and collaborative marketing were not part of the proposed new complementary scheme.

[12] This approach to the text and purpose of s 26(1) was, in Mr Walker's submission, supported by its legislative history as well as by a comparison with the Apple and Pear Industry Restructuring Act 1999. As, on this approach, the meaning of s 26(1) was clear and unambiguous, it was unnecessary to refer to the Parliamentary debates relating to the Restructuring Act, but if reference was made to them for the purpose of checking this approach they either supported the approach or were equivocal.

[13] In relation to the Commerce Act 1986, Mr Walker made it clear in his submissions in reply that Turners & Growers only relied on that Act to the extent that the natural reading of s 26(1), namely that paragraphs (b) to (f) were intended to operate as a regulatory scheme, was reinforced by its consistency with the policy clearly expressed in the long title of the Commerce Act and reflected in its provisions. That Act supports competition for the long term benefit of consumers. While competition is not an end in itself and may have to give way to other mechanisms where that is in the public benefit, the Commerce Act, which is part of the general legislative context, does reflect a policy view in favour of competition.

[14] In relation to the right to "freedom of association" protected by s 17 of the Bill of Rights Act, Mr Walker made it clear that Turners & Growers relied strongly on the right which was inconsistent with the Regulations in that they obliged suppliers to contract with Zespri and no-one else and, in doing so, to associate with all other suppliers who were similarly required to contract with Zespri alone. An analysis of the relevant international conventions, commentaries and texts on the

right to "freedom of association" and the authorities in New Zealand and overseas, especially recent Supreme Court of Canada cases, supported the view that the right extends to economic associations of the nature involved in this case and includes freedom not to associate. The limitations imposed on the right by the Regulations were not justified and meant that, in the absence of any provisions permitting independent exporters, the Regulations, as subordinate legislation, were not saved in terms of ss 4, 5 and 6 of the Bill of Rights Act and were therefore invalid.

Response for Zespri, NZKGI and the Attorney-General

[15] For Zespri, Mr Goddard QC submitted that:

a) The power to make regulations under s 26(1) of the Restructuring Act was a discretionary power that could be exercised "from time to time". While regulations restricting exports and requiring KNZ to authorise Zespri to export were appropriate, there was no textual indication that a permit regime was mandatory on day one or what type of regime was required. The possibility of a permit regime under s 26(1)(d), like the possibility of regulations providing for the dissolution of KNZ under s 26(1)(w), were "future-proofing" provisions that gave Zespri a strong incentive to maintain grower support. As the Apple and Pear Industry Restructuring Act 1999 showed, a permit regime was an alternative to a collaborative export regime as envisaged by s 26(1)(e).

b) As the legislative history, especially the Select Committee report, and the Parliamentary debates showed, the scheme of the regulatory regime was to implement an agreement reached between the old Board and the industry to enable regulations to be made which preserved the status quo of the single desk and enabled either partial or complete deregulation in the future.

c) An independent export regime was not necessary to restrain Zespri, which would be constrained by the proposed regulations relating to non-discrimination and non-diversification and information disclosure

("light handed regulation") as well as by the restrictive trade practices provisions in Part 2 of the Commerce Act 1986 and the possibility of price control under Part 4 of that Act. The threat of partial or complete deregulation could not be overstated as a discipline. There was no "enduring monopsony guaranteed by the regulations".

d) There were also constraints on the regulation-making power: political constraints on the Minister, the Regulations Review Committee (which had not taken the opportunity to review the Regulations over the last ten years), the Regulations (Disallowance) Act 1989, and judicial review.

e) The Commerce Act 1986 argument was a "red herring" because, while it was possibly a relevant factor which might be taken into account, it did not require competition at all costs and gives way to policy choices made in other enactments. The Commerce Act did not prevent regulation of the kiwifruit industry.

f) This was not a freedom of association case. There is no individual "right to export" and such a right cannot be manufactured by saying "we want to export in association with others". A grower is not forced by the export prohibition to associate with Zespri or to refrain from associating with others. The "freedom of association" jurisprudence did not support Turners & Growers' case. Even if "freedom of association" were relevant here, the regulations must be given effect in any event.

g) The Court should not exercise its discretion after ten years to grant the declaration sought by Turners & Growers. Alternatively, the Court might grant a declaration that s 26(1) of the Restructuring Act requires a licensing regime to be included, leaving it to the Executive to introduce such a regime within a reasonable time frame, to operate prospectively with appropriate transitional provisions.

[16] For NZKGI, Mr Crombie, supporting the submissions for Zespri, submitted that the interpretation of the Restructuring Act promoted by Turners & Growers was, as the legislative history and Parliamentary debates showed, contrary not only to the wishes of the kiwifruit industry, which was in favour of retaining the single desk regime, but also to the position of each of the major political parties when the legislation was introduced and received its second and third readings in Parliament. The new 1999 regime was a move away from the old prescriptive regulatory regime and required the corporatised Zespri to be restrained by "light-handed regulation" and to respond to market demands. The single desk regime will only survive with industry support. An inference may be drawn from the fact that there have been no changes to the regulatory regime over the last ten years that it has operated successfully. The arrangements for collaborative marketing are set out in Zespri's authorisation.

[17] For the Attorney-General, Mr Keith submitted that:

a) The Restructuring Act restructured the industry by converting the old board into Zespri and permitting the Minister to recommend regulations that regulated the export of kiwifruit by retaining a single desk and by imposing constraints on Zespri, monitored and enforced by the new Board, KNZ. No requirement under the Restructuring Act mandated regulations equivalent to every paragraph of s 26(1). Express words would have been expected. Instead Parliament deliberately, if unusually, decided that the new kiwifruit export regime should be implemented by way of regulations. The Regulations were not unreasonable or irrational. There is also a question whether the Court would have power to grant a declaration that effectively required the Minister to recommend a regulation that required KNZ to permit other persons to export kiwifruit.

b) The Commerce Act 1986 does not assist Turners & Growers because it is clear from the Restructuring Act and the Parliamentary debates that a monopsony was intended.

c) The right to "freedom of association" under s 17 of the Bill of Rights Act does not apply in the circumstances of this case. Although the scope of s 17 of the Bill of Rights Act was unexplored in New Zealand and the concept of "association" was potentially very broad, a broad philosophical approach was not supported by international jurisprudence. Reference was made to the distinction drawn between restrictions on association and activity in the Canadian authorities and the English Court of Appeal in *R (Countryside Alliance & Ors) v Attorney-General*[1] (the fox hunting case) and the different approach of the House of Lords in the same case,[2] as well as decisions of the European Court of Human rights in *Gorzelik v Poland*[3] and *Sigurjonsson v Iceland*[4] and *Chassagnou v France.*[5] None of the approaches adopted by the Courts in these cases supported Turners & Growers. There had not been a report by the Attorney-General under s 7 of the Bill of Rights Act that any provision in the Bill which became the Restructuring Act appeared to be inconsistent with the Bill of Rights Act.

d) Even if the Regulations engaged the right under s 17 of the Bill of Rights Act, the restriction of arrangements for the export of kiwifruit was in the wider public interest so that the requirements of an important objective and of rational connection were clearly satisfied to justify the restriction in terms of s 5 of the Bill of Rights Act: *R v Hansen.*[6]

e) Given that the Restructuring Act clearly mandates the restriction of arrangements for the export of kiwifruit, it is not possible, consistently with s 4 of the Bill of Rights Act, to disapply that restriction so as to uphold the s 17 right: *R v Hansen.*[7]

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[1] *R (Countryside Alliance & Ors) v Attorney-General* [2007] QB 305 at [106].
[2] *R (Countryside Alliance & Ors) v Attorney-General* [2008] 1 AC 719 at [18], [57]–[58], [117] and [143].
[3] *Gorzelik v Poland* (2004) 38 EHHR 4 at [92].
[4] *Sigurjonsson v Iceland* (1993) 16 EHHR 462.
[5] *Chassagnou v France* (1999) 29 EHHR 615.
[6] *R v Hansen* [2007] 3 NZLR 1 (SC) at [70], [123], [203]–[204] and [271].
[7] *R v Hansen* at [60], [92] and [157].

Challenging validity of regulations

[18] Regulations made under statutory powers are a common form of delegated legislation that may be reviewed by Parliament itself and by the Courts: Philip A Joseph *Constitutional & Administrative Law in New Zealand.*[8] Parliament's Regulations Review Committee may review regulations and Parliament itself may disallow, amend and revoke regulations under ss 5 and 9 of the Regulations (Disallowance) Act 1989: David McGee *Parliamentary Practice in New Zealand.*[9] The Courts may review regulations when exercising their powers of judicial review. The cases show that, notwithstanding a statutory presumption of validity by virtue of s 142 of the Evidence Act 2006 and s 24 of the Interpretation Act 1999, the Court may declare regulations invalid on a range of grounds if they are outside the scope of their statutory empowering clause. It is well-established that determining whether regulations are outside the scope of the empowering statute is a question of statutory interpretation. The Court must consider the text and purpose of the particular empowering provision to ascertain whether the regulations are within the objects and intentions of Parliament: *Carroll v Attorney-General,*[10] *F E Jackson & Co Ltd v Collector of Customs,*[11] *Brader v Ministry of Transport,*[12] *New Zealand Drivers' Association v New Zealand Road Carriers*[13] and *Cropp v Judicial Committee.*[14]

[19] It is also well-established that the Court will not accept, in the absence of express authorisation or necessary implication, that Parliament would intend to authorise regulations that:

a) imposed a tax or levy: cf *Harness Racing New Zealand v Kotzikas*;[15]

b) removed a citizen's right of access to justice or legal representation: *Drew v Attorney-General*[16] and Joseph;[17]

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[8] Philip A Joseph *Constitutional & Administrative Law in New Zealand* (3rd ed, Thomson Brookers, Wellington, 2007) at Chapter 25.
[9] David McGee *Parliamentary Practice in New Zealand* (3rd ed, Dunmore Publishing Ltd, Wellington, 2005) at 411 and 413.
[10] *Carroll v Attorney-General* [1933] NZLR 1461 (CA) at 1478.
[11] *F E Jackson & Co Ltd v Collector of Customs* [1939] NZLR 682 (SC) at 720.
[12] *Brader v Ministry of Transport* [1981] 1 NZLR 73 (CA) at 80.
[13] *New Zealand Drivers' Association v New Zealand Road Carriers* [1982] 1 NZLR 374 (CA) at 388.
[14] *Cropp v Judicial Committee* [2008] 3 NZLR 774 (SC) at [40].
[15] *Harness Racing New Zealand v Kotzikas* [2005] NZAR 268 (CA) at 285.
[16] *Drew v Attorney-General* [2002] 1 NZLR 58 (CA).
[17] Joseph at 1026

c) encroached on the personal or property rights of a person: *Cropp v Judicial Committee*,[18] *Carroll v Attorney-General* (where a regulation was invalidated when it improperly interfered with the freedom of contract of dairy farmers) and Joseph;[19]

d) prohibited an activity: Joseph.[20]

[20] The approach to be followed when rights under the Bill of Rights Act are involved has been explained in the judgment of the Supreme Court delivered by Blanchard J in *Cropp v Judicial Committee*:

> [25] Subordinate legislation involving a relevant guaranteed right or freedom will be invalid when the empowering provision, read in accordance with s 6 of the Bill of Rights, does not authorise its making. Where the Bill of Rights is a relevant consideration, and obviously it will then be an important consideration, the court gives the generally expressed empowering provision a tenable meaning that is consistent with the right or freedom. "In accordance with s 6, that meaning is to be preferred to any other meaning."
>
> ...
>
> [27] Counsel is correct in pointing out that the courts will presume that general words in legislation were intended to be subject to the basic rights of the individual. That presumption naturally applies to words which authorise subordinate legislation...
>
> (Footnotes omitted)

[21] The Supreme Court judgment in *Cropp*[21] is also authority for the proposition that Parliament would not intend to authorise regulations that cannot be given an ascertainable and reasonable meaning. Parliament would not intend regulations to be so conceptually uncertain or unreasonable in their application that they were ambiguous.

[22] Reference to the reasonableness of meaning does not, however, mean that the Court is concerned with the reasonableness of the regulation in policy terms because that is the responsibility of the Government which promulgated the regulation. As Cooke J said in *New Zealand Drivers' Association v New Zealand Road Carriers*:[22]

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[18] *Cropp v Judicial Committee* at [25].
[19] Joseph at 1027.
[20] Joseph at 1028.
[21] *Cropp* at [40].
[22] *New Zealand Drivers' Association v New Zealand Road Carriers* at 388.

> It is elementary that the Court is not concerned with the wisdom or otherwise of regulations, nor with whether the Court considers them necessary, nor with assessing the comparative values of social policies.

Whether regulations fall within the authority of an empowering statute is in the end a question of opinion and degree: *Brader v Ministry of Transport*.[23]

[23] The distinction between reasonableness in policy terms and reasonableness of meaning was recognised by Greig J in *Ross v Secretary for Transport*:[24]

> It is plain, I think, that the Courts are not entitled to inquire into policy considerations or as to the appropriateness, the desirability, whether the regulations are fitting or fair in the general circumstances. In that sense the Courts may not consider the reasonableness or unreasonableness of the regulations or their effect. **But there is a sense where unreasonableness means contrary to reason or, in another word, irrational**. If that may be shown then the Court must be entitled to say that the regulation is made outside the powers given by the legislature and is therefore invalid. Like all such questions it is, in the end, a matter of degree.
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> (emphasis added)

[24] The need for the Court to take care in focussing on the legal limits of the exercise of the regulation making power rather than on assessing the merits of its exercise reflects the general approach of the Court to the review of the exercise of statutory powers. As the Supreme Court said in *Unison Networks Ltd v Commerce Commission*[25] in the judgment of the Court delivered by McGrath J:

> [53] A statutory power is subject to limits even if it is conferred in unqualified terms. Parliament must have intended that a broadly framed discretion should always be exercised to promote the policy and objects of the Act. These are ascertained from reading the Act as a whole. The exercise of the power will be invalid if the decision-maker "so uses his discretion as to thwart or run counter to the policy and objects of the Act". A power granted for a particular purpose must be used for that purpose but the pursuit of other purposes does not necessarily invalidate the exercise of public power. There will not be invalidity if the statutory purpose is being pursued and the statutory policy is not compromised by the other purpose.
>
> [54] Ascertaining the purpose for which a power is given is an exercise in statutory interpretation which is not always straightforward. This is partly because legislative regimes differ in the specificity with which they grant powers. **In this area the courts are concerned with identifying the legal limits of the power rather than assessing the merits of its exercise in any**

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[23] *Brader v Ministry of Transport* at 84.
[24] *Ross v Secretary for Transport* (1990) 5 CRNZ 658 at 662.
[25] *Unison Networks Ltd v Commerce Commission* [2008] 1 NZLR 42 (SC).

> **case. They must be careful to avoid crossing the line between those concepts.**
>
> [55] Often, as in this case, a public body, with expertise in the subject-matter, is given a broadly expressed power that is designed to achieve economic objectives which are themselves expansively expressed. In such instances Parliament generally contemplates that wide policy considerations will be taken into account in the exercise of the expert body's powers. The courts in those circumstances are unlikely to intervene unless the body exercising the power has acted in bad faith, has materially misapplied the law, or has exercised the power in a way which cannot rationally be regarded as coming within the statutory purpose.
>
> (Footnotes omitted. Emphasis added)

[25] In the present case there is no suggestion that the regulation making power under the Restructuring Act was exercised in bad faith. Rather Turners & Growers claim that the power was not exercised properly in accordance with the policy and objects of the Act.

Relevant principles of statutory interpretation

[26] For present purposes there are a number of relevant and well-established principles of statutory interpretation.

[27] First, the starting point is s 5 of the Interpretation Act 1999 as explained by the Supreme Court in *Commerce Commission v Fonterra Co-operative Group Ltd*[26] in the judgment of the Court delivered by Tipping J:

> [22] It is necessary to bear in mind that s 5 of the Interpretation Act 1999 makes text and purpose the key drivers of statutory interpretation. The meaning of an enactment must be ascertained from its text and in the light of its purpose. Even if the meaning of the text may appear plain in isolation of purpose, that meaning should always be cross-checked against purpose in order to observe the dual requirements of s 5. In determining purpose the Court must obviously have regard to both the immediate and the general legislative context. Of relevance too may be the social, commercial or other objective of the enactment.
>
> (Footnotes omitted)

[28] Second, in ascertaining the meaning of a statutory provision from its text and purpose, the context within which the provision was enacted and is to be interpreted

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[26] *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] 3 NZLR 767 (SC).

will be vital: J F Burrows and R I Carter *Statute Law in New Zealand*.[27] Context is internal, including the place of the provision in the scheme of the particular statute, and external, including other statutes and the common law, social and economic factors, and Parliamentary history. As the authorities cited by Burrows and Carter show, New Zealand Courts now refer to the Parliamentary history of legislation, including relevant Parliamentary debates, whenever they are of assistance in the interpretation exercise. Counsel for Zespri provided a schedule prepared by Ms O'Gorman of some 20 Supreme Court decisions containing references to the legislative history of statutory provisions, including nine with references to Select Committee reports and ten with references to Parliamentary debates. A list of the Supreme Court decisions is attached as a schedule to this judgment. In none of these decisions was there any discussion of the propriety of doing so.

[29] Notwithstanding the practice of the Supreme Court apparent from these 20 decisions, counsel for Turners & Growers submitted that the High Court was bound by the more restrictive approach mandated by the judgment of the Court of Appeal in *Wellington International Airport Ltd v Air New Zealand*:[28]

> ...To determine the object and purpose in the present context, [counsel] invited us to refer to the parliamentary debates on the Bill, to the ministry papers and departmental correspondence which preceded it, and to the minutes of the select committee. In our view, it is inappropriate to do this. The law is to be found in the enactment itself, and not in the subjective intentions of the draftsman or of the department, nor in those of the Minister or of other members of the legislature. In a very few cases the Court may find it helpful to refer to such extraneous material "as supporting a provisional interpretation of the words of the Act, or as helping to identify the mischief aimed at or to clarify some ambiguity in the Act" per Cooke J in *Marac Life Assurance Ltd v Commissioner of Inland Revenue* [1986] 1 NZLR 694 at p 701. We were referred also to *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 where *Hansard* was referred to in the judgment of Cooke P at p 658, but with the comment, "As is so often the case, however, *Hansard* ultimately provides no significant help". As the Court has often said, it would not wish to encourage reference to such materials, except in the exceptional case. For observations to that effect, see *Attorney-General v Whangarei City Council* [1987] 2 NZLR 150, 152; *Devonport Borough Council v Local Government Commission* [1989] 2 NZLR 203, 208-209; *McKenzie v Attorney-General* [1992] 2 NZLR 14, 19. To do otherwise may not only burden the Court with irrelevant material, but may result in counsel feeling they must research such extraneous materials in

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[27] J F Burrows and R I Carter *Statute Law in New Zealand* (4th ed, LexisNexis, Wellington, 2009), at chapter 9.

[28] *Wellington International Airport Ltd v Air New Zealand* [1993] 1 NZLR 671 at 675 (CA).

> every case of statutory interpretation in case they may find something, thereby adding unnecessarily to the burden of cost on the litigant. The material we were invited to consider in the present case does not, in our view, add anything to what is implicit in the words of the section, and in the context provided by the Act as a whole.

[30] It was also submitted that this more restrictive approach was supported by Lord Steyn's influential 2000 Hart Lecture "*Pepper v Hart*; a Re-Examination",[29] the speeches of Lord Nicholls and Lord Hope in *R v Secretary of State for the Environment, Transport and the Regions and Ano'r, ex parte Spath Holme Ltd*[30] and Lord Hoffmann in *Robinson v Secretary of State for Northern Ireland and Ors*[31] (with Lords Hobhouse and Millett concurring at [65] and [97]) and Lord Hobhouse in *Wilson v First County Trust Ltd (No 2)*[32] (with Lord Rodger concurring at [178]) and the decisions of the Court of Appeal in *Christchurch District Licensing Agency Inspector v Karara Holdings Ltd*[33] and *Skycity Auckland Ltd v Gambling Commission*,[34] which emphasise, expressly or by implication, that constitutionally legislation is enacted by Parliament and not the executive and that it is the responsibility of the Courts to ascertain objectively Parliament's intentions from the legislation as enacted rather than from speeches by Government Ministers or members of the executive expressing their subjective views.

[31] While a word of warning about reliance on the subjective views of Government Ministers during Parliamentary debates and the need for caution in accepting without question their views as to the intentions of Parliament in enacting legislation is salutary, it would be a retrograde step to consider that reference to legislative history, including Parliamentary debates, should be unduly restricted when on an objective analysis it may provide valuable contextual assistance for the interpretation exercise. As the practice of the Supreme Court shows, the Courts in New Zealand are entitled to obtain such assistance while recognising that it may not necessarily be determinative in the particular case.

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[29] "*Pepper v Hart*; a Re-Examination" (2001) 21 OJLS 59.
[30] *R v Secretary of State for the Environment, Transport and the Regions and Ano'r, ex parte Spath Holme Ltd* [2001] AC 349.
[31] *Robinson v Secretary of State for Northern Ireland and Ors* [2002] NI 390 at [40].
[32] *Wilson v First County Trust Ltd (No 2)* [2004] 1 AC 816 at [139].
[33] *Christchurch District Licensing Agency Inspector v Karara Holdings Ltd* [2003] NZAR 752 at [36].
[34] *Skycity Auckland Ltd v Gambling Commission* [2008] 2 NZLR 182 at [52] to [54].

[32] On this basis I start with an examination of the text and purpose of s 26(1) of the Restructuring Act before turning to the legislative history and Parliamentary debates.

The text and purpose of s 26(1)

[33] The text of s 26(1) itself contains a number of features which indicate that Parliament intended to confer a broad, discretionary regulation-making power on the Minister and the Governor-General in respect of the matters mentioned in the paragraphs of the provision. These features are:

a) The opening words of s 26(1) provide that regulations "may" be made "from time to time". These expressions clearly indicate a discretionary power to make regulations at such times as are considered appropriate by the executive. Contrary to the submission for Turners & Growers that "may" should be read as "must" to the extent that some replacement regulations were required immediately, it is most unlikely that the opening words should be read as "**must** from time to time". Parliament would not have intended the regulation-making power to be mandatory and to be exercised on a continual basis. No doubt some replacement regulations were required immediately, but it was left to the Minister to make not only the initial but also subsequent selections and recommendations to the Governor-General.

b) There is nothing in s 26(1) itself to suggest that it was necessary for regulations to be made encompassing all the matters in either all the paragraphs or in paragraphs (b) to (f) inclusive. On the contrary, there are a number of indications otherwise. First, as was accepted for Turners & Growers, a regulation in terms of paragraph (w) providing for the dissolution of the new Board would not be expected to be made at the same time as a regulation in terms of paragraph (a) providing for the establishment of the Board. Second, there is no "and" between paragraphs (x) and (y), which would be expected if

regulations encompassing all of the paragraphs were required. Third, paragraph (f) refers to a regulation providing for the terms and conditions or other requirements that may or may not be part of "the authorisation, permit, **or** collaborative marketing approval". This suggests that the Zespri authorisation under paragraph (c), the permit regime under paragraph (d), and the collaborative export regime under paragraph (e) were not necessarily a complementary regime, but might be alternatives.

c) The range and nature of the potential regulations envisaged by paragraphs (d) to (v) of s 26(1) indicates that any export monopsony granted to Zespri under paragraph (c) would be able to be constrained not only by the possibility of permits to other persons under paragraph (d) and collaborative exporting under paragraph (e) but also by the mitigation measures in paragraphs (g) and (h) and the information disclosure requirements in paragraphs (j) to (r) and (v). Nothing indicates, however, that the discretionary regulation-making power in s 26(1) had to be exercised in respect of all the possible constraints. On the contrary, the text of s 26(1) leaves the selection of the appropriate constraints to the recommendation of the Minister.

d) Under paragraph (d) of s 26(1) the manner in which the regulations would provide for the new Board "to permit other persons to export kiwifruit" is left at large. Bearing in mind that in terms of paragraph (f) there could also be regulations providing for "the terms and conditions or other requirements" that may or may not be part of the permit, it is clear that an independent exporter permit regime might be established that included criteria for permits, procedures for applications to be made to and considered by the new Board in the light of the criteria, and decisions by the new Board imposing terms, conditions and other requirements for any permits granted to ensure compliance with the criteria. A potentially sophisticated regime of this nature would be expected to involve careful consideration by the Minister and the new Board, as well as consultation with the industry,

before regulatory implementation. There is no indication in s 26(1) that a regime of this nature was expected to be implemented immediately.

e) Paragraph (s) of s 26(1) empowers regulations providing for offences for a contravention of the regulations and for penalties. If Parliament had intended the offence and penalty regulations to be mandatory, it would have so provided because such regulations would have constituted the principal means of enforcement. Instead it was left open to the Minister to recommend offence and penalty regulations in respect of some, but not necessarily all, of the requirements of the regulations, other means of enforcement or a combination of both. Turners & Growers did not argue otherwise, presumably because their claims for declarations relating to regulations 9 and 11 depended on alleged inadequacies in the other means of enforcement.

[34] This interpretation of the text of s 26(1) is reinforced by the purpose and scheme of the Restructuring Act, which was enacted on 8 September 1999 and came into force the next day, although s 27 (which revoked the Kiwifruit Marketing Regulations 1977) did not come into force until 1 April 2000 when the Kiwifruit Export Regulations 1999 also came into force. The Restructuring Act's long title states that it is an Act to provide for:

a) the conversion of the New Zealand Kiwifruit Marketing Board into a company; and

b) powers to regulate the export of kiwifruit.

[35] Part 1 of the Act contains the provisions that converted the old New Zealand Kiwifruit Marketing Board into Zespri, a company deemed to be registered under the Companies Act 1993. The old Board was required to prepare a restructuring plan that included a plan for the allocation of shares in Zespri to persons who were kiwifruit producers as at 31 March 2000 based on supply history of the land: ss 4–6. Shares in Zespri were to be fully tradeable at least among producers, including persons who become producers after 31 March 2000, lessees under a lease of at least one year's duration of kiwifruit land and the persons Zespri's board determines are

producers for that purpose: s 7(1)(b) and (2). There are then provisions relating to Ministerial approval for the restructuring plan and a producer referendum: ss 9–17. If the restructuring plan received support from 75 per cent of the votes cast in the referendum, the Minister was obliged to confirm the plan: ss 16 and 18. If there was insufficient support, there was a default position for the Minister to specify a share allocation plan: s 19. Significantly, under s 19(1)(b) the Minister was required to specify:

> a constitution for the company that, in the opinion of the minister, is consistent with this Act **and the regulations**.
>
> (emphasis added)

This must be a reference to the proposed new Kiwifruit Export Regulations 1999 and indicates that the Restructuring Act and the Regulations were being considered contemporaneously as a complementary new regime for the kiwifruit industry.

[36] The restructuring plan was to be implemented on 1 April 2000 ("the restructuring day": s 2(1)) with the conversion on that day of the old board into Zespri: ss 20–21. The taxation provision made it clear that Zespri was not a "statutory producer board" for the purposes of the Income Tax Act. The schedule to the Restructuring Act contained further provisions relating to the restructuring of the old Board as Zespri.

[37] The conversion of the old Board into Zespri under Part 1 of the Restructuring Act did not complete the restructuring of the kiwifruit industry contemplated by the Act. Part 2 empowered the Governor-General to make regulations on the recommendation of the Minister "to regulate the export of kiwifruit". It also obviously contemplated that regulations would be made at the same time for the purpose of regulating the export of kiwifruit. As is apparent from s 26(1), the Act contemplated the regulation of the export of kiwifruit through:

a) The establishment of the new Board (KNZ) with a range of functions and powers: paragraphs (a) and (c)–(e);

b) The restriction on the export of kiwifruit otherwise than for consumption in Australia: paragraph (b);

c) The exceptions to the export restrictions in the form of Zespri's authorisation, permits to others and collaborative marketing: paragraphs (c)–(f);

d) The mitigation measures and information disclosure requirements to constrain Zespri's monopsony: paragraphs (g) to (o);

e) The information disclosure requirements for others permitted to export and collaborative marketers: paragraphs (p) and (q); and

f) Other provisions, including offences for contravention of the regulations and for penalties: paragraphs (r) to (y).

[38] The purpose of providing for a regulatory regime for the export of kiwifruit, which might be adopted and varied "from time to time" rather than having a fixed statutory regime, was to provide for flexibility as to the precise nature and scope of the regime adopted. Bearing in mind the conversion of the old Board into Zespri and the legislative intention to empower the regulation of the export of kiwifruit, it is reasonable to conclude that Parliament would have anticipated that there would at least be regulations in the first instance establishing the new Board, restricting the export of kiwifruit, authorising Zespri to export and constraining Zespri's monopsony in some appropriate manner. Beyond that, however, it is apparent from s 26(1) that Parliament left the precise nature and scope of the kiwifruit export regulation regime to the Minister to determine.

[39] The existence of the power in paragraph (w) for regulations providing for the dissolution of the new Board makes it clear that Parliament intended the Ministerial discretion to include deregulation of the export of kiwifruit at such time as the Minister considered appropriate. The existence of this power reinforces the discretionary and non-mandatory nature of the various potential regulations and the wide scope of the decision making delegated to the Minister.

[40] The purpose and scheme of the Restructuring Act does not support the case for Turners & Growers.

The legislative history and Parliamentary debates

[41] The New Zealand kiwifruit industry was first regulated when the Kiwifruit Marketing Licensing Regulations 1977 were made under s 3 of the Primary Products Marketing Act 1953 on 31 October 1977. The purpose of the Primary Products Marketing Act 1953 was to provide for the establishment of "Marketing Authorities" to regulate the marketing of primary products, including any product derived from "fruit growing", and to make provisions with respect to those authorities. Section 3(1) of the Act empowered the Governor-General acting on the recommendation of the Minister to make "all such regulations as may be considered necessary" for "the purpose of providing for the marketing of primary products, and generally for the purpose of enabling the producers of primary products to control the marketing of the products they produce". A wide range of specific regulations were authorised by s 3(2), including the acquisition of primary products by Marketing Authorities and for the marketing of the products in New Zealand or elsewhere, the prices to be paid for the products, the licensing of persons engaged in the production, sale, storage or distribution of the products and the prohibition of the sale of primary products except in accordance with the regulations. The Minister was required to obtain the support of a majority of the persons engaged in the production of the primary product concerned before recommending any regulations: s 3(3). Any regulations made under this provision then had to be laid before Parliament and expressly validated or confirmed by an Act: ss 3(6) and 4(1).

[42] The Kiwifruit Marketing Licensing Regulations 1977, under the Primary Products Marketing Act 1953, established the Kiwifruit Marketing Licensing Authority as a licensing and supervisory body which would license the export of kiwifruit and grant permits for the export of kiwifruit and grant permits for the export of kiwifruit cultivars by others. The Authority could only acquire kiwifruit for sale if approved in a referendum by at least 80 per cent of producers producing not less than 75 per cent by volume of kiwifruit for export. Only persons holding a license granted by the Authority issued under the Regulations were allowed to export kiwifruit.

[43] The 1977 Regulations were amended on a number of occasions, but the significant amendment for present purposes was effected in 1988 by the Kiwifruit

Marketing Regulations 1977, Amendment No. 4, which revoked the licensing regime, renamed the Authority as the New Zealand Kiwifruit Marketing Board and made the Board the sole or single desk exporter of kiwifruit. The object of the Board was:

> to obtain, in the interests of New Zealand producers the best possible long term returns for kiwifruit intended for export.

The Board was also obliged to acquire all kiwifruit harvested in New Zealand after 31 March 1989 and intended for export otherwise than for consumption or sale and consumption in Australia. Other persons were prohibited from exporting kiwifruit otherwise than for consumption or sale and consumption in Australia. There were also new regulations relating to the price to be paid by the Board for kiwifruit it acquired and the time for payment. The assets of the Board belonged ultimately to the producers from whom it acquired kiwifruit.

[44] The validity of the 1988 Amendment to the Regulations was challenged in *Turners & Growers Exports Ltd v Moyle,*[35] by a number of licensed exporters on the grounds that the amendments were unauthorised and unreasonable and had been made on the recommendation of the Minister who had denied their legitimate expectation that they would have the opportunity to make representations on the question of compensation. McGechan J accepted the latter argument, but declined to grant any relief because it was anticipated that Parliament would enact the Primary Products Marketing (Regulations Confirmation) Bill to validate and confirm the Amendment to the Regulations.

[45] The Bill was enacted as the Primary Products Marketing (Regulations Confirmation) Act 1988 on 21 December 1988. Its compensation provisions led to further litigation: *New Zealand Kiwifruit Marketing Board v Kiwi Harvest Ltd.*[36] The power of the Board to market kiwifruit, other than kiwifruit grown in New Zealand, was also subsequently upheld by the Court of Appeal in *New Zealand*

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[35] *Turners & Growers Exports Ltd v Moyle* HC Wellington CP 720/88, 15 December 1988.
[36] *New Zealand Kiwifruit Marketing Board v Kiwi Harvest Ltd* CA 59/90, 20 September 1990.

Kiwifruit Marketing Board v Beaumont.[37] In the judgment of Richardson P, Thomas, Keith and Tipping JJ delivered by Tipping J it was said:[38]

> ...The Act, and the regulations which here have statutory effect, give the board what amounts to a monopoly in that, pursuant to regulation 13C, no person other than the board, or a person acting on its behalf, is allowed to export any kiwifruit, otherwise than for consumption, or sale and consumption in Australia. The corollary is that the board must accept all kiwifruit harvested in New Zealand, intended for export beyond Australia and delivered to a coolstore designated by the board.

[46] The Kiwifruit Industry Restructuring Bill was introduced into Parliament and given its second reading on 20 July 1999. Rt Hon Sir William Birch (Minister of Finance) speaking on behalf of the Minister for Food, Fibre, Biosecurity and Border Control said:[39]

> The New Zealand kiwifruit industry wants to reposition for a more positive response to the opportunities and challenges of the international market. The Government's objective is maximum economic well-being for New Zealanders, and that requires efficient resource use right across the economy. The kiwifruit industry has come a long way since the debt crisis of the Kiwifruit Marketing Board in 1992-93. The board has since then initiated a thorough review of its operations. That review led ultimately to four changes reshaping the industry to better achieve its commercial goals.
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> The first substantive change driven by the kiwifruit industry review was the formation of New Zealand Kiwifruit Growers Inc. as a body of industry participants elected to represent industry issues. Subsequently, the board split its regulatory and commercial functions, rebranded itself as Kiwifruit New Zealand, and established Zespri as the commercial subsidiary responsible for the marketing of New Zealand kiwifruit. The third step came early last year with the provision of the regulatory changes needed to move the point when Kiwifruit New Zealand actually acquires the fruit from the point when it enters into the cool-store to when it is stowed on the ship on which the fruit is exported. That change introduced true contestability at all stages of the distribution chain from orchard to ship. Those moves left corporatisation as the only recommendation of the kiwifruit industry review not yet implemented.
>
> This Bill enables corporatisation to be achieved. Enactment of this Bill will empower Kiwifruit New Zealand to prepare a restructuring plan. That plan has to be approved by both the Minister and growers before Kiwifruit New Zealand can implement it. Growers will get their opportunity to vote on Kiwifruit New Zealand's restructuring plan later this year. Today's Bill transforms Kiwifruit New Zealand into a company to be called Zespri Group Ltd. Zespri will hold all of Kiwifruit New Zealand's commercial assets. It is this company, Zespri, that growers will own. From 1 April 2000 Zespri will

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[37] *New Zealand Kiwifruit Marketing Board v Beaumont* [1997] 3 NZLR 516 (CA).
[38] *New Zealand Kiwifruit Marketing Board v Beaumont* at 518.
[39] (20 July 1999) 579 NZPD 18440–18441;

be the sole exporter of kiwifruit other than to Australia. Growers will be issued shares in Zespri Group Ltd. The basis of allocation is not stated in the Bill; that is a matter for the industry to decide.

I understand that the industry proposes to allocate shares on the basis of the last 3 years' average production for export other than to Australia. Once growers receive their shares they will be free to trade them with other growers. This will introduce normal commercial shareholder disciplines on Zespri's management. In addition, it brings Zespri the commercial focus of generating shareholder wealth. With shareholding vested in growers, this can only assist in better achieving the contribution of the kiwifruit industry to the Government's overall objective. In addition, share tradability will improve transparency by separating returns on equity from the fruit price. Those disciplines can only improve the commercial performance of Zespri.

The Bill also provides clarification to taxation issues related to the conversion of the board into a company, and clarifies growers' ownership rights. **In addition to corporatising Zespri, the Bill provides for a new and more targeted regulatory environment for the export of kiwifruit to be established by regulations made under the Bill once it is enacted. The Bill is designed to enable regulations to be made granting Zespri special export rights and, at the same time, protecting suppliers from the market power that Zespri would then have over them. There are three key means by which the proposed regulations would protect suppliers. They are: restricting Zespri's ability to discriminate between suppliers on anything other than commercial grounds; restricting Zespri's ability to diversify into other products, thereby limiting the risks of diversification to captured suppliers; and requiring Zespri to disclose the information needed to evaluate its activities so that suppliers and shareholders can, if necessary, put pressure on Zespri to perform and not abuse its dominant position.**

In addition to provision for Zespri's establishment, the Bill includes regulation-making powers enabling the establishment of a new Kiwifruit Board to monitor and enforce Zespri's compliance with those supplier protections. The new board will also consider and approve other export marketers to sell New Zealand kiwifruit in collaboration with Zespri. This provision builds on the board's existing collaborative marketing initiative under which the board can approve alternative exporters and force its subsidiary marketing company to work with it in overseas markets. I have no doubt that the Bill contributes towards an improvement of the future available to the kiwifruit industry. It provides more and better options than before for the industry to innovate, respond to market opportunities, adjust quickly and flexibly to market conditions, and become more efficient in all its operations.

The corporatisation package, enabled by the provisions of the Bill, reflects a very extensive process of consultation that has taken place within the kiwifruit industry in the last year...

(emphasis added)

[47] The Minister's speech is significant for several reasons. First, as the emphasised passage indicates, it was intended from the outset to establish the

regulatory environment for the export of kiwifruit by regulations made under the Bill once it was enacted. Second, it was intended that regulations would be made granting Zespri "special export rights". Third, it was intended that suppliers would be protected from Zespri's market power by "three key means" in the proposed regulations:

a) restricting Zespri's ability to discriminate between suppliers on anything other than commercial grounds;

b) restricting Zespri's ability to diversify into other products, thereby limiting the risks of diversification to captured suppliers; and

c) requiring Zespri to disclose the information needed to evaluate its activities so that suppliers and shareholders could, if necessary, put pressure on Zespri to perform and not abuse its dominant position.

Fourth, as the Minister noted, the regulations would enable the establishment of a new Kiwifruit Board to monitor and enforce Zespri's compliance with these supplier protections. Fifth, building on an existing collaborative marketing initiative, the new Board would also consider and approve other export marketers to sell New Zealand kiwifruit in collaboration with Zespri.

[48] The Minister's speech provides confirmation that Zespri's market power or dominant position was intended to be constrained by the proposed "non-discrimination" and "non-diversification" measures and information disclosure requirements in the regulations. While mention is made of collaborative marketing, no mention is made of a permit regime for independent exporters either as a constraint on Zespri or as a regime anticipated in its own right at that stage. It is conspicuous by its absence from the Minister's speech.

[49] There was also no mention in the Minister's speech of the decision not to require Zespri to be under an obligation to purchase all kiwifruit for export, other than for consumption in Australia. The "corollary" referred to by the Court of

Appeal in *New Zealand Kiwifruit Marketing Board v Beaumont*[40] was not going to be retained. It was replaced by the non-discrimination rule: *Aotearoa Kiwifruit Export Ltd v Southlink Ltd.*[41] That was a Government policy decision that is not open to review by the Court.

[50] The Bill was then considered by a Select Committee which reported back on 30 August 1999. The report of the Select Committee included the following statements:

> **Purpose**
>
> The bill provides for a new regulatory framework for the exporting of kiwifruit and the transition of the commercial business to generic governance laws. Part 1 of the bill concerns corporatisation. The Board is to be converted into a company, ZESPRI Group Limited (ZESPRI), with shares to be issued to producers and to be tradable among producers. The share issue to producers will not be a taxable event.
>
> Part 2 outlines the regulatory framework for the industry restructuring. **Regulations will provide for ZESPRI to be the main exporter of New Zealand kiwifruit**. Regulations will also impose a non-discrimination rule on ZESPRI so that it cannot discriminate among growers other than on commercial grounds. Other mitigation measures require ZESPRI:
>
> - to obtain producers' consent before using their funds on activities outside its core business (non-diversification rule).
>
> - to provide producers and the new regulatory board with detailed information to assess its performance and compliance with the mitigation measures.
>
> Regulations will prevent any changes to ZESPRI's constitution which reduce certain shareholder rights provided by the Companies Act 1993. **They will also establish a new board, the New Zealand Kiwifruit Board, to authorise the export of kiwifruit, to monitor and enforce ZESPRI's mitigation duties and to approve collaborative marketing applications**.
>
> ...
>
> **Background**
>
> The kiwifruit industry has sought to change the way it exports kiwifruit since 1995, **following a producer referendum which confirmed the co-operative company model for the Board** and endorsed the deregulation of onshore operations and introduction of collaborative marketing was introduced in 1998. The current marketing structure for exporting kiwifruit

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[40] *New Zealand Kiwifruit Marketing Board v Beaumont* at 518.

[41] *Aotearoa Kiwifruit Export Ltd v Southlink Ltd* HC Auckland CIV-2003-470-478, 3 February 2006 at [9](iv) and [16].

has a number of public policy problems associated with it, however, these include:

- costs and distortions from having a single exporter seller in a production driven acquisition regime.
- a mix of commercial and regulatory functions making the Board both player and referee.
- a lack of defined shareholder disciplines and rights and a risk to owners of captured capital.
- a regime which is set by regulations rather than contracts.

In October 1998 the Government agreed in principle to corporatise the Board, subject to consistency with the Government's wider criteria and objectives. In June 1999, the Government and the Board agreed on a reform package, the key feature of which are in the bill. The reform package was subsequently endorsed by producers in a series of meetings by a margin of 512 in favour to four against with ten abstentions.

Export control regime

The majority of submitters support the single desk export regime as provided for in Part 2 of the bill. The retention of the existing export control regime was strongly supported by producers and producer organisations. Calls for the removal of export controls, either immediately or through a sunset provision, have come primarily from horticultural exporters.

The export control regime reflects the agreement reached between the Board and the Government. We do not consider the bill requires any amendment.

Collaborative marketing

Clause 28 provides for the new board to require ZESPRI to export kiwifruit in collaboration with other persons approved by the new board. The purpose of collaborative marketing is to maximise the total net export income for kiwifruit producers by complementing ZESPRI'S marketing strategies and supply programmes. The collaborative marketing regime proposed under the bill differs from the current regime in that the decision to approve collaborative marketing proposals will be made by the new board, which will be independent of ZESPRI.

The Board and NZKGI support the proposed collaborative marketing regime while opposition to it has come from horticultural exporters. The Fresh Fruit Company of New Zealand Limited (Freshco), reflecting horticultural exporters' concerns, says that while the intent of collaborative marketing is good, the practical application of serious proposals is almost impossible to implement. This is because ZESPRI is charged with marketing the entire export crop and collaboration is contrary to its commercial imperatives. **The horticultural exporters want the collaborative marketing regime changed to an export permit regime, similar to that proposed for apple and pears, with decisions made by an independent committee.** Freshco further suggests that the Commerce Committee should review the progress of collaborative marketing in the latter half of 2000.

The Board has spent a considerable amount of time and resource developing the collaborative marketing regime, including actively seeking Maori involvement in collaborative marketing. It is a new development with only 560 000 trays marketed under the regime in the year ending 31 March 1999. We believe that the onus will be on the new board to ensure that collaborative marketing works. **We recommend no change.**

Corporatising the Board

A number of issues arose about the proposal to corporatise the Board.

Corporate form

The bill expressly requires ZESPRI to be company registered only under the Companies Act 1993. The Board and the NZKGI have accepted the generic company model as part of the package agreed to by the Government and the Board. Producers have strongly endorsed the package even though industry consultations with producers had previously been on the basis of a co-operative company model. **The Government considers that the circumstances of a single buyer (monopsony) producer board sufficient to justify a legislative restriction on using a traditional co-operative form of company. As this provision reflects the agreement reached between the Government and the Board, we do not recommend any amendments in this regard.**

...

Mitigation measures

Paragraphs (g) to (r) of clause 28(1) contain mitigation measures and information disclosure requirements to be included in regulations. **Two submitters believe that export fruit ZESPRI refused to buy should be able to be exported independent of ZESPRI.** Another submitter wants ZESPRI and any collaborative marketer to provide commercial information to the new board on a confidential basis and not subject to the Official Information Act 1982.

The new regime enables ZESPRI to focus its efforts on responding to market demands rather than being production driven. The main change of removing the regulatory obligation to buy will be that the costs of surplus fruit are more likely to be left with the supplier. **However, if unpurchased kiwifruit were able to be exported as a matter of right, ZESPRI's role as the main marketer of export kiwifruit would be undermined.** It would also create strong incentives on ZESPRI to buy all fruit, even if it did not have a buyer. This would effectively continue the current duty to buy all fruit.

The new regime will effectively replace the duty to buy with a non-discrimination rule enforced by the new board with the benefit of a detailed information disclosure regime. Information disclosure will assist enforcement of the mitigation measures and is a common competition policy tool in relation to cost and performance. It will make transparent any unacceptable activity. The Board has accepted the proposed requirements as part of the agreement. We recommend no change.

Intellectual property

Several submitters raise the issue of kiwifruit plant varietal rights (PVRs), particularly in relation to Hort16A kiwifruit (ZESPRI gold). They believe that the current licence agreements between the Horticulture and Food Research Institute of New Zealand Limited (HortResearch) and the Board should not be transferred to ZESPRI. They want the licenses transferred either to an industry body, such as the new Board, or put into a trust so that any grower can use the PVRs. HortResearch submits that current contractual arrangements must be retained and strongly support the transfer of all current licence, breeding and research and development agreements to ZESPRI. The Board sees PVRs as a key component to its future strategy in having an integrated commercial approach to the market.

We do not believe we should interfere in how HortResearch chooses to operate its business. **To the extent that the license agreements form a future barrier to new entrants to the industry, then that can be addressed by generic competition law and section 21 of the Plant Variety Rights Act 1987, which provides for compulsory licensing**.

Use of delegated legislation

The Regulations Review Committee has drawn our attention to its longstanding criticism of the use of regulations in establishing the Board and setting out its functions and powers. The committee considers such authority should be by statute rather than by regulation. The committee notes that Part 2 of the bill will continue the existing regime. It recommends that the new board, the regulation of the export of kiwifruit, mitigation measures, Crown liability in relation to exports, Ministerial directions and the ability to dissolve the new board should be specified in primary legislation instead of in regulations. The Labour Party strongly supports the committee's recommendations.

The committee further notes that the regulation-making power does not require the Minister to consult with any persons or organisations before making these regulations. It recommends that clause 28 be amended to include a requirement for consultation with persons having an interest in the proposed regulations prior to making any regulation.

While we acknowledge the Regulations Review Committee's concerns about the use of regulations for the kiwifruit industry, the continued use of delegated legislation is accepted by the Board and NZKGI. The regulations allow changes to be made more readily than if primary legislation is used and well allow a quicker reaction in a commercial environment. The new board will be more limited in its functions and powers than the existing one. Its principal function will be to monitor and enforce the mitigation measures applying to ZESPRI, which will operate primarily under generic company and commercial law. For the above reasons, a majority of us consider that the regulation-making powers in Part 2 are appropriate.

...

(emphasis added)

[51] While Mr Walker for Turners & Growers submitted that the absence of any reference to the provision which became s 26(1) of the Restructuring Act limited the usefulness of the report, both he and Mr Goddard for Zespri drew support for their cases from the Select Committee report. Mr Walker emphasised:

a) the references to Zespri as "the main exporter" and not the sole exporter, which suggested that an independent exporter permit regime was expected to be included;

b) the alternative was that the regime had simply been overlooked;

c) the establishment of the new Board "to authorise the export of kiwifruit" generally and not specifically;

d) the co-operative company model, consistent with a monopsony, which was not adopted;

e) "the key features" being in the Bill, that is including paragraph (d);

f) the confusion of the horticultural exporters who overlooked paragraph (d) in seeking a change from collaborative marketing to "an export regime" similar to that proposed for apple and pears;

g) "a single buyer (monopsony) producer board", which was a strange way to describe Zespri;

h) the new regime enabling Zespri to focus its efforts on responding to market demand rather than being production driven (that is having to purchase all kiwifruit for export) and the undermining of Zespri's role "as the main marketer of export kiwifruit" if unpurchased kiwifruit were able to be exported "as a matter of right" which implicitly recognised the proposed permit regime for independent exporters;

i) "a future barrier to new entrants to the industry" in the intellectual property context which meant an exporter other than Zespri; and

j) the continued use of delegated legislation to allow changes to be made more readily and a quicker reaction in a commercial environment, which meant either that the Minister had a free hand and could have decided not to require KNZ to authorise Zespri to export, which would have been strange, or that the regulations were not once and for all time.

Mr Walker also noted the view of some parties that there had been inadequate time for proper consideration of the Bill.

[52] Mr Goddard emphasised the references in the report to "a new regulatory framework"; the public policy problems associated with the current market structure, which indicated the "mischiefs" at which the Bill was directed; the agreement between the Government and the Board which was being implemented by the Bill; the strong support for "the existing export control regime", that is a single desk exporter in the form of Zespri; the retention of collaborative marketing rather than the introduction of "an export permit regime" as sought by the horticultural exporters; the mitigation measures; and the use of delegated legislation as accepted by the Board and NZKGI.

[53] A Select Committee report is not susceptible of detailed textual analysis as though it were itself a statute. While, as the references identified by Mr Walker show, the report is capable of different interpretations, for the main part it reflects and reinforces the following significant points:

a) a corporatised Board renamed Zespri would remain a single desk exporter, but no longer required to purchase all kiwifruit for export;

b) Zespri's monopsony powers would be constrained principally by the mitigation measures and information disclosure requirements in the regulations;

c) collaborative marketing would be retained;

d) an export permit regime was not anticipated; and

e) notwithstanding the views of the Regulations Review Committee, delegated legislation would be used for reasons of flexibility and speed of reaction.

[54] The Select Committee report was considered by Parliament on 2 September 1999.[42] Hon John Luxton (Minister for Food, Fibre, Biosecurity and Border Control) summarised the report in his speech and noted that the "overall package" was designed to promote efficient price signals from the market place back to growers, a strong downward pressure on the costs that growers have to meet, and continued innovation. After some debate, Parliament moved into Committee of the whole House to consider the Bill part by part.[43] It is apparent from the debate in Committee that the proposed regulations had also been tabled in Parliament.[44] This explains why Hon Jim Sutton (New Zealand Labour-Aoraki) was able to move an amendment to the Bill seeking to insert the regulations which subsequently became the Kiwifruit Export Regulations 1999 as Part 1A of the Bill.[45] The amendment was lost, but it establishes that Parliament had the content of the proposed regulations before it and would have been aware that there was no provision relating to an independent exporter permit regime as envisaged by paragraph (d) of what became s 26(1) of the Restructuring Act.

[55] The Bill received its third reading under urgency on 2 September 1999.[46] On this occasion the Minister Hon John Luxton summarised the position reached:

> There has been an element of contention about the proposed changes. For some, the changes go too far, for some, the changes do not go anywhere near far enough. But they do trend down the line of a more open and competitive environment over time for the export of kiwifruit from this country.

And, significantly, Hon Denis Marshall (Minister of Lands) commented:[47]

> There were questions in the committee on the Bills about collaborative marketing. The board assures us it has spent a lot of time consulting over how to establish that system. I believe that only 560,000 trays were exported last year through this new system. I know that some of my colleagues in the

[42] (2 September 1999) 580 NZPD 19024.
[43] (2 September 1999) 580 NZPD 19039.
[44] (2 September 1999) 580 NZPD 19056.
[45] (2 September 1999) 580 NZPD 19046.
[46] (2 September 1999) 580 NZPD 19060.
[47] (2 September 1999) 580 NZPD 19062.

> House have reservations about collaborative marketing. I think it will just have to stand the test of time, to see whether it works. **It is certainly a different regime from the consents procedure adopted by the Apple and Pear Marketing Board**, but, like all these things, we just have to see whether it works effectively in the future.
>
> (emphasis added)

As already noted, the Bill received its assent on 8 September 1999.

[56] This summary of the legislative history and Parliamentary debates supports the conclusion already reached that Parliament did not intend or require the regulation-making power in paragraph (d) of s 26(1) to be exercised as part of the initial regulatory regime. Parliament intended to delegate to the Minister the power to determine the precise nature and extent of the regulatory constraints to be imposed on Zespri's monopsony and the timing of their introduction. The omission of an independent exporter permit regime from the regulations as initially made did not therefore invalidate the export ban or Zespri's monopsony.

[57] This conclusion is reinforced by the fact that the Regulations themselves were tabled in Parliament during the passage of the legislation and were not inserted in the Restructuring Act as proposed by Hon Jim Sutton's amendment. There was no suggestion during the Parliamentary debates that after the Regulations were made Parliament should or would exercise its power under s 9(1)(a) of the Regulations (Disallowance) Act 1989 to amend the Regulations to include a provision enabling KNZ to establish an independent exporter permit regime. The absence of any such suggestion or action is consistent with Parliament's intention apparent from s 26(1) of the Restructuring Act.

The Apple and Pear Industry Restructuring Act 1999

[58] As already noted, both Mr Walker and Mr Goddard relied on the enactment of the Apple and Pear Industry Act 1999, contemporaneously with the Kiwifruit Industry Act 1999, and a comparison of the respective empowering provisions in the two statutes and the regulations in fact made under them, also contemporaneously, to support their cases. Mr Walker pointed out that for present purposes it was significant that, while the two restructuring schemes were broadly similar, the Apple

and Pear Industry Act 1999 contained no provision empowering a regulation for collaborative marketing, but did contain a provision empowering an additional mitigation measure requiring Zespri's equivalent, ENZA Limited, to operate its core business "at arms length from its activities in contestable markets in New Zealand": s 25(1)(j) and (2). In the Apple and Pear Industry Act 1999, the regulation empowering provision equivalent to s 26(1)(d) of the Kiwifruit Industry Act 1999, was s 25(1)(d) which empowered regulations:

> (d) Providing for the new Board to appoint a separate independent body to permit other persons to export apples and pears, and for the establishment, functions, powers, membership, funding, and other matters relating to that body, and for other matters relating to export permits:

Reflecting these provisions in the Apple and Pear Industry Act 1999, the Apple and Pear Export Regulations contained provisions establishing an independent exporter permit regime and the additional mitigation measure as well as non-discrimination and non-diversification rules and information disclosure obligations designed to constrain ENZA's monopsony. On the basis of this comparison, Mr Walker submitted that an independent exporter permit regime was an essential element in the monopsony constraints contemplated by Parliament when enacting s 26(1)(d) of the Kiwifruit Industry Act 1999.

[59] As Mr Goddard submitted, however, the comparison between the two restructuring regimes also showed that a permit regime was seen as an alternative to a collaborative export regime. It was not essential to have both as part of the range of regulatory measures implemented to constrain the respective monopsonies. Furthermore, the provision for the additional mitigation measure and its inclusion in the Apple and Pear Export Regulations showed that the permit regime under those Regulations was only one aspect of the constraints on ENZA's monopsony considered necessary in the different context of that industry. As is apparent from the comment of Hon Denis Marshall during the third reading of the Bill which became the Restructuring Act, the differences between the regimes for the two industries were recognised in Parliament. For these reasons, I do not consider that a comparison of the respective regulation empowering provisions in the two statutes and the regulations made under them alters the conclusion that I have reached.

A monopsony contrary to the Commerce Act 1986?

[60] There was no dispute that as a general rule the interpretation of a statutory provision should be interpreted in a manner consistent with the statute book as a whole: *Agnew v Pardington*[48] and JF Burrows and RI Carter *Statute Law in New Zealand.*[49] And the Commerce Act 1986 may be recognised as a statute of general application when interpreting specific provisions of another statute: *Air New Zealand Ltd v Wellington International Airport Ltd.*[50] In the present case Turners & Growers claim in its other causes of action not presently being considered that Zespri has contravened the restrictive trade practices provisions of the Commerce Act 1986.

[61] But this does not mean that the Minister was bound to recommend to the Governor-General that regulations providing for an independent exporter permit regime were a mandatory requirement when regulations were made under s 26(1) of the Restructuring Act. It is one thing to interpret s 26(1) consistently with the Commerce Act by recognising it as a relevant factor which the Minister might take into account when recommending the making of regulations to the Governor-General. It is quite another matter to suggest that the Commerce Act required the Minister to recommend an independent exporter permit regime in order to provide competition for Zespri.

[62] As the Commerce Act is not the only statute enacted to implement public interest considerations under which commerce operates, its general terms may well have to yield to specific enactments implementing regulatory regimes. The Commerce Act itself recognises the possibility of statutory exceptions to the application of its restrictive trade practices provisions: ss 43–45. But, even in the absence of a specifically authorised exception of that nature, a statute may expressly empower the adoption of a regulatory regime for a specific industry and when, as here, that regime is to be implemented by regulations the existence of the Commerce Act will not invalidate regulations which are otherwise within the scope of the statutory empowering provision. There is no provision in the Restructuring Act

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[48] *Agnew v Pardington* [2006] 2 NZLR 520 (CA) at [41].
[49] JF Burrows and RI Carter *Statute Law in New Zealand* (4th ed, LexisNexis, Wellington, 2009) at 247–248.
[50] *Air New Zealand Ltd v Wellington International Airport Ltd* [2009] 3 NZLR 713 (CA) at [43] and [161]–[162].

requiring the Minister to recommend regulations consistent with the Commerce Act and it is not necessary to imply such a provision.

[63] The existence of regulatory regimes for primary production markets in New Zealand was recognised by the Primary Products Marketing Act 1953 and the subsequent industry specific regulatory regimes: *Laws of New Zealand, Agriculture, Part 1 Agricultural Industries.*[51] The relationship between such regimes and the Commerce Act was referred to by Richardson J in *New Zealand Apple and Pear Marketing Board v Apple Fields Ltd*:[52]

> But the Commerce Act does not incorporate and reflect all public interest considerations under which commerce operates. It is not the only statutory expression of relevant public policies. Other statutes rely to a greater or lesser extent on regulation rather than competitive markets to achieve their public policy objectives in particular areas of the economy. Public regulation is provided for because of dissatisfaction with market results. Those laws are part of the legal framework within which competition law is to operate. Not surprisingly then the Commerce Act itself, through s 43, recognises that general competition policies must yield in appropriate cases to regulatory decisions. But in New Zealand, as in other countries, the regulated industries vary greatly in the rationale, administration and intensity of their regulations. Thus, as observed by Areeda & Kaplow, *Antitrust Analysis* (4th ed, 1988) at p 128:
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> > "Thus, the relation of the regulatory policies to the antitrust laws will vary from industry to industry; the tighter the regulatory control, the less room there is for antitrust policy."
>
> There is a long tradition of co-operative marketing of primary production in some sectors of the rural economy. Producer boards began to develop in the 1920s and others grew out of wartime stabilisation. They reflect the broad philosophy that, while efficient farming is dependent primarily on the effectiveness of the individual farmer, the efficient disposal of primary products in such an export oriented sector of the economy is dependent on the ability and strength in international terms of the marketing organisations. The general function of producer boards such as the New Zealand Dairy Board and the Apple and Pear Marketing Board is to provide machinery for giving effective access to overseas markets; and through their size, strength and innovative skills they have been able to compete very successfully. See the New Zealand Market Development Board study *Export Marketing Systems for Primary Produce* (1988) for a contemporary analysis of the structures best suited for the export of primary foodstuffs. While the current general deregulatory tide reflected in the 1988 amendments to the producer boards legislation has reduced direct Governmental involvement in the operation of the boards and any Government financial support for the

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[51] *Laws of New Zealand, Agriculture, Part 1 Agricultural Industries* at [76]–[104].
[52] *New Zealand Apple and Pear Marketing Board v Apple Fields Ltd* [1989] 3 NZLR 158 (CA) at 167.

> boards, the central thesis underlying the 1971 legislation, that it is in the public interest to provide an orderly marketing system under the control of the Apple and Pear Marketing Board, remains.

The decision of the Court of Appeal on the question of the interpretation of s 43 of the Commerce Act was overturned by the Privy Council in *New Zealand Apple and Pear Marketing Board v Apple Fields Ltd*,[53] but the general statement of Richardson J remains an apposite description of the background to regulation in primary production markets in New Zealand.

[64] Similarly apposite is the statement in the judgment of Chambers and Arnold JJ in *Air New Zealand Ltd v Wellington International Airport Ltd*[54] recognising that industry regulation may come in a variety of forms and depend on both general competition law and "light-handed" regulation:

> [42] At this point, another important feature of the reforms introduced by the Fourth Labour Government becomes relevant, namely, the establishment of the so-called "light-handed" regulatory regime (see Bollard and Pickford "New Zealand's 'Light-Handed' Approach to Utility Regulation" (1995) 2 *Agenda* 411"). This form of regulation was a reaction to the heavy-handed regulation that had operated in New Zealand for many years. In relation to essential facilities, utilities and such like, highly prescriptive industry-specific regulation was replaced with regulation by means of:
>
> (a) general competition law, in particular Parts 2 and 3 of the Commerce Act and the Fair Trading Act 1986;
> (b) information disclosure and/or consultation obligations; and
> (c) the threat of further regulation, in particular the imposition of price control under Part 4 of the Commerce Act.
>
> For a discussion of these characteristics of the light-handed regulatory regime in the context of the electricity industry see *Power New Zealand Ltd v Mercury Energy Ltd and Commerce Commission* [1996] 1 NZLR 686 at 695 (HC) and *Vector* [*Ltd v Transpower New Zealand Ltd* [1999] 3 NZLR 646 (CA)]...

[65] Recognition of this approach to industry regulation confirms that the Minister in the present case was not prevented by the Commerce Act from recommending a "light-handed" regulatory regime to constrain Zespri's monopsony.

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[53] *New Zealand Apple and Pear Marketing Board v Apple Fields Ltd* [1991] 1 NZLR 257 (PC).
[54] *Air New Zealand Ltd v Wellington International Airport Ltd* at [42].

Infringement of the Bill of Rights Act?

[66] There was no dispute that if the Bill of Rights Act was a relevant consideration the regulation-making power under s 26(1) of the Restructuring Act needed to be given a tenable meaning that is consistent with the right or freedom: Bill of Rights Act s 6 and *Cropp v Judicial Committee*.[55] Then, as the Supreme Court has decided in *R v Hansen*,[56] where the natural and established meaning of a statutory provision is prima facie inconsistent with a right or freedom affirmed by Part 2 of the Bill of Rights Act, the Court is to apply s 5 to determine whether that inconsistency could demonstrably be justified in a free and democratic society. If so, the natural meaning can be applied without any resulting inconsistency with the Bill of Rights Act. If not, the provision has to be examined again under s 6 to determine whether a reasonably possible alternative meaning consistent with the Bill of Rights Act can be found. If such a meaning cannot be found, s 4 requires that the natural meaning of the provision be applied regardless of the resulting inconsistency with the Bill of Rights Act.

[67] The first question is whether the Bill of Rights Act was a relevant consideration for the Minister and Governor-General in exercising the regulation-making power under s 26(1) of the Restructuring Act. Turners & Growers rely on s 17 of the Bill of Rights Act, which provides:

> **17. Freedom of association**
>
> Everyone has the right to freedom of association.

[68] There was no dispute that:

a) The right to freedom of association applies for the benefit of legal persons, such as companies, as well as natural persons: s 29 of the Bill of Rights Act, P Rishworth & Ors *The New Zealand Bill of*

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[55] *Cropp v Judicial Committee* [2008] 3 NZLR 774 (SC) at [25] and [27].
[56] *R v Hansen* [2007] 3 NZLR 1 (SC) at [6], [57], [60], [61], [90], [94], [191], [192], [269] and [270].

Rights[57] and Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: a Commentary*.[58]

b) The right to freedom of association encompasses the right *not* to join an association.[59]

c) As the relevant international conventions show, the right to freedom of association is a broad right. Rishworth states:[60]

> Association with family, friends, and like-minded individuals in churches, clubs, trade unions, professional bodies, lobby groups, political parties, and a host of other organisations, both formal and informal, is an integral part of modern life. Through associations, individuals pursue common interests and exercise their rights to freedoms of expression, freedom of religion, and freedom of peaceful assembly.

Butler and Butler state:[61]

> 15.7.2 The ambit of freedom of association in s 17 of BORA is wide, encompassing the right to form and participate in any kind of organisation. Section 17 of BORA has been held to go further and encompass the right of an individual to associate *with any other individual* simpliciter. [*B v JM* [1997] NZFLR 529 (HC) at 532: right to freedom of association encompassed a grandfather's ordinary social intercourse with his granddaughter "as part of his freedom to associate with those he chooses".] In our view, this wide interpretation of the ambit of s 17 of BORA is to be supported. First, it is consistent with the broad ambit of the closely related rights of free expression (s 14 of BORA) and free assembly (s 16 of BORA). Secondly, in other human rights systems a narrow view of the ambit of free association is acceptable since the right to associate with other individuals in an informal, disorganised way would likely be protected by a right to privacy or autonomy. The absence of such rights from BORA means it is legitimate for the right of free association to occupy the field that its ordinary meaning suggests.
>
> (footnotes omitted)

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[57] P Rishworth & Ors *The New Zealand Bill of Rights* (Oxford University Press, Melbourne, 2003) at 112.

[58] Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: a Commentary* (LexisNexis, Wellington, 2005) [15.11] and [15.7.1].

[59] Rishworth at 356, and Butler and Butler, at [15.5.2] and [15.7.9]–[15.7.11].

[60] Rishworth at 354.

[61] Butler and Butler at 448–449.

Reference was also made to Lester & Ors (ed) *Human Rights Law and Practice*[62] commenting to similar effect on the European Convention.

d) There will be some limits on the scope of the right, but just where the line might be drawn was neither settled nor clear. In *Lewis v Real Estate Institute of New Zealand*[63] the Court of Appeal held that the issue of whether a solicitor could not only act as a solicitor but also have a business as a real estate agent was well outside the ambit of s 17 of the Bill of Rights Act. In the judgment of the Court delivered by Hardie Boys J it was said at 393—

> There is no doubt that where a statutory provision is capable of having more than one meaning, the Court should prefer the meaning that is the more consistent with the affirmed rights and freedoms: s 6. On the other hand, the Court may not decline to apply a provision by reason only that it is inconsistent with the Bill of Rights: s 4(b). However we do not see that this case has anything to do with freedom of association. Counsel referred to the decisions of the Alberta Court of Appeal affirmed by the Supreme Court of Canada in *Black v Law Society of Alberta* (1986) 27 DLR (4th) 527, (1989) 58 DLR (4th) 317, but the issue there was quite different and clearly was one of freedom of association. Restrictions on professional or business activities are more appropriately to be considered in the context of the law as to restraint of trade and of the Commerce Act 1986, neither of which of course has any bearing on the proper construction to be given to the Real Estate Agents Act.

In *Black v Law Society of Alberta*, it was held that rules prohibiting non-residents from practising law in law partnerships with residents of Alberta and members of the Alberta Law Society from being a partner in more than one firm infringed s 2(d) of the Canadian Charter.

e) The Canadian cases have distinguished between the right to freedom of association, which is protected, and an activity that is prohibited for individuals, which does not become protected by the formation of an

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[62] Lester & Ors (ed) *Human Rights Law and Practice* (LexisNexis, London, 2009) 4.11.15.
[63] *Lewis v Real Estate Institute of New Zealand* [1995] 3 NZLR 385 (CA).

association: *Canadian Egg Marketing Agency v Richardson,*[64] *Archibald v Canada,*[65] *Dunmore v Ontario (Attorney-General)*[66] and *Health Services and Support – Facilities Subsector Bargaining Assn v British Columbia,*[67] and Rishworth.[68]

f) The right of freedom of association may be subject to justified limitations under s 5 of the Bill of Rights Act.[69]

[69] There was, however, dispute between the parties as to the correct understanding of the Canadian cases, the scope of the right of freedom of association and its application to the facts of the present case. For Turners & Growers, Mr Walker submitted that the recent Canadian decisions in *Dunmore* and *Health Services* showed that associational activities were protected whether or not the activity practised in association was separately protected by the Charter or was at least lawful. The earlier decisions in *Canadian Egg Marketing Agency* and *Archibald* were undermined by the more recent decisions. Here the Regulations do not prohibit the export of kiwifruit. They provide that only one person can export kiwifruit which means that anyone who would otherwise export kiwifruit in association with others is prevented from doing so and growers who wish to export are practically compelled to associate with each other and Zespri in doing so, and are prevented from associating with others voluntarily. It is precisely the associational aspect of the activity that is being attacked, not the activity itself. The defendants and intervenors have adduced no evidence to justify the limitations on Turners & Growers' right.

[70] For Zespri and the Attorney-General, Mr Goddard and Mr Keith submitted that while the recent Canadian decisions added a gloss that where an activity, such as collective bargaining, was inherently associational there was no need to identify a lawful or constitutionally protected individual activity, they did not otherwise undermine the earlier cases which had held that an association could not provide

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[64] *Canadian Egg Marketing Agency v Richardson* [1998] 3 SCR 157.
[65] *Archibald v Canada* (2000) 188 DLR (4th) 538.
[66] *Dunmore v Ontario (Attorney-General)* [2001] 3 SCR 1016.
[67] *Health Services and Support – Facilities Subsector Bargaining Assn v British Columbia* [2007] 2 SCR 391.
[68] Rishworth at 361–362.
[69] Butler and Butler at 15.9.1.

protection for unlawful individual activity. Here, where exporting kiwifruit was not inherently associational because an exporter could export on its own, freedom of association could not be used to challenge the validity of making the activity of exporting by individuals unlawful.

[71] The issue in this case is whether the restrictions on the export of kiwifruit in regulation 3 (the export ban) and regulation 4 (the Zespri export authorisation) and the absence of an independent exporter permit regime, which means that Turners & Growers must, like other suppliers, sell its kiwifruit for export to Zespri, infringe Turners & Growers' right to freedom of association so that it can be said that the making of the regulations was not empowered by s 26(1) of the Restructuring Act. For the following reasons I have concluded the answer is "No".

[72] First, while in the context of the Bill of Rights Act where the purpose is to affirm, protect and promote "human rights and fundamental freedoms", including the "democratic and civil rights" in ss 12–18, the right to "freedom of association" protected by s 17 is undoubtedly broad and encompasses a wide range of associational activities, not every activity involving or carried on by more than one person will necessarily be within the meaning of "association" in this context. Some limits to the scope and significance of what may be encompassed by the expression "association" in this context is suggested by the primary meanings given by dictionaries which refer to the "action of joining or uniting for a common purpose": Shorter Oxford English Dictionary and Webster's Encyclopaedic Unabridged Dictionary of the English Language. The elements of "joining or uniting" and "a common purpose" do seem essential for the type of "association" protected by the Bill of Rights Act. As Baroness Hale of Richmond said in *R (Countryside Alliance) v Attorney-General*:[70]

> It is about people getting together, whether in public or private, in pursuit of a common aim.
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> ...
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> It protects the freedom to meet and band together with others in order to share information and ideas and to give voice to them collectively. While democracy values each individual, it also knows that individuals cannot get much done unless they band together. These articles, then, are designed to

[70] *R (Countryside Alliance) v Attorney-General* [2008] 1 AC 719 at [117] and [118].

> protect the freedom to share and express opinions, and to try to persuade others to one's point of view, which are essential political freedoms in any democracy.

[73] Second, when two people enter into a contract for the sale and purchase of an item, they may be described as "associating" with each for the purpose of the contract, but they would not be considered to have an "association", or at least one deserving of protection, under the Bill of Rights Act. Freedom of association under the Bill of Rights Act and freedom of contract are two distinct concepts. While in *Carroll v Attorney-General for New Zealand*[71] regulations that took away freedom of contract for dairy farmers were invalidated, Mr Walker disavowed any reliance on infringement of freedom of contract as a ground for invalidating the Regulations in this case.

[74] Third, freedom of contract may be inhibited or prohibited by valid statutory or regulatory provisions which do not have "freedom of association" implications. As Iacobucci and Bastarache JJ said in the *Canadian Egg Marketing Agency* case:[72]

> It cannot be said that freedom of contract and trade is a modern notion. Nevertheless, the regulation of trade, and in particular, trade in agricultural commodities, is an exercise that involves a balance of competing interests that requires specialized expertise. Yet the effect of the respondents' submissions would be to constitutionalize all commercial relationships under the rubric of freedom of association. There is no trade or profession that can be exercised entirely by oneself. Following the reasoning of the Court of Appeal, all forms of government regulation of the economy that affect the ability of individuals to trade would, at least *prima facie*, infringe s. 2(*d*) and require justification under s. 1. As William Shores noted in a comment on the Court of Appeal's decision in the case at bar:
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> > [a]n interpretation of the freedom of association that protects trade expands the role of the *Charter* in protecting commercial activity far beyond anything recognized by the courts to date. Such an interpretation will provide a sharp weapon for attack on a wide range of regulatory systems. ("Walking Onto an Unfamiliar Playing Field -- Expanding the Freedom of Association to Cover Trade" (1996), 6 *Reid's Administrative Law* 1.)

[75] Fourth, in the context of the Bill of Rights Act it may in some cases be of assistance to draw a distinction between the associational aspect of an activity which

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[71] *Carroll v Attorney-General for New Zealand* [1933] NZLR 1461 (CA).
[72] *Canadian Egg Marketing Agency* at 57.

may be protected and the activity itself which may not be. As Bastarache J said in *Dunmore v Attorney-General for Ontario*:[73]

> In sum, a purposive approach to s. 2(d) demands that we "distinguish between the associational aspect of the activity and the activity itself", a process mandated by this Court in the *Alberta Reference* (see *Egg Marketing,* supra, per Iacobucci and Bastarache JJ., at para. 111). Such an approach begins with the existing framework established in that case, which enables a claimant to show that a group activity is permitted for individuals in order to establish that its regulation targets the association *per se* (see *Alberta Reference,* supra, per Dickson C.J., at p. 367). Where this burden cannot be met, however, it may still be open to a claimant to show, by direct evidence or inference, that the legislature has targeted associational conduct because of its concerted or associational nature.

I do not overlook the reservations about the association/activity distinction expressed by the members of the House of Lords in *R(Countryside Alliance) v Attorney-General*[74] by Lord Bingham of Cornhill at [18], by Lord Hope of Craighead at [57] and by Baroness Hale of Richmond at [117], but their reservations were not accepted by Lord Brown of Eaton-under-Heywood at [143] or by Lord Rodger of Earlsferry at [90], who agreed with Lord Brown. Furthermore, both Lord Hope at [58] and Baroness Hale at [118] considered that the purpose of the right of association was to protect essential political freedoms in a democracy. This is not the purpose of the "association" which Turners & Growers claims it is forced to join in this case.

[76] Fifth, the Regulations in this case have prohibited the export of kiwifruit by anyone other than Zespri. That activity is restricted: there is no individual "right to export". The fact that for Turners & Growers to export they must enter into contracts for sale and purchase with Zespri and that other suppliers enter into similar contracts with Zespri does not mean that Turners & Growers has an "association" with Zespri or with the other suppliers that, because of its mandatory nature, infringes Turners & Growers' right *not* to join an association in breach of s 17 of the Bill of Rights Act.

[77] Even if, contrary to this conclusion, it were considered that Turners & Growers' right not to join an association had been infringed by the requirements of the Regulations to enter into contracts with Zespri, I would still not have been

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[73] *Dunmore v Attorney-General* at 216.
[74] *R (Countryside Alliance) v Attorney-General.*

satisfied that it was an invalid exercise of the regulation-making power because the requirements would constitute a reasonable limitation on the right to freedom of association that could be demonstrably justified in a free and democratic society: *R v Hansen.*[75] Turners & Growers did not dispute that a ban on the export of kiwifruit other than through appropriate regulatory controls was a reasonable limitation on the rights which it and other suppliers growers would otherwise have had to export their own kiwifruit. There was no argument that an export ban of that nature was either an infringement or an unjustified infringement of any right to freedom of association. In other words, it was accepted that Parliament was entitled to enact legislation which empowered the making of regulations that restricted any individual "right to export". Turners & Growers' argument was that the regulations accompanying the export ban unjustifiably limited its right to freedom of association because, in the absence of regulations establishing an independent exporter permit regime, it was forced to associate with Zespri and other suppliers if it wished to export kiwifruit. But once it is accepted that Parliament was entitled to empower the making of regulations that restricted any individual "right to export" without unjustifiably infringing the Bill of Rights Act, then it must also be accepted that the provisions of the Regulations which authorise Zespri to export kiwifruit and enable other suppliers to contract with Zespri or enter into collaborative export marketing arrangements with Zespri are similarly justifiable limitations on the right to freedom of association. These provisions are part and parcel of the restrictions on the export of kiwifruit that Parliament has decided as a matter of policy are justifiable. Similarly, s 26(1)(d) of the Restructuring Act, which empowers the making of regulations providing for KNZ "to permit other persons to export kiwifruit", envisages regulations which would also be part of the justifiable restrictions on the export of kiwifruit. Turners & Growers did not argue that an independent exporter permit regime, which would require it to "associate" with KNZ and other independent exporters (at least to a similar extent as it is required to "associate" with other suppliers who sell to Zespri), would be either an infringement of its right to freedom of association to export without a permit from KNZ or an unjustifiable infringement of its right to freedom to do so.

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[75] *R v Hansen.*

[78] Accordingly, Turners & Growers have not established that the Regulations were invalidly made under the Restructuring Act. This conclusion means that it is not necessary for me to consider the question whether, if the Regulations had been invalidly made, the Court should exercise its discretion at this stage to grant a declaration of invalidity retrospectively as Turners & Growers appeared to suggest or only prospectively as submitted by Mr Goddard: cf Zamir & Woolf *The Declaratory Judgment*[76] and Clive Lewis *Judicial Remedies in Public Law*.[77] The practical repercussions for the industry of a retrospective declaration of invalidity ten years after the making of the Regulations might well have meant that any declaration granted would have only been prospective.

The jurisdiction issue

[79] The second principal issue in this case arises because Turners & Growers have pleaded that Zespri has breached the Regulations in two respects.

[80] First, Turners & Growers have pleaded in their second cause of action that Zespri has engaged in unjustifiable discrimination, contrary to regulation 9, by entering into exclusivity contracts with growers and paying them a loyalty premium as provided for in those contracts.

[81] Second, Turners & Growers have pleaded in their third cause of action that Zespri has failed to comply with the non-diversification rule in regulation 11 by:

a) engaging in the activity of supporting the single point of entry by providing funding to NZKGI, and by engaging in certain "lobbying" activities;

b) acquiring the rights to kiwifruit cultivars and developing new kiwifruit cultivation;

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[76] Zamir & Woolf *The Declaratory Judgment* (3rd ed, Sweet & Maxwell, London, 2002) [4.016]–[4.017].
[77] Clive Lewis *Judicial Remedies in Public Law* (4th ed, Sweet & Maxwell, London, 2009) at [7-074] and [11-009].

c) growing, purchasing and selling kiwifruit grown in countries other than New Zealand; and

d) establishing and operating a business dealing in products derived from kiwifruit.

[82] In both causes of action Turners & Growers seek declarations at common law or under s 3 of the Declaratory Judgments Act 1908 that Zespri's actions are in breach of regulations 9 and 10, and 11, respectively. In respect of the second cause of action Turners & Growers also seek a declaration that the exclusivity contracts are illegal contracts within the meaning of s 3 of the Illegal Contracts Act 1970 and are of no effect by virtue of s 6 of that Act.

[83] Subject to certain qualifications, Zespri admits the terms of the exclusivity contracts and the payment of loyalty premiums. This means that the second cause of action will require determination of the following questions:

a) whether in these circumstances there has been discrimination among suppliers; and

b) if so, whether that discrimination is justifiable in terms of regulation 10.

[84] In respect of the third cause of action Turners & Growers allege that the providers of capital to be used for the specified activities have not been asked or agreed to the use of their capital for these activities, or alternatively that the shareholders and suppliers who have not agreed are exposed to a more than minimal risk from these activities contrary to regulation 11(1)(a) and (b).

[85] There are on the pleadings factual disputes concerning the nature and scope of the activities engaged in by Zespri. In addition, Zespri says that:

a) the activities referred to in [81](a) and (c) above are necessary for its core business;

b) approvals for the activities referred to in [81](b) and (d) above have been obtained from providers of capital; and

c) shareholders and suppliers who have not agreed are not exposed to a more than minimal risk for these activities.

[86] This means that the third cause of action will require determination of the following questions:

a) factual disputes about the nature and scope of the activities carried on by Zespri;

b) whether activities (a) and (c) are necessary for Zespri core business;

c) whether appropriate approvals have been obtained in respect of activities (b) and (d) (and any other activities held to be non-core); and

d) whether shareholders and suppliers who have not consented are exposed to a more than minimal risk in respect of activities (b) and (d) (and any other activities held to be non-core).

[87] Zespri, supported by NZKGI, seeks orders from the Court that there is no jurisdiction to hear and determine the second and third causes of actions before they are considered by KNZ or that they are struck out as an abuse of process. Turners & Growers opposed such orders. The Attorney-General made no submissions on this issue.

Zespri's "no jurisdiction" case

[88] The case for Zespri is that under the regulatory regime KNZ has exclusive jurisdiction to determine in the first instance Turners & Growers' complaints about Zespri's alleged non-compliance with the non-discrimination and non-diversification rules. The Regulations provide for Turners & Growers to make their complaints to KNZ, whose function it is to monitor and enforce these rules. It is not appropriate

for the Court to assume the functions of this specialised body with industry expertise, which is accountable to the industry through the appointment process. The role of the Court is to supervise the exercise by KNZ of its jurisdiction by way of judicial review.

[89] For Zespri, Mr Goddard submitted that:

a) Zespri's obligations under regulations 9 and 11 and the specific regulatory enforcement regime are complementary. There are no private rights of action independent of this regime: *Aotearoa Kiwifruit Export Ltd v Southlink Ltd.*[78] By mistake, the jurisdiction issue was not taken in that case.

b) Under regulation 33(1)(b)(i) KNZ has sole responsibility for monitoring and enforcing the non-discrimination and non-diversification rules and, by virtue of regulation 7(1)(a), it does so by ensuring "reasonable compliance" with the rules. By virtue of regulation 7(2)(c), KNZ also has sole responsibility for determining appropriate remedies for complaints under the enforcement regime. This points against any initial role for the Court.

c) KNZ has the necessary independence, expertise and powers to monitor and enforce the rules and determine Turners & Growers' complaints. By virtue of s 24 of the Restructuring Act, members of KNZ are not directors of Zespri. The specialised nature of the New Zealand Kiwifruit Authority, KNZ's predecessor for these purposes, has been recognised by the Court: *NZI Financial Corporation Ltd v New Zealand Kiwifruit Authority.*[79] KNZ has power under regulation 20(1)(b) and (4) to require Zespri to provide information for monitoring and enforcement purposes. By regulation 7(2)(b) KNZ's enforcement regime must comply with the rules of natural justice.

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[78] *Aotearoa Kiwifruit Export Ltd v Southlink Ltd* HC Auckland CIV-2003-470-478, 3 February 2006 at [83].
[79] *NZI Financial Corporation Ltd v New Zealand Kiwifruit Authority* [1986] 1 NZLR 159 at 165 and 173.

d) As the obligations in regulations 9 and 11 and the specific regime for enforcing them were created at the same time by the same regulations, and declarations were not being sought concerning pre-existing private rights, Turners & Growers must proceed before KNZ and not the Court which has no jurisdiction at this stage to determine the complaints: cf *Barraclough v Brown*[80] *Pyx Granite Co v Ministry of Housing and Local Government*,[81] *Van Kessell v Human Rights Commission*,[82] *R v Director of Establishment of the Security Service*,[83] and Zamir and Woolf *The Declaratory Judgment*.[84]

e) The Court should not determine mixed questions of fact and law on an application for a declaration under s 3 of the Declaratory Judgments Act 1908: *Turner v Pickering*,[85] *New Zealand Insurance Co Ltd v Prudential Assurance Co Ltd*[86] and *Van Kessell v Human Rights Commission*.

f) The Court's jurisdiction to grant declarations at common law was broad and subject to few limits, but may be excluded by legislation, either expressly or by necessary implication as here: cf *Commerce Commission v Telecom Corporation of New Zealand Ltd*.[87]

g) It was an abuse of the process of the Court to seek a declaration where there is a specific procedure to be followed in connection with the matters in dispute: *O'Reilly v Mackman*[88] and Zamir and Woolf.[89]

h) The declarations of non-compliance sought by Turners & Growers would not provide a practical answer, but would raise more questions as to what should happen next and what action, if any, KNZ should

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[80] *Barraclough v Brown* [1897] AC 615 (HL) at 619–620.
[81] *Pyx Granite Co v Ministry of Housing and Local Government* [1960] AC 260 (HL) at 302.
[82] *Van Kessell v Human Rights Commission* [1986] 1 NZLR 628 (HC) at 631–635.
[83] *R v Director of Establishment of the Security Service* [2010] 2 WLR 1 (HL) at [21]–[22],.
[84] Zamir and Woolf at [3.044]–[3.071].
[85] *Turner v Pickering* [1976] 1 NZLR 129.
[86] *New Zealand Insurance Co Ltd v Prudential Assurance Co Ltd* [1976] 1 NZLR 84(CA) at 85.
[87] *Commerce Commission v Telecom Corporation of New Zealand Ltd* HC Auckland CIV-2004-404-1333, 9 October 2009.
[88] *O'Reilly v Mackman* [1983] 2 AC 237 (HL) at 285.
[89] Zamir and Woolf at [4.208].

take. A declaration is not a remedy contemplated by the Regulations for issues involving questions of fact and judgment by KNZ.

i) Turners & Growers' application for a declaration that the exclusivity contracts are illegal contracts under the Illegal Contracts Act 1970 could never succeed as a matter of law because any inconsistency with the regulatory regime as a result of non-compliance by Zespri with regulations 9 and 11 could not produce that consequence. The remedies for breach of the Regulations are provided for comprehensively in the Regulations and it is wrong in law to suggest that there is any room for the operation of the Illegal Contracts Act. It would never be appropriate for the Court to grant the relief sought as it would be inconsistent with the legislative scheme and would have adverse consequences for other suppliers who do not wish to be relieved of their contracts with Zespri: cf *Master Education Services Pty Ltd v Ketchell.*[90]

[90] For NZKGI, Mr Crombie supported the submissions made by Mr Goddard. He also referred to the relevant parts of KNZ's Procedures Manual relating to the non-discrimination and non-diversification rules, the procedure for complaints, collaborative marketing, and summaries of KNZ's significant decisions on complaints that Zespri breached the non-discrimination rule. He noted that the chairpersons of KNZ had legal experience: formerly Sir Peter Trapski and now Sir Brian Elwood.

The response for Turners & Growers

[91] The case for Turners & Growers is that the High Court has a broad jurisdiction to declare the rights and obligations of parties, including those arising out of statutes or regulations: *Pyx Granite Co v Ministry of Housing and Local Government*, *Anderson v Valuer-General,*[91] *Salmar Holdings Ltd v Hornsby Shire Council,*[92] *Forster v Jododex Aust. Pty Ltd,*[93] *Imperial Tobacco Ltd v Attorney-*

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[90] *Master Education Services Pty Ltd v Ketchell* (2008) 236 CLR 101 (HCA) at 117.
[91] *Anderson v Valuer-General* [1974] 1 NZLR 603 (HC) at 612.
[92] *Salmar Holdings Ltd v Hornsby Shire Council* [1971] 1 NSWLR 193 at 201.
[93] *Forster v Jododex Aust. Pty Ltd* (1972) 127 CLR 421 at 435.

General,[94] *Gouriet v Union of Post Office Workers*,[95] *Re Chase*,[96] *Gazley v Attorney-General*[97] and *Commerce Commission v Telecom Corporation of New Zealand Ltd.*[98] The jurisdiction is not limited to the declaration of rights vested in the parties themselves. This original jurisdiction is supplemented by the jurisdiction conferred by s 3 of the Declaratory Judgments Act 1908. Parliament can exclude the High Court's jurisdiction to declare the law, but the Court will not lightly assume that Parliament has done so. The Court's jurisdiction must be excluded expressly or by necessary implication. Neither the Restructuring Act nor the Regulations in this case expressly exclude the Court's jurisdiction. Nor, on examination, do they do so by necessary implication: cf *Barraclough v Brown* and *Van Kesell v Human Rights Commission.*

[92] For Turners & Growers, Mr Walker submitted that:

a) The Court's jurisdiction is not excluded by necessary implication in that it was not intended that KNZ should have exclusive jurisdiction over the matters raised by the declarations sought because KNZ is not qualified to determine the issues raised which are primarily legal issues of statutory interpretation or complex disputes of fact; KNZ is not a specialist tribunal in the sense that the Commerce Commission or the Valuer-General is specialised; KNZ is not independent of Zespri; KNZ does not have the powers (examination on oath, compulsion of witnesses or cross-examination) appropriate to final determination of important factual disputes; there is no appeal from KNZ's decision; judicial review of a KNZ decision would be inherently limited in scope and, in particular, would generally not extend to review of factual findings; and the remedial powers given to KNZ are permissive, partial and supplementary, and do not purport to cover the full ground of regulations 9 and 11, which impose absolute statutory duties on Zespri.

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[94] *Imperial Tobacco Ltd v Attorney-General* [1981] AC 718 at 750.
[95] *Gouriet v Union of Post Office Workers* [1978] AC 435.
[96] *Re Chase* [1989] 1 NZLR 325 (CA).
[97] *Gazley v Attorney-General* (1995) 8 PRNZ 313.
[98] *Commerce Commission v Telecom Corporation of New Zealand Ltd.*

b) The High Court may retain jurisdiction to grant declarations in respect of questions which are relevant to, or even determinative of, matters which Parliament has given to a particular tribunal or body to decide: cf *Bulk Gas Users Group v Attorney-General.*[99]

c) The Court may take into account the availability of other avenues to address an issue in deciding whether, as a matter of discretion, to grant declaratory relief. Here there are good reasons why Turners & Growers should not be compelled to go before KNZ first: Turners & Growers are pursuing other causes of action which address some of the same subject matter (loyalty contracts, cultivars) as the applications for declarations in connection with regulations 9 and 11; if Turners & Growers were compelled to pursue the matter first before KNZ and then issue judicial review proceedings, there would be two sets of proceedings addressing common subject matter; the primary disputes are questions of law, which are more suited for decision by the Court than by KNZ; and the third cause of action involves complicated disputes of fact which KNZ does not have the facility to resolve.

d) The decision in *Aotearoa Kiwifruit Export Ltd v Southlink Ltd* confirms that the Court has the jurisdiction to decide issues of duty and breach under the Regulations. The decision that breach of regulation 9 did not give rise to a "private right of action" did not mean that the Court had no jurisdiction to declare whether there had been a breach of the regulation. This was confirmed by the costs judgment in that case.[100]

e) The positive obligations imposed on Zespri by regulations 9 and 11 are new free standing statutory duties in respect of which declarations of non-compliance may be obtained. The provisions for monitoring and enforcement in regulations 7(1)(a), 7(2) and 33(1)(b)(i) are not part and parcel of the relevant duties. Nor are they the only way in

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[99] *Bulk Gas Users Group v Attorney-General* [1983] NZLR 129 (CA) at 135.
[100] *Aotearoa Kiwifruit Export Ltd v Southlink Ltd* (2006) 18 PRNZ 60 at [18]–[19].

which the statutory duties may be enforced. As the rights and remedies are therefore not given "in the one breath" (*uno flatu*), the decision in *Barraclough v Brown* does not apply.

f) The reference to "reasonable compliance" in regulation 7(1)(a) did not limit the statutory duties under regulations 9 and 11, but it was accepted that, if it did, it would be more likely to suggest that KNZ had exclusive jurisdiction in the first instance.

g) It was not an abuse of process to seek a declaration where there is a statutory procedure. *O'Reilly v Mackman* did not decide otherwise.

h) The Court should not decline to grant relief where the dispute raises matters peculiarly suited to judicial determination. The Court should not insist on Turners & Growers exhausting the alternative remedy first if that is inconvenient or impractical: Zamir & Woolf.[101]

i) Declarations of breach of the regulation had utility because they would make the actions of Zespri unlawful.

j) The non-exclusive nature of the Regulations was supported by reference to clause 12 of Schedule 4 in the Apple and Pear Export Regulations 1999 which provided:

> **12. Other rights of redress**—(1) This schedule does not limit any other right of redress under any other enactment or rule of law.
> (2) However, any person determining any other redress must take into account any redress obtained under this schedule.

k) The High Court has jurisdiction to determine whether a contract is illegal within the meaning of the Illegal Contracts Act 1970, to determine the consequences of illegality under that Act, and to grant relief as sought by the Turners & Growers in its amended statement of claim. The decision in *Master Education Services Pty Ltd v Ketchell* was not concerned with the exclusion of the Court's jurisdiction but

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[101] Zamir & Woolf at [4.210].

whether an industry code of conduct was a relevant factor in deciding whether a particular contract was illegal.

Exclusion of the Courts jurisdiction?

[93] Access to justice, a fundamental element of the rule of law, is obtained by access to the Courts which have jurisdiction to hear and determine not only private disputes but also public disputes involving public authorities, and to declare the rights and obligations of parties before such authorities. The fundamental importance of access to justice through the Courts for the resolution of disputes involving public authorities and the Crown and the declaration of rights and obligations is affirmed by s 27(2) and (3) of the Bill of Rights Act, which provide:

> **Right to justice**
>
> ...
>
> (2) Every person whose rights, obligations, or interests protected or recognised by law have been affected by a determination of any tribunal or other public authority has the right to apply, in accordance with law, for judicial review of that determination.
>
> (3) Every person has the right to bring civil proceedings against, and to defend civil proceedings brought by, the Crown, and to have those proceedings heard, according to law, in the same way as civil proceedings between individuals.

[94] But it is not just s 27(2) and (3) that protect access to justice through the Courts. The Courts themselves guard their jurisdiction by recognising the constitutional importance of the right of access: Philip A Joseph *Constitutional & Administrative Law in New Zealand.*[102] Ultimate jurisdiction to determine questions of law is retained by the Court: *Bulk Gas Users Group v Attorney-General* and Joseph at 860. And the Courts do not accept that their jurisdiction has been removed by statute or regulation in the absence of clear words: JF Burrows and RI Carter, *Statute Law in New Zealand.*[103] As Viscount Simonds said in *Pyx Granite Co v Ministry of Housing and Local Government*:[104]

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[102] Philip A Joseph, *Constitutional & Administrative Law in New Zealand* (3rd ed, Thomson Brookers, Wellington, 2007) at 1026.
[103] JF Burrows and RI Carter, *Statute Law in New Zealand* (4th ed, LexisNexis, Wellington, 2009) at 323.
[104] *Pyx Granite Co v Ministry of Housing and Local Government* at 286.

> It is a principle not by any means to be whittled down that the subject's recourse to Her Majesty's courts for the determination of his rights is not to be excluded except by clear words. That is, as McNair J. called it in *Francis v. Yiewsley and West Drayton Urban District Council*, a "fundamental rule" from which I would not for my part sanction any departure.

[95] As counsel for both Turners & Growers and Zespri accepted in this case, the Court's jurisdiction to grant the declarations sought by Turners & Growers may only be excluded by "clear words", that is either by express words in the Restructuring Act or the Regulations or by necessary implication from those words. In this context exclusion of jurisdiction by "necessary implication" means, as Lord Hobhouse of Woodborough put it in *R (Morgan Grenfell & Co. Ltd) v Special Commissioners of Income Tax*:[105]

> A necessary implication is not the same as a reasonable implication.... A *necessary* implication is one which necessarily follows from the express provisions of the statute construed in their context. It distinguishes between what it would have been sensible or reasonable for Parliament to have included or what Parliament would, if it had thought about it, probably have included and what it is clear that the express language of the statute shows that the statute must have included. A necessary implication is a matter of express language and logic not interpretation.

This statement has been applied by both the Privy Council in *B v Auckland District Law Society*[106] and the Supreme Court in *Cropp v Judicial Committee*.[107]

[96] In the present case, as counsel also accepted, there are no express words excluding the jurisdiction of the Court to grant the declarations sought by Turners & Growers at this stage, that is before KNZ hears and determines any complaint. The question therefore is whether the Court's initial jurisdiction has been excluded as a matter of logic by necessary implication from the express provisions of the Restructuring Act and Regulations construed in their context. The question focuses on the Court's initial jurisdiction because there is no dispute that, in accordance with s 27(2) of the Bill of Rights Act, the Court's supervisory jurisdiction to review any decision reached by KNZ in subsequent judicial review proceedings has not been excluded.

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[105] *R (Morgan Grenfell & Co. Ltd) v Special Commissioners of Income Tax* [2003] 1 AC 563 at [45].
[106] *B v Auckland District Law Society* [2004] 1 NZLR 326 at [58].
[107] *Cropp v Judicial Committee* [2008] 3 NZLR 774 at [26].

[97] The question whether the Court's initial jurisdiction has been excluded by necessary implication requires a close examination of the provisions of the Restructuring Act and the Regulations relating to the "non-discrimination" and "non-diversification" rules and the enforcement regime relating to them. The following features of the relevant regulatory provisions are to be noted:

a) The "non-discrimination" rule in regulation 9 and the "non-diversification" rule in regulation 11 are, together with the "information disclosure" requirements in regulations 12–20, the "mitigation measures" in Part 3 of the Regulations, the purpose of which, as stated in regulation 8, is to mitigate the potential costs and risks arising from [Zespri's] monopsony, by:

> (a) encouraging innovation in the kiwifruit industry while requiring that providers of capital agree to the ways in which their capital is used outside the core business; and
>
> (b) promoting efficient pricing signals to shareholders and suppliers; and
>
> (c) providing appropriate protections for ZGL's shareholders and suppliers; and
>
> (d) promoting sustained downward pressure on ZGL's costs.

b) The rules constitute a "light-handed" regulatory regime which, like Zespri and KNZ themselves, would not exist but for the Restructuring Act and the Regulations. The rules are unique to Zespri and must be interpreted on the basis of their text and in light of their stated purpose and their context.

c) The "non-discrimination" rule in regulation 9 prohibits Zespri from "unjustifiably" discriminating among suppliers and potential suppliers in respect of:

> (a) a decision on whether to purchase kiwifruit; or
>
> (b) the terms of the purchase contract.

The meaning of "justifiable discrimination" is explained in part by regulation 10, which provides:

> (1) Discrimination (or the extent of the discrimination) is justifiable if it is on commercial grounds.
>
> (2) A commercial ground includes, but is not limited to, matters relating to product features, quality, quantity, timing, location, risk, or potential returns.

To determine whether in any particular instance Zespri has breached the prohibition by discriminating "unjustifiably", it is necessary to evaluate the relevant "commercial grounds" including those stipulated in regulation 10(2), and make a kiwifruit industry specific judgment in the particular circumstances.

d) The "non-diversification" rule in regulation 11 prohibits Zespri from carrying out activities, and owning or operating assets, that are not necessary for its "core business" unless:

> (a) the providers of capital used or to be used for those activities have been asked and have agreed to the use of their capital for those activities; and
>
> (b) the shareholders and suppliers who have not agreed are not exposed to more than a minimal risk from those activities.

The expression "core business" is defined in regulation 2 and:

> (a) means the purchase of New Zealand-grown kiwifruit for export where the point of acquisition of title to fruit is at FOBS and the export of that fruit:
>
> (b) excludes the export at FOBS of kiwifruit for consumption in Australia:
>
> (c) excludes the sale of kiwifruit in New Zealand.

The prohibition in regulation 11(1) does not apply in the situations covered by regulation 11(2), (3) and (3A), and the expression "use of capital" is defined as including the matters in regulation 11(4). To determine whether in any particular instance Zespri has breached the prohibition by carrying out activities, or owning or operating assets,

that are not necessary for its "core business", it is necessary to evaluate "necessity" in the context of Zespri's "core business" and, if that requirement is not met, to ascertain whether agreement has been sought and obtained from providers of capital used and whether the shareholders and suppliers who have not agreed are not exposed to "more than a minimal risk" for those activities. The existence of an agreement will be largely a matter of fact, but determining "minimal risk" will involve an evaluative judgment in the particular circumstances.

e) Although regulations 9 and 11 contain prohibitions on Zespri in respect of "non-discrimination" and "non-diversification", the Regulations contain no offence provisions or penalties for contravention of the Regulations. Notwithstanding s 26(1)(s) of the Restructuring Act, which empowered the making of regulations providing for offences and penalties for contravention of the regulations, none was made in respect of the "non-discrimination" and "non-diversification" rules. This means that the question of the propriety of granting a declaration when criminal proceedings are available does not arise in this case: cf Zamir & Woolf[108] and Lewis.[109]

f) In this context, instead of offence and penalty provisions, the Regulations contain an "enforcement regime" implemented through Zespri's export authorisation and the functions of KNZ: regulations 7 and 33(1)(b). The statutory power to proceed in this way was presumably derived from the combined effect of the regulation-making powers in s 26(1)(a) (providing for the functions and powers of the new Board (KNZ)), (f) (providing for the terms and conditions or other requirements that may be part of Zespri's authorisation), and (y) (providing for such other matters as are contemplated by or are necessary for giving full effect to the Act and its due administration).

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[108] Zamir & Woolf at [4.172] ff.
[109] Lewis at [7.053] ff.

Turners & Growers did not argue that the regulatory "enforcement regime" was invalid.

g) By regulation 33(1), one of KNZ's three functions which, by regulation 33(2), it must carry out to best achieve the purpose in regulation 8, is:

> (b) to monitor and enforce—
>
> > (i) the non-discrimination rule, the non-diversification rule, the information disclosure requirements, and the collaborative marketing requirements; and
> >
> > (ii) the requirement that the point of acquisition of title to kiwifruit purchased for export be in accordance with regulation 5(c); and
> >
> > (iii) any other terms and conditions of the authorisation.

h) KNZ is then required by regulation 7(1)(a) to carry out its monitoring and enforcement function under regulation 33(1)(b) by providing for "an enforcement regime" in Zespri's export authorisation that ensures "reasonable compliance" with the "non-discrimination" and "non-diversification" rules and the information disclosure and collaborative marketing requirements. The expression "reasonable compliance" is not defined in the regulations. How "reasonable compliance" is to be ensured by the enforcement regime through specified terms in Zespri's export authorisation is left for KNZ to determine following consultation with Zespri: regulation 7(3).

i) Zespri's export authorisation must provide for Zespri to pay to KNZ the reasonable costs incurred by KNZ on monitoring and enforcing the regime: regulation 7(c)(i).

j) Under regulation 7(2) Zespri's export authorisation must also include provisions for:

> (a) the identification of enforcement events:

(b) procedures which comply with natural justice:

(c) remedies, including provisions enabling affected persons to initiate, by way of complaint to the Board, an action through the enforcement regime and to receive an appropriate remedy if their claim is made out.

How these matters are addressed as specified terms in Zespri's export authorisation is left for KNZ to determine following consultation with Zespri: regulation 7(3).

k) Under regulation 7(4) the "range of enforcement options" to be included in the enforcement regime in Zespri's first export authorisation and any variation in that range of enforcement options requires the prior approval of the Minister and compliance with any Ministerial request.

[98] A copy of Zespri's export authorisation was in evidence before the Court. A comprehensive enforcement regime, which I infer in the absence of any submission to the contrary was made with Ministerial approval and following consultation with Zespri, is contained in clause 6 of the export authorisation. It enables KNZ to consider complaints by affected persons and to act of its own volition. It provides that KNZ shall regulate its own procedure in a way that is consistent with the rules of natural justice and ensures that "enforcement is speedy, inexpensive and simple". There are provisions for notice to Zespri, opportunities for Zespri to make submissions and respond to "any prejudicial comment" by other parties, and a procedure for provisional determinations. KNZ is bound to provide written decisions with reasons.

[99] The remedies are contained in clause 6.3 of the export authorisation, which provides:

6.3.1 Where NZKB [KNZ] determines that ZGL [Zespri] has failed to comply with any matter, NZKB may decide that no enforcement action should be taken or may make any one or more of the following orders:

(a) issue a private warning or reprimand;

(b) issue a public warning or reprimand;

(c) impose a financial penalty;

(d) order the payment of compensation in accordance with clause 6.3.5;

(e) require ZGL to do any specified thing for the purpose of remedying any non-compliance;

(f) make a cease and desist order restraining non-compliant conduct;

(g) make orders providing for any other reasonable remedies, undertakings, or penalties that NZKB considers appropriate.

6.3.2 An order may be made on such terms and conditions as NZKB thinks fit, provided that an order shall not include any matter which cannot be included in the Authorisation itself under Regulation 6.

6.3.3 In the event NZKB chooses to impose a financial penalty, NZKB may, at its discretion, apply the moneys so received in whole or in part:

(a) to a party or parties detrimentally affected by ZGL's non-compliance;

(b) for a purpose of benefit to the kiwifruit industry;

(c) to a use connected with NZKB's operations;

and may accumulate, and invest in an interest bearing bank account, such moneys for such periods as NZKB may determine, prior to making any such application.

6.3.4 NZKB shall not be required to apply the amount of any financial penalty received to meet its operational or other costs.

6.3.5 NZKB may order the payment of any compensation as follows:

(a) to any supplier who has suffered loss directly arising from a failure to comply with the non-discrimination rule;

(b) to any provider of capital, shareholder or supplier who has suffered loss directly arising from an activity, or ownership or operation of assets which did not comply with the non-diversification rule;

(c) to any person who has suffered loss directly arising from a failure to comply with a requirement to enter into a collaborative market arrangement with that person.

6.3.6 NZKB may make orders regarding the costs of an investigation or an enforcement proceeding, and such order may be in addition to any order under clause 6.3.1.

6.3.7 NZKB may require a complainant to give an undertaking to comply with any order for costs under clause 6.3.6.

6.3.8 ZGL shall comply promptly with any order made.

6.3.9 A decision of NZKB is final and binding on all affected persons.

[100] When considering whether to make an order under the enforcement regime, KNZ is required by clause 6.2.9 of the authorisation to have regard to the following matters:

(a) the circumstances in which the non-compliance occurred;

(b) the degree of the non-compliance;

(c) the extent to which the non-compliance was inadvertent, negligent, deliberate, or otherwise;

(d) the length of time the non-compliance remained unresolved;

(e) ZGL's actions on learning of the non-compliance;

(f) how the non-compliance was disclosed;

(g) any benefit that ZGL obtained or expected to obtain as a result of the non-compliance;

(h) any previous non-compliance by ZGL;

(i) the impact of the non-compliance on the complainant and/or the kiwifruit industry generally;

(j) any explanation for the non-compliance provided by ZGL;

(k) such other matters as NZKB thinks fit.

[101] This examination of the relevant regulatory provisions relating to the "non-discrimination" and "non-diversification" rules and the enforcement regime implemented through the terms of Zespri's export authorisation made with Ministerial approval and following consultation with Zespri shows that the only remedies that exist for any breach by Zespri of those rules are the remedies in clause 6.3 of the authorisation. Breach of the prohibitions in the rules does not constitute a criminal offence and no private rights of action to enforce the rules are created by the Regulations or the terms of Zespri's export authorisation. As envisaged by the Regulations, monitoring and enforcement of the regime is dependent on KNZ's ability to make the necessary evaluative judgments relating to the critical issues whether any discrimination by Zespri is "justifiable" in the context of the kiwifruit industry, whether any diversification by Zespri is "necessary" for its "core business", whether any shareholders and suppliers who have not agreed to activities not necessary for Zespri's core business are exposed to "more than a minimal risk", and

whether, in any event, after following the prescribed procedures and after taking into account the matters prescribed in clause 6.2.9 of the authorisation, there has or has not been "reasonable compliance" with the rules justifying any of the remedies in clause 6.3.1 of the authorisation and, if so, which ones should, in KNZ's discretion, be granted. These decisions by KNZ require a knowledge of and expertise in the kiwifruit industry which KNZ with its producer elected and NZKGI appointed membership is uniquely able to provide. Contrary to the submissions for Turners & Growers, KNZ has and is expected to have the facility to resolve all these issues, including any factual issues, likely to arise in the determination of complaints under the enforcement regime.

[102] Against this background, I have decided for the following reasons that the Court's initial jurisdiction to grant the declarations sought by Turners & Growers in this case has been excluded as a matter of logic by necessary implication from the express provisions of the Restructuring Act and the Regulations.

[103] First, the prohibitions on discrimination and diversification are imposed on Zespri solely by the rules in regulations 9 and 11 and the regime for the monitoring and enforcement of those prohibitions by KNZ is contained solely in Zespri's export authorisation as required by regulation 7(1)(a). The prohibitions and the enforcement regime arise solely from the Regulations and the authorisation required by the Regulations. It is solely the enforcement regime which gives Turners & Growers the right to complain about Zespri's actions to KNZ. Turners & Growers had no pre-existing right to complain about any alleged breaches of the "non-discrimination" and "non-diversification" rules which did not exist outside the Regulations. This is a case, therefore, where the decision in *Barraclough v Brown* rather than the decision in *Pyx Granite Co v Ministry of Housing and Local Government* applies. The prohibitions and the requirements for the enforcement regime in Zespri's authorisation were imposed simultaneously by the Regulations effectively "in the one breath".

[104] Second, the Regulations created no private right of action for Turners & Growers. In *Aotearoa Kiwifruit Export Ltd v Southlink Ltd*, after referring to the principle that whether a statute gives rise to a private remedy as well as to confer

public duties is a question of statutory interpretation and to the provisions of regulations 7 and 9, Winkelmann J said:

> [81] Therefore, there is a statutory requirement that the Board provide suppliers with a means of enforcing Zespri's obligations under Regulation 9, and the ability to seek an appropriate remedy should those obligations not be complied with. The integrity of those processes are secured as they must comply with natural justice. Although no rights of appeal are provided for, any decision by the Board would naturally be subject to judicial review.
>
> [82] Although not mentioned in argument, I am satisfied that the New Zealand Bill of Rights Act 1990 is relevant as well. Section 27 cements the rights to natural justice and judicial review.
>
> [83] When these matters are weighed up, I am satisfied that Parliament did not intend to create a private right of action on the part of suppliers for unjustifiable commercial discrimination. Rather, it intended that the Board act as a watchdog in enforcing compliance, and in providing remedies to the supplier. The Plaintiffs' claim under this head must therefore fail.

The issue whether, in these circumstances, the Court had jurisdiction to determine in the first instance whether Zespri had breached the regulations and whether a declaration to that effect might be granted was not argued in that case. The absence of any private right of action, together with the creation of the prohibitions and enforcement regime solely by the Regulations, strongly suggests, however, that the Court would be most unlikely to do so: Zamir & Woolf.[110] There is nothing in the costs decision in *Aotearoa Kiwifruit Export Ltd v Southlink Ltd*[111] to suggest otherwise.

[105] Third, KNZ, rather than the Court, has not only the power but also the responsibility and the expertise to make the evaluative judgments to determine in the first instance whether there has been a breach of the prohibitions and, if so, whether any remedy should be granted. The reference to "reasonable compliance" in regulation 7(1)(a) is reflected in the factors listed in clause 6.2.9 of the authorisation which KNZ is required to take into account when considering whether to make an order under the enforcement regime. The limitations on the remedies which may be granted indicate clearly that it is KNZ that has exclusive jurisdiction in the first instance. Mr Walker accepted that this outcome was a likely consequence of

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[110] Zamir & Woolf at 23–24.
[111] *Aotearoa Kiwifruit Export Ltd v Southlink Ltd* (2006) 18 PRNZ 60.

viewing the reference to "reasonable compliance" as a limitation on the duties under regulations 9 and 11.

[106] Fourth, it is well-established that the Court will not determine questions of fact or mixed questions of fact and law on an application for a declaratory order by way of originating summons under s 3 of the Declaratory Judgments Act 1908 because that is a procedure designed to provide a speedy and inexpensive method of obtaining a judicial interpretation where the matter in dispute cannot conveniently be brought before the Court in its ordinary jurisdiction and where a declaratory judgment would be appropriate relief: *New Zealand Insurance Co Ltd v Prudential Assurance Co Ltd.*[112] To avoid this difficulty, Turners & Growers have sought in the alternative a declaration at common law. As the Court of Appeal recognised in *New Zealand Insurance Co Ltd*, there is no doubt that the Court in its ordinary jurisdiction may grant a declaratory judgment: Zamir & Woolf. And such a declaratory judgment may be given after a hearing in which disputed questions of fact and mixed questions of fact and law are determined. But, while a declaratory judgment is a discretionary remedy of almost unlimited scope, a Court also retains another discretion to decide at the outset of a proceeding that because the discretion would not be exercised the application should not proceed: *Commerce Commission v Telecom Corporation of New Zealand Ltd*[113] and Zamir & Woolf.[114] For instance, a declaratory judgment will not be granted unless it will serve a practical purpose: Zamir & Woolf.[115] Issues of public policy, the desirability of finality, balance of convenience and public interest may be relevant in this context. In the present case the problem for Turners & Growers is that even if the Court, after a defended hearing, were to determine the questions of fact in its favour and to grant a declaratory judgment that Zespri had contravened the non-discrimination and non-diversification rules, Turners & Growers would be no further ahead because the only remedies for contravention are contained in clause 6.3 of Zespri's export authorisation and only KNZ has jurisdiction in the first instance to grant any of those remedies. This is not a case where KNZ has considered a complaint against Zespri and declined to grant a remedy in which case the complainant might be entitled to

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[112] *New Zealand Insurance Co Ltd v Prudential Assurance Co Ltd* [1976] 1 NZLR 84 (CA) at 85.
[113] *Commerce Commission v Telecom Corporation of New Zealand Ltd* HC Auckland at [169]–[187].
[114] Zamir & Woolf, Chapter 4.
[115] Zamir & Woolf at [4.093].

ask the Court for an order in the nature of mandamus requiring KNZ to grant an appropriate remedy. Turners & Growers are endeavouring to bypass the KNZ complaints procedure and to obtain a declaratory judgment from the Court in the first instance. As such a judgment would serve no real practical purpose, the Court should decline to consider the application for it at this stage.

[107] Fifth, the provisions of clause 12 of Schedule 4 in the Apple and Pear Export Regulations 1999, relied on by Mr Walker, do not alter my conclusion. As Mr Goddard pointed out, clause 12 was included in Schedule 4, a transitional enforcement regime, to ensure, perhaps out of an abundance of caution, that rights of redress under the previous legislation were not lost. Furthermore, I do not consider that a provision of that nature means that the Court's initial jurisdiction under the Kiwifruit Export Regulations 1999 is not able to be excluded by necessary implication from the express provisions of those Regulations.

[108] Sixth, the decision that the Court's jurisdiction is excluded in the first instance does not mean that Turners & Growers are being denied access to the Courts. Any decision by KNZ on a complaint by Turners & Growers about Zespri's alleged breaches of the non-discrimination and non-diversification rules would, in accordance with s 27(2) of the Bill of Rights Act, be amenable to judicial review. In such review proceedings Turners & Growers could challenge all aspects of KNZ's procedure and decision, on all available administrative law grounds, including reasonableness. This is not a case where the Court has denied Turners & Growers access for all time; just at this initial stage and just in respect of the particular declarations it has sought. It is also to be noted that Turners & Growers have not sought declarations limited to the interpretation of the Regulations in terms of s 3 of the Declaratory Judgments Act 1908.

[109] Mr Walker's concern that if Turners & Growers are compelled to pursue the matter first before KNZ and then issue judicial review proceedings there would be two sets of proceedings addressing common subject matter is valid to the extent that the Court will seek to avoid duplication or multiplicity of proceedings relating to the same matters, but is not determinative in this case where Turners & Growers' two Commerce Act causes of action raise discrete competition law issues that do not

depend for their determination on the outcome of complaints to KNZ for breach of the non-discrimination and non-diversification rules in the Regulations. It is also to be noted that if Turners & Growers had pursued their complaint against Zespri with KNZ expeditiously any subsequent judicial review proceedings might have been consolidated with the Commerce Act proceeding. Turners & Growers are not able to rely on their decision to seek declaratory relief in the first instance to avoid the current outcome.

[110] Seventh, the exclusivity contracts between Zespri and its suppliers would not be "illegal contracts" under the Illegal Contracts Act 1970 even if they were found to contravene the non-discrimination rule in regulation 9. The definition of "illegal contract" in the Illegal Contracts Act 1970 is subject to s 5 of that Act which provides:

> **Breach of enactment**—A contract lawfully entered into shall not become illegal or unenforceable by any party by reason of the fact that its performance is in breach of any enactment, unless the enactment expressly so provides or its object clearly so requires.

The short point is that the Regulations do not expressly provide that the exclusivity contracts are illegal or unenforceable if they contravene the non-discrimination rule nor does the object of the Regulations clearly so require. On the contrary, the clear object of the Regulations is to require their enforcement to be solely in the hands of KNZ whose powers in terms of Zespri's export authorisation and its complaints procedure do not, and were not intended to, extend to declarations of illegality or unenforceability. The fact that under clause 6.3.1(f) of the authorisation KNZ may make "a cease and desist order" also tells against such an interpretation.

[111] This conclusion is supported by the decision of the High Court of Australia in *Master Education Services Pty Ltd v Ketchell*[116] that a contravention of s 51AD of the Trade Practices Act 1974 did not result in a franchise agreement being illegal and unenforceable at common law because s 51AD did not in terms prohibit the making of the franchise agreement and the Act made detailed provision for the remedial consequences of non-compliance with the Franchising Code of Conduct. In reaching this conclusion, the High Court took into account the impact on third parties of a

[116] *Master Education Services Pty Ltd v Ketchell* (2008) 236 CLR 101 (HCA).

decision rendering void every franchise agreement entered into where a franchiser had not complied with the Code. In the present case a declaration that Zespri's exclusivity contracts were illegal contracts would have adverse consequences for the suppliers who were parties to those contracts and who are not before the Court in this proceeding.

[112] Accordingly, Zespri has established that under the regulatory regime KNZ has exclusive jurisdiction to determine in the first instance Turners & Growers' complaints about Zespri's alleged non-compliance with the non-discrimination and non-diversification rules and that the Court should decline jurisdiction to hear and determine the second and third causes of action in Turners & Growers amended statement of claim.

[113] Having reached this conclusion for the reasons I have given above, it is not necessary for me to determine what was really an alternative submission for Zespri based on the decision in *O'Reilly v Mackman*[117] that it was an abuse of process of the Court for Turners & Growers to seek a declaration where there was a specific procedure to be followed in connection with the matters in dispute. In *O'Reilly v Mackman* the House of Lords held that, as a general rule, public law issues must be brought by way of judicial review and could not be brought by way of ordinary claim. The precise ambit of the rule is, however, unclear and the rule is subject to exceptions and has been qualified by subsequent case law in England: Lewis.[118] In view of subsequent developments in English law and the absence of any submissions from the parties as to their application in New Zealand and to the circumstances of the present case, I express no further view on this submission by Zespri.

Result

[114] For the reasons given in this judgment I answer the two preliminary issues as follows:

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[117] *O'Reilly v Mackman* [1983] 2 AC 237.
[118] Lewis at [3–002].

a) Turners & Growers have not established that regulations 3 and 4 of the Kiwifruit Export Regulations 1999 are ultra vires and of no effect; and

b) Zespri has established that KNZ has exclusive jurisdiction to determine in the first instance Turners & Growers' complaints about Zespri's alleged non-compliance with regulations 9 and 11 of the Kiwifruit Export Regulations 1999.

[115] The formal orders of the Court therefore are that:

a) The declaration sought in the first cause of action in the amended statement of claim is declined; and

b) The Court has no jurisdiction to hear and determine the second and third causes of action in the amended statement of claim which are therefore struck out.

Costs

[116] I see no reason why the defendants and the intervenors should not be entitled to costs on a category two basis as determined by Associate Judge Doogue in his minute dated 25 September 2009 at [5], with disbursements to be fixed by the Registrar, but if the parties are unable to agree the defendants and the intervenors may submit memoranda within 14 days and the plaintiffs may respond within a further 14 days.

D.J. White J.

D J White J

SCHEDULE

List of decisions of Supreme Court with references to legislative history and Parliamentary debates.

1. *Allen v Commissioner of Inland Revenue* [2006] 3 NZLR 1 at [19].
2. *Condon v R* [2007] 1 NZLR 300 at [19].
3. *Hansen v R* [2007] 3 NZLR 1 at [188].
4. *Brooker v Police* [2007] 3 NZLR 91 at [112], [187] and [228].
5. *Unison Networks Ltd v Commerce Commission* [2008] 1 NZLR 42 at [43] and [66].
6. *Rajamani v R* [2008] 1 NZLR 723 at [6].
7. *New Zealand Airline Pilots' Association Industrial Union of Workers Inc v Air New Zealand Limited* [2008] 2 NZLR 1 at [36] to [38], [101] to [103] and [109].
8. *R v Hayes* [2008] 2 NZLR 321 at [54] to [58].
9. *BNZ Investments Limited v CIR* [2008] 2 NZLR 709 at [29], [32] and [34].
10. *Creedy v Commissioner of Police* [2008] 3 NZLR 7 at [17].
11. *Elders New Zealand Ltd v PGG Wrightson Ltd* [2009] 1 NZLR 577 at [26] and [34].
12. *Greenpeace NZ Inc v Genesis Power* [2009] 1 NZLR 730 at [29] to [35], [40], [59], [60], [61] and [62].
13. *Li v R* [2009] 1 NZLR 754 at [60].
14. *R v Gordon-Smith (No 2)* [2009] 2 NZLR 725 at [6].
15. *Davies v Police* [2009] 3 NZLR 189 at [7], [12], [19], [22], [26], [39], [40], [45], [65] to [71], [77] to [78].
16. *NZ Recreational Fishing Council Inc v Sandford Ltd* [2009] 3 NZLR 438 at [31] and [55].
17. *McAlister v Air New Zealand* [2010] 1 NZLR 153 at [21], [90] to [94] and [118].
18. *B v Crown Health Financing Agency* [2010] 1 NZLR 338 at [58], [63], [64] and [71].
19. *Ports of Auckland Ltd v Southpac Trucks Ltd* [2010] 1 NZLR 363 at [2], [26] to [30] and [38].
20. *Ward v Ward* [2010] 2 NZLR 31 at [18].