KIWIFRUIT EXPORT REGULATIONS 1999

In the matter of the enforcement regime contained in the Export Authorisation issued by Kiwifruit New Zealand to Zespri Group Limited ("Zespri") pursuant to regulation 33(1)

And in the matter of a complaint of unjustifiable discrimination made by

[redacted] ("[redacted]") pursuant to clause 6.1.1 of that Export Authorisation.

INQUIRY: 12 June 2001 and
3 December 2001

BOARD: Peter J Trapski (Chairman)
Hendrik Pieters
Malcolm J Cartwright
Grant Eynon

APPEARANCES: [redacted] and [redacted] for [redacted]
[redacted] for Zespri
[redacted] as Counsel Assisting the Board

FINAL DECISION

31 May 2002

The Complaint

[redacted] complains that Zespri has acted in breach of its obligations under the non-discrimination rule set out in the Kiwifruit Export Regulations 1999 ("the Regulations") in that it has required [redacted] (as a Supplier) to adhere to the *Deed of Agreement (Proportionate Recovery of Tomua Payments)* ("the Tomua Deed") as a precondition of Zespri entering into a Supply Agreement for 2001. It complains that this is an abuse of power by Zespri as a single desk marketer and is a breach of the Regulations.

The Inquiry

We commenced our inquiry into this complaint on 12 June 2001 when we met with Zespri and [redacted]. At that time the quorum of the Board involved in the inquiry was the Chairman, Malcolm Cartwright, Bruce Abrahams and Terry Richards.

We then made further inquiries that concluded in September 2001 and we determined that it would be appropriate to reconvene the meeting with Zespri and [redacted] to seek their assistance on important issues that had emerged. We identified those issues in a letter to the parties dated 8 October 2001 as:

(a) whether [redacted] was a "supplier" for the purposes of the Regulations;

(b) the correct test to apply in determining whether there had been discrimination; and

(c) the extent of consensus reached in Zespri's consultation or negotiations with Suppliers on the Tomua settlement; in particular,

   (i) what effect, if any, those consultations had on the issue of discrimination;

   (ii) whether there was an "all in or all out" consensus;

   (iii) if there was an "all in or all out" consensus the effect of that consensus on the complaint.

The inquiry reconvened on 3 December 2001 as it had not been practicable to arrange a meeting prior to that date. At that meeting the Deputy Chairman, Hendrik Pieters, was present as a member of the Board and Grant Eynon who had replaced Bruce Abrahams as a member of the Board in elections held during 2001 was also present. The Chairman sought and obtained the consent of [redacted] and Zespri for the Board as it was then constituted to consider and determine the complaint.

As the 3 December 2001 meeting progressed it became clear to us that:

(a) Zespri then accepted that [redacted] was a "supplier" and had the ability to bring its complaint; and

(b) neither [redacted] nor Zespri were contending that the "all in or all out" consensus reached among suppliers was relevant to whether there had been unjustifiable discrimination in this case. (Zespri did however, place reliance on the consensus achieved in the industry over the Tomua Settlement in support of its arguments on commercial justification.)

However, we address the question of ability to make a complaint in the next part of this decision to clarify an issue that although not now pursued by Zespri, was raised earlier.

At the meeting on 3 December 2001 Zespri reserved its position on whether, if there was discrimination, such discrimination could be characterised as *"justifiable"*. Immediately following that meeting we decided to seek further assistance on that question. We took the view that the non-discrimination rule[1] involved the single concept of *"unjustifiably discriminating"* among suppliers and that it was not appropriate to seek to separate the elements of discrimination on the one hand, and whether any discrimination was justifiable on the other. We therefore advised both parties on 5 December 2001 that we would appreciate

[1] Regulation 9 of the Kiwifruit Export Regualtions1999

any assistance they could give on that overall issue and we sought that assistance before 14 December 2001. We have received and considered the parties' submissions on that issue.

In addition, when we communicated with the parties on 5 December 2001 we noted Zespri's submission that Tomua was included in the Green Pool and we sought further information.

We then released our second provisional decision on 27 February 2002 and asked for and received submissions from both Zespri and [redacted] on that decision. [redacted] sought an extension until 1 May 2002 to make its submission, which we granted. We also extended Zespri's deadline for its submission to the same date.

At the end of March 2002 Terry Richards retired as the New Zealand Kiwifruit Growers Incorporated representative on the Board. He was replaced by Ruth Lee, but as Ruth Lee has had no involvement with this complaint and was not present at the hearings, she has not participated in the Board's decision.

Zespri's submission on the provisional decision in summary made the following points:

- There is no material distinction between suppliers/growers who are shareholders and those who are not. Therefore it is not possible to discriminate between suppliers/growers by reason of their shareholding status.
- If it is possible to discriminate between suppliers/growers by reason of their shareholding status, then suppliers/growers who are shareholders are worse off by reason of Zespri participating in the Tomua settlement.

- The Pools are not a convenient accounting device. They are a structure by which suppliers/growers accept collective returns and share risk of inadequate returns.
- The risk of Tomua returns rested with suppliers/growers and not with the New Zealand Kiwifruit Marketing Board ("NZKMB"). Zespri did not inherit or incur a liability in respect of poor Tomua returns. The Tomua Settlement did not settle or remove a Zespri liability and so there was no benefit to Zespri shareholders.

[redacted] in its submission on the provisional decision in summary made the following points:

- Discrimination unquestionably occurred but the different outcome for shareholders and non-shareholders was incidental.
- Fruit of equal quality must be accepted from all suppliers of such fruit whether they agree to the Tomua deductions or not. It was discriminatory to refuse to accept fruit from suppliers who did not agree.
- The approach adopted by the Board on the issues of justification is wrong. It is not an industry matter and concerns only risk to Zespri. Zespri has never argued risk.
- Zespri (comprising grower/shareholders) sought to recover from suppliers' costs, which Zespri had voluntarily assumed in respect of the Tomua settlement. Those suppliers who were shareholders / suppliers would get a counter-benefit though their shareholding in the company but non-shareholders/suppliers would not. This was carried into effect by Zespri's decision not to accept fruit from those who did not agree to the Tomua deductions. The decision was an abuse of Zespri's monopsony power and in breach of the regulations since it was not, as now acknowledged in the Zespri submission, based on risk.

[redacted] also expressed a concern that Board was substituting its members' personal interpretations and not following the Regulations in particular Regulation 8. [redacted] conclude its submission by asking two questions as follows:

- Did Zespri make a decision about whether it would purchase kiwifruit which was discriminatory; and
- If so, was that decision commercially justified on the grounds of risk to Zespri?

We have been greatly assisted by and taken account of the submissions that the parties have made in reaching our final decision. In our deliberations we have considered many possible outcomes. In reaching our final decision we have applied the Regulations and in doing that we have examined issues that we consider relevant to the application of Regulation 9.

The Ability to Make a Complaint – Standing

The Board is empowered to consider any complaint made to it by *"an affected person"* about an alleged failure to comply with any of the matters referred to in Regulation 33(1)(b) of the Regulations[2]. Suppliers are the people affected by the non-discrimination rule. The term "supplier" is defined in the Regulations as meaning a person from whom Zespri acquires the property in kiwifruit grown in New Zealand[3].

[redacted] is one of 13 or so entities that contract directly with Zespri to supply kiwifruit for export. We refer to those entities as "Suppliers" to differentiate them from other "suppliers" (they may be growers or producers) who contract with Suppliers to act for them as intermediaries with Zespri.

[2] Clause 6.1.1 of the Export Authorisation
[3] Regulation 2 of the Kiwifruit Export Regulations 1999

At our first meeting it was suggested by Zespri that in re [redacted] the Board had limited the term "suppliers" to growers. That was not our intention. In that decision we focused upon the need for property in kiwifruit to be acquired by Zespri from a supplier and we held that the term "supplier" in the Regulations *included* a grower, and we said:[5]

> *...it seems that those 13 or so entities with which Zespri contracts as "Suppliers" each season, have the right to pass property in kiwifruit to Zespri themselves, or as agent for a grower. In either situation they deal with Zespri as Suppliers in their own right, or as entities which will have the right to pass that property at a later date, either themselves, or as agents for growers. When those Suppliers act as agent for a grower, the principal, the grower, still remains the principal and retains his or her identity as (s)upplier within the meaning of the regulations.*

Whether a person is a supplier for the purposes of the Regulations turns upon whether the entity concerned passes property in the kiwifruit to Zespri. If one of the 13 or so entities with which Zespri contracts as Suppliers each season (at all times material to this complaint [redacted] was one of those Suppliers) has itself the right to pass property it will be a supplier for the purposes of the Regulations. If it acts merely as an agent for a grower or producer – it will not be a supplier for those purposes. In the latter case its role is no more than that of an intermediary or a conduit.

Information obtained between 12 June 2001 and 3 December 2001 made it clear that in some cases [redacted] sells kiwifruit to Zespri (as well as acting as an intermediary for growers in other cases) so that Zespri does acquire the property in kiwifruit from [redacted]. As a result Zespri accepted that [redacted] could bring this complaint.

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[4] Decision of the Board dated 31 May 2001
[5] page 3 of decision in *re* [redacted]

The 2001 Supply Agreement

Each season Zespri formulates its terms and conditions for the purchase of kiwifruit grown in New Zealand for export. Its 2001 Supply Agreement incorporated the terms of the Tomua Deed as part of that agreement.[6] Clause 20 of the Agreement provided:

> *20.1 In clause 3.1 of the Tomua Deed the parties agree that any supply contract between them shall provide for certain matters specified in that clause, including provision for the reduction by Zespri of the amounts payable to the Supplier for each tray of Class 1 New Zealand grown kiwifruit supplied by the Supplier up to a maximum amount referred to in that clause 3.1.*
>
> *20.2 Clause 1.5 of Section A and clause 3.2 of Section B of the Pricing and Payment Manual address the matters set out in clause 3.1 of the Tomua Deed, and the parties agree that those sections of the Pricing and Payment Manual shall apply as part of this Agreement in order to give affect to clause 3.1 of the Tomua Deed.*
>
> *20.3 The Supplier shall ensure that its contracts and arrangements with Growers and Kiwifruit Titleholders (as the case may be) in respect of any Kiwifruit that the Supplier will supply to Zespri under this Agreement (regardless of whether the Supplier will pass tide to that Kiwifruit to Zespri as principal or on behalf of a Grower or Kiwifruit Titleholder (as the case may be) reflect and do not conflict with the Tomua Deed, clauses 20.1 and 20.2 of this Agreement, and clause 1.5 of Section A and clause 3.2 of Section B of the Pricing and Payment Manual.*
>
> *20.4 If there is any conflict between the terms of the Tomua Deed entered into by the Supplier and this Agreement the Tomua Deed shall prevail.*

[redacted] executed its 2001 Supply Agreement on 27 March 2001 but it did so *"under protest"*. In a letter to Zespri sent by facsimile on that day [redacted] said:

> *This company has signed and returned the 2001 Supply Contract and the Deed of Agreement relating to the Tomua Settlement under protest. Imposition of the financial consequences of your predecessor's actions upon your suppliers is an abuse of the*

[6] Schedule 7 of the 2001 Supply Agreement

> *power, which Zespri Group holds as sole authorised exporter of kiwifruit.*
>
> *Some growers contracted to [redacted] will not accept liability for the Tomua Settlement. Not being in the same powerful bargaining position as Zespri, we are not able to force it upon them.*
>
> *The pressure by Zespri upon captive suppliers to carry the liability that is in no way their responsibility, amounts to economic duress. [redacted] [redacted] [redacted] gives notice of its intention to pursue legal remedies available with the intention of having the Tomua Deed set aside or annulled and severing relevant provisions for the Supply contract and Pricing and Payments Manual.*

The phrase *"under protest"* in the context of that letter would seem to reserve [redacted] right to bring this complaint and to argue that Zespri's conduct infringed the non-discrimination rule.

The Tomua Settlement

Early in 1998 the former NZKMB offered and encouraged growers to enter into 10 year Grower Licence Agreements to grow the kiwifruit cultivar known as Tomua, an early ripening variety. It was expected that the variety would be successful and that all growers would benefit from its anticipated price and marketing advantages. Subsequently it became part of the Green Pool. But it was not a successful variety. It encountered resistance in the market. There was negative trade feedback and significant losses were sustained. During the 2000 season Zespri decided that Tomua would no longer be sold under the Zespri brand and it decided to cease its marketing. It then developed a range of solutions and a support package to offer to Tomua growers but issues arose about the way in which, and by whom, that support package would be funded.

Zespri considered that it was fundamentally an industry issue and that growers should pay either as shareholders of Zespri or as suppliers or both, and that because Tomua was at that stage part of the Green Pool it was considered appropriate that the burden of funding the support package should fall in the

main on growers supplying to that pool. It then consulted with the Growers' Forum of New Zealand Kiwifruit Growers Incorporated who were not of that view.

A Working Party was then formed to develop a mutually agreed position on funding the support package. The essential question raised was:

Who pays?

- Tomua growers to pay a percentage?
- Zespri shareholders?
- All pools?
- Green Pool?.

The extensive industry consultation that followed rejected Zespri's initial proposals. Instead a significant consensus of those growers who attended road shows accepted that the cost of the Tomua support package should be shared on a 50/50 basis by Zespri and by growers of all pools. Zespri was to pay for the costs of conversion; the growers of all pools would be responsible for other costs up to $5.2 million plus a contingency of 10%; and Zespri would be responsible for the underwriting of the costs for Gold - up to $3.4 million. The growers' share was to be collected by pro rata deduction from payments that would normally be made to Suppliers.

The series of slides presented to grower road shows between July and September 2000 that were shown to the Board confirmed for us the steps that had been taken by Zespri to consult with the industry in order to gain that degree of consensus and agreement to the settlement.

The Tomua Deed

As a result the *Deed of Agreement (Proportionate Recovery of Tomua Payments)* ("the Tomua Deed") was developed and presented to Suppliers so that Zespri could recover the growers' proportion of the support package

payments that were to be made to Tomua growers over the period between 2001 and 2005.

Clause 3 of the Tomua Deed contemplated recovery by Zespri of Tomua payments under future supply agreements. In broad terms it entitled Zespri to reduce the amounts payable to the Supplier in consideration for each tray of class 1 New Zealand grown kiwifruit supplied by the Supplier whether that kiwifruit was owned by the Supplier or any other person.

Clause 3.2 of the Deed obliged the Supplier to ensure that any arrangements that it entered into with growers or suppliers of kiwifruit to the Supplier were not inconsistent with the provisions of the Deed and the terms of the Supply Agreement put to Suppliers provided for the growers' contribution to the Tomua settlement, consistent with the industry "consensus".

Applying the terms of clause 20 of the 2001 Supply Agreement and the terms of the Tomua Deed to [redacted] circumstances meant that:

(a) although [redacted] had never been involved in the growing or sale of Tomua, it was nevertheless required by Zespri to contribute to the Tomua settlement; and

(b) in its role of Supplier, as an intermediary between growers and Zespri, it has been compelled to ensure that all of its grower suppliers paid their proportionate share of the Tomua settlement by Zespri's requirement that [redacted]l incorporate into its agreement with its grower suppliers terms that did not conflict with the provisions of the Tomua Deed.

The issue is therefore whether Zespri's decision to purchase kiwifruit from [redacted] only if those terms were incorporated into its contracts amount to an unjustifiable discrimination among suppliers.[7]

[7] in terms of Regulation 9 of the Kiwifruit Export Regulations 1999

In order to determine that question it is necessary to first consider who is now responsible for the NZKMB's obligations under the Tomua Grower Licence Agreements and therefore what happened during 1999/2000 when the industry was restructured.

1999 Industry Restructuring

Prior to the 1999 restructuring[8] the kiwifruit industry was governed by the Kiwifruit Marketing Regulations 1977[9]. Those regulations established the NZKMB, a marketing organisation whose object was to obtain the best possible long-term returns for kiwifruit intended for export in the interest of New Zealand producers of kiwifruit.

At the time of its demise, but not originally, the functions of the NZKMB included the acquiring and marketing of New Zealand kiwifruit intended for export; determining the price for the kiwifruit it acquired; helping the general development of the kiwifruit industry; endorsing desirable methods of and standards for dealing with kiwifruit; and establishing standards of soundness and acceptability for kiwifruit for export.

NZKMB was empowered to do anything it was authorised to do by those regulations or by statute, but it could only exercise those powers to achieve its objects, to perform its functions, or to pay people for the cancellation of exporters' licences under previous provisions of the regulations. It was required to:

- acquire and market *all* kiwifruit harvested in New Zealand and intended for export;
- determine the prices to be paid for the kiwifruit which it was to acquire for export; and

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[8] by the Kiwifruit Industry Restructuring Act 1999
[9] made under the Primary Products Marketing Act 1953

- help the general development of the kiwifruit industry.[10]

Its assets, at the time of the Kiwifruit Industry Restructuring Act 1999, were declared to belong ultimately to producers and to be held and administered for the benefit of persons who were for the time being producers[11].

The 1999 Restructuring Act on the other hand, provided for:

- the conversion of the NZKMB into a company deemed to be registered under the Companies Act 1993 and called Zespri Group Limited[12]; and
- the regulation of the export of kiwifruit.

Shares in Zespri were issued to producers – orchard owners who had invested capital in their orchards for the production of kiwifruit – in accordance with the share allocation plan devised as part of the restructuring process

The Restructuring Act made it clear that Zespri was to be regarded as the same body corporate as the NZKMB[13] and that the deemed registration of the company did not create a new entity. It was made clear that:[14]

- proceedings that could have been commenced against the NZKMB may be commenced against Zespri;
- the deemed registration of Zespri did not affect liabilities or obligations existing immediately before the conversion of the NZKMB;
- all transactions entered into by the NZKMB before the conversion were deemed to have been entered into by, or to be those of Zespri;

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[10] Regulation 12A(1)(a), (b) and (c) of the Kiwifruit Marketing Regulations 1977
[11] Regulation 30 of the Kiwifruit Marketing Regulation 1977
[12] Section 20 of the Kiwifruit Restructuring Act 1999
[13] Section 21 (1), (2) and (3) of the Kiwifruit Restructuring Act 1999
[14] Clause 1(c),(d),(e) and (f) of the Schedule to the Act

- all agreements and undertakings entered into by the NZKMB were binding on and enforceable against Zespri.

As the decisions which gave rise to the need for the Tomua Deed were made while the NZKMB had responsibility for the industry, Zespri inherited or acquired as a contingent liability the responsibilities of the NZKMB, so the major thrust of the complaint is that the inherited Tomua liability is one that ought to be met by Zespri rather than by the imposition of some sort of industry levy that requires growers to contribute to that liability.

Mitigation Measure – The Regulations

After the 1999 restructuring this Board was required by the Regulations to grant an Export Authorisation to Zespri.[15] Zespri is the only holder of an export authorisation and therefore has the power of a monopsony for that purpose. The potential for abuse of that power has been tempered by the mitigation measures set out in Part 3 of the Regulations that include the non-discrimination rule.

The non-discrimination rule is contained in Regulations 9 and is part of Part 3 of the Regulations that in turn is headed *"Mitigation Measures".* The purpose of the provisions in Part 3 are set out in Regulation 8 that provides:

> ***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 (Zespri's) shareholders and suppliers; and*
> *(d) Promoting sustained downward pressure on ZGL's costs.*

[15] Section 26(1)(c) of the Kiwifruit Restructuring Act 1999 and Regulation 4(1) of the Kiwifruit Export Regulations 1999

Regulations 9 and 10 then provide:

> ***9. Duty not to discriminate unjustifiably-***
> *ZGL, (Zespri) 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.*

It is clear that Part 3 of the Regulations is intended to counterbalance the grant of monopsony power in favour of Zespri but we emphasise that the objective of Part 3 of the Regulations is *"to mitigate"* the potential costs and risks arising from the monopsony rather than to *prevent* those potential costs and risks.

The Board's Enforcement Functions

Regulation 33(1)(b)(i) confirms that one of the functions of the Board is to monitor and enforce the non-discrimination rule. Regulation 33(2) requires the Board to carry out its function under Regulation 33(1)(b) to best achieve the purpose set out in Regulation 8.

In addition, the Board is required to perform its functions in a manner that is as efficient and cost-effective as possible[16]. That obligation is reinforced by clause 6.2.1 of the Export Authorisation granted to Zespri.

The Competing Contentions on Discrimination

Zespri contends that it is entitled to use its monopsony power in order to insist that all Suppliers enter into identical supply agreements. It contends that in its discussions with Suppliers a general consensus had emerged that Suppliers would deal with the 2001 Supply Agreement on an "all in or all out" basis and that

all Suppliers have been treated in the same way. It suggests that this Board must ask:

(a) are the Suppliers alike – do they share material characteristics?

(b) if not, is it discrimination between them to treat them in the same way?

On the other hand [redacted] contends that:

(a) all like suppliers were not treated alike; Zespri required all suppliers – shareholders and non shareholders – to contribute to the Tomua settlement; the financial consequences of not signing the contract were different for grower/suppliers who do not own the land on which their kiwifruit is grown than for those who do; those who do, have shares in Zespri; and grower/suppliers who do not own their land are being asked to fund Zespri's operations without the benefit of a dividend that may otherwise be payable to shareholders of Zespri; and

(b) it is discriminatory for Zespri to refuse to enter into a Supply Agreement with a Supplier unless the Supplier executes the Tomua Deed because [redacted] (as a Supplier) is unable to force growers with which it contracts to accept liability for the sums in issue.

[redacted] in its submission on our provisional decision in effect withdraw the complaint outlined at paragraph (a) above by saying that the different outcome for shareholders and non-shareholders was incidental; it is not a matter of shareholder/non-shareholder, that difference was and is merely coincidential. [redacted] say that the decision was clearly about whose fruit would be accepted for export. Zespri similarly submitted on our provisional decision that there is no material distinction between suppliers/growers who are shareholders and those who are not; therefore it is not possible to discriminate between

[16] Regulation 34 of the Kiwifruit Export Regulations 1999

suppliers/growers by reason of their shareholding status. We agree with both and Zespri on this issue.

also say that as well as purchasing fruit for supply to Zespri, it also supplies fruit direct to Zespri from leased orchards. As far as leased orchards are concerned, say that it is not possible to negotiate Tomua deductions into the terms of the leases as the terms of the leases are set at the beginning and can only be re-negotiated at stated intervals. We understand the point that is making, but we are of the view that this point is beyond the Board's jurisdiction.

Discrimination

At the meeting on 12 June 2001 for Zespri drew our attention to the decision of the Full Court of the Federal Court of Australia in *O'Brien Glass Industries Limited v. Cool & Sons Limited* (1983) ATPR 40,376, a case decided in the context of price discrimination rules in force under the (Australian Federal) Trade Practices Act.

Then at our meeting on 3 December 2001 he drew our attention to the decision of the Supreme Court of the United States in *Federal Trade Commission v. Anheuser-Busch Inc 363* US 536 (1960) and to extracts from Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* (Vol 14), with particular reference to the discussion of price discrimination in Part 23C at pp 54-71. He did so to assist the Board reach an understanding of the meaning of "discrimination".

In our view the aims of price discrimination rules and the rules that regulate the kiwifruit industry are different in kind. Price discrimination prohibitions are aimed at removing, or making less difficult, entry barriers into a particular market. But once a monopsony power has been granted, the barrier arm is down and well and truly locked. It is no longer possible to approach the issue by determining

whether particular conduct will substantially lessen competition. Instead, the object of the regulatory regime becomes the protection of suppliers from discriminatory action by the holder of the monopsony power that cannot be justified on commercial grounds.

Taking what assistance we can from the decisions that [redacted] has referred us to, we note we previously sought help from the way discrimination is described in *Laws of New Zealand*, as:

> *A distinction, whether intentional or not, based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed on others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society.*[17]

We have investigated the situation further, particularly within a regulatory framework, and note that discrimination has been defined in Australia in these general terms:

> *Discrimination may occur both when treating like people differently and when applying a general rule to people with genuine differences. It is therefore necessary to examine the practical effect of a law to see if it imposes a discriminatory burden.*[18]

We adopt those refinements of our previous definition, on reflection, and say that in our view, the test of discriminating in terms of the Regulations poses for us the inquiry whether like suppliers have not been treated alike; whether like suppliers have been treated differently; whether a general rule has been applied to people with genuine differences; and whether a burden has been imposed in the process.

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[17] Laws NZ, Discrimination paragraph 1

[18] Laws Australia, paragraph 19.6:50[50], and *Street v Queensland Bar Association* (1989) 168 CLR 461

But the adopting of that test in the kiwifruit industry and to the Tomua situation involves the prior inquiry – when are suppliers alike? – or, who are like suppliers? To answer those questions we return to consider the obligations created by the Tomua Grower Licence Agreements.

The decision to develop Tomua was made while the NZKMB had responsibility for the industry. The variety was developed in order to bring benefits to the whole industry. The benefits that were expected of Tomua were to be shared by the industry as a whole. In order to develop the variety contracts were entered into with growers for a 10 year period. They entitled growers to sell Tomua to the NZKMB until 2007.

At that time the Tomua contracts were assets of NZKMB; they were declared to belong ultimately to producers[19] and were required to be held and administered for the benefit of those persons who were, for the time being, producers. It was on those producers, the participants in the industry, that Zespri subsequently sought to impose the burden of the Tomua settlement.

Then in June 2000, Zespri made the decision that Tomua could no longer be sold under the "Zespri" brand; that it would not continue to market Tomua because Tomua was detrimentally affecting the Zespri brand. Whilst there were "industry good" elements in that decision it was nevertheless the decision of a corporate entity, a company deemed to be registered under the Companies Act 1993, that made it's decision in respect of assets and liabilities that it had acquired from growers/producers/suppliers in the restructuring process. On that basis it proposed that all suppliers, those who had a liability under the Grower Licence Agreements and those who did not, should enter into the Tomua settlement so that the cost of that settlement would be shared by all of its suppliers.

[19] Regulation 30 of the Kiwifruit Marketing Regulations 1977

Decision

In our view it is not a matter of whether Zespri treated all "suppliers" alike or compelled suppliers to contribute to the Tomua settlement. Rather, it is a question of whether it treated all "like suppliers" alike or whether it discriminated among suppliers by treating some like suppliers differently.

It is clear to us that throughout the whole of this episode Zespri took account of and was motivated by not only its own risk but by the wider implications for the industry as a whole – by considerations of "industry good".

In the first place it is clear the Tomua settlement arose out of an inherited obligation over which the directors of Zespri as a corporate entity had little control. They had to deal with the Tomua Grower Licence Agreements that its predecessor – a different entity with very different allegiances and responsibilities – had entered into. The Tomua liability was a "legacy" liability. It predated industry restructuring. It arose at a time when the industry was co-operative; when the assets and liabilities of the industry were shared by all growers. We are of the view that it is appropriate therefore for this liability to remain with growers – at least to some extent – rather than to fall entirely on Zespri.

Secondly, we note that before corporatisation the assets of the NZKMB were held for all producers and that in those circumstances an industry wide levy could reasonably have been expected as a response to a liability of that Board. It is, we believe, appropriate to view defrayment of the cost of settlement of an inherited Zespri liability in the same light.

Thirdly, the grower members of the Board know, from their own knowledge, that the terms that Zespri imposed were imposed after widespread industry consultation. The Board is satisfied that those terms were required for the good of the industry as a whole and to remove a risk, not only to Zespri, but also to all growers; that there was at that time a real risk that the industry restructuring that had been fought for so long and so hard, and that had been adopted by a

significant majority in the industry only two years previously, could be derailed. The decision, taken by a significant majority of the industry, was for us, clearly made to protect the industry from risks that were then very real.

Fourthly, while some growers opposed and continue to oppose the terms of the Tomua settlement as not being their responsibility, the fact remains that there was a strong measure of agreement among growers that they should accept some of risk and that this was commercially good for the industry as a whole.

Bringing together the circumstances described in the four preceding paragraphs, we are of the view that all suppliers in the context of the Tomua settlement are "like suppliers". We are also of the view that in the Tomua settlement Zespri treated all "like suppliers" alike and that Zespri did not discriminate among suppliers by treating some like suppliers differently.

We do not accept the alternative suggestion made by [redacted] that it is discriminatory to require a Supplier to execute or be bound by the Tomua Deed because it is unable to force the growers with which it deals to accept their share of liability for the settlement. Each Supplier has, like Zespri, the ability to enter into contracts with suppliers or to refuse to do so; it has the ability to refuse to deal with those who decline to accept liability. If a Supplier takes that action, then no action can be taken against it under the Regulations; it is only Zespri who is bound by those regulations; [redacted] as a Supplier, is free to discriminate among suppliers, if it so chooses.

We conclude by answering the questions posed by [redacted] at the end of its submission on the provisional decision. The questions were:

- Did Zespri make a decision about whether it would purchase kiwifruit which was discriminatory; and
- If so, was that decision commercially justified on the grounds of risk to Zespri?

The answer to the first question is that Zespri's decision whether or not it would purchase kiwifruit was not discriminatory. As such it is not necessary to answer the second question.

Accordingly, and for these reasons, we dismiss this complaint.