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] 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] for the Complainant
[redacted] for Zespri
[redacted] as Counsel assisting the Board

FINAL DECISION

31 May 2002

The Complaint

The [redacted] comprises two family trusts that grow kiwifruit and have been supplying an average of 50,000 trays of Green to Zespri each year. On 19 March 2001 they formally made a complaint that Zespri had failed to comply with the requirements of Regulation 33(1)(b) of the Kiwifruit Export Regulations 1999 ("the Regulations") – in particular the non discrimination rule.

They complained that they had been advised by their supply entity that unless they, as growers, agreed to a deduction from the payments due to them for fruit sold by Zespri, for moneys Zespri had undertaken to pay Tomua growers, Zespri would not accept their fruit for export. They complained that this was not only an abuse of Zespri's power as a single desk marketer, but that it was also contrary to the Regulations in that Zespri had no power to refuse to accept a grower's fruit on the grounds that a grower refused to permit a deduction from payments due to him arising from a liability that Zespri had incurred in respect of a claim by Tomua growers.

The Inquiry

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

After that meeting on 12 June 2001, we made further inquiries and received a written submission that [redacted] had undertaken to provide in response to written submissions that had been presented by Zespri.

On 27 August 2001 we released our first provisional decision and we asked for and received submissions from both Zespri and [redacted] on that decision.

The inquiry then reconvened on 3 December 2001 - it had not been practicable for all parties to meet prior to that date - when 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.

At the meeting on 3 December 2001 both Zespri and [redacted] reserved their positions on whether, if there was discrimination, it could be characterised as *"justifiable"*, but 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 advised both parties on 5 December 2001 that we would appreciate 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.

We then released our second provisional decision on 5 April 2002 and asked for and received submissions from both Zespri and [redacted] on that decision.

At the end of March 2002 Terry Richards retired as the New Zealand Kiwifruit Growers Incorporated representative on the Board. Ruth Lee replaced him, 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 second 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.

[1] Regulation 9 of the Kiwifruit Export Regualtions1999

- 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.
- The Tomua entitlement was to be paid from the Green Pool and any risk or liability lay with this pool.

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

- The Board's finding that if there was discrimination that is then saved by Regulation 10 has not been argued and cannot be made.
- The action of Zespri in making it a condition that a grower would not have his fruit accepted for export unless he agreed to accept liability under the Tomua deed is quite clearly discriminatory in the common accepted meaning of that term – very simply growers who agreed to accept the condition had their fruit accepted while those who did not agree were refused. For the true effects of that action one must look to the Regulations that govern the actions of Zespri as a monopsony.
- How can a condition that fruit would only be accepted for export from growers who accepted the Tomua settlement be justified on commercial grounds in relation to the purchase of kiwifruit or the terms of the purchase contract.
- Zespri treated like people differently.

- The concept that suppliers/growers have a responsibility to Tomua growers by virtue of their association with Zespri as shareholders is simply wrong in fact and law.
- [redacted] position as a shareholder has no bearing on its position as a supplier in so far as its rights and liabilities in dealing with Zespri are concerned. The attempt to merge the position as a shareholder with that of a supplier in order to reinforce the already very questionable argument that discrimination has not occurred is wrongly based in law and is incorrect in fact.
- [redacted] as a supplier/grower has certainly suffered detriment due to the discriminatory actions of Zespri in that it has wrongly deducted from the sale of its fruit monies to meet the debt due by Zespri to Tomua growers.
- [redacted] is deeply concerned that the view held by Zespri and endorsed by the Board of Kiwifruit New Zealand if it is to be upheld creates an extremely dangerous precedent for the future conduct of Zespri.

[redacted] ask that if the Board took into account Zespri's new argument on the Tomua liability, then [redacted] wish to be heard on this. [redacted] submitted that the correct course of action is for the complaint to either be referred back to another forum to enable an independent review to be undertaken or alternatively that a Queens Counsel be appointed to presumably undertake such a review. We have considered these points, but in the circumstances, we are of the view that it is proper for the Board to now make its final decision without further submissions, hearings or the use of other methods for considering the issue.

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.

Background - The Tomua Settlement

Early in 1998 the former NZKMB offered and encouraged growers to enter into 10 year Grower Licence Agreements to grow Tomua, an early ripening variety of kiwifruit. It was expected that Tomua would be successful in the marketplace and that all growers would benefit from its anticipated price and marketing advantages.

But it was not successful. 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 that it would cease its marketing. It 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 time 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 was 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 deductions from payments that would normally be made to the major supply entities.

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 of these discussions Zespri developed a document, a *Deed of Agreement (Proportionate Recovery of Tomua Payments)* ("the Tomua Deed") and presented it to the major supply entities 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. It entitled Zespri to reduce the amounts payable to the supply entities for each tray of class 1 New Zealand grown kiwifruit supplied by the supply entity whether that kiwifruit was owned by the supply entity or any other person, and it then provided:-

> *3.2 The Supplier shall ensure that any arrangements which it enters into with growers of kiwifruit or other suppliers of kiwifruit to the Supplier are not inconsistent with the provisions of this Deed.*
>
> *3.3 ZGL will:*
> *(a) require all suppliers of class 1 New Zealand grown kiwifruit to ZGL in the years in which the amounts are or may be payable by the Supplier under this Deed to enter into Deeds to the same effect as this Deed as a precondition to the procurement of a Supply Contract with ZGL;*
> (b) *not acquire class 1 New Zealand grown kiwifruit from any person who has not entered into a Deed to the effect of this Deed and a Supply Contract incorporating the provisions required by this Deed;*

(c) *apply the provisions of those Deeds to all Suppliers (including the Supplier) on the same basis*

Independent Kiwis NZ Limited ("IKL"), the supply entity that [redacted] supplies to, was one of the Suppliers to whom the Tomua Deed was presented.

The 2001 Supply Agreements

To this end Zespri incorporated the Tomua Deed, as Schedule 7, into its 2001 Supply Agreement that set out its purchase conditions for all suppliers, including IKL, for the forthcoming season. Clause 2.2 of that Agreement provided:-

> *This Agreement is conditional upon the Supplier having (and will not take effect until the Supplier has) entered into the Tomua Deed.*

and Clause 20 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.*

In turn these provisions were incorporated into the agreement that [redacted] as a grower was required to enter into with IKL. Clause 9 of that agreement says:

> *9. TOMUA DEED*
>
> *9.1 The Grower acknowledges that the Grower is aware of the provisions of clause 2.2 of the ZGL Contract which provides that the ZGL Contract is conditional upon and will not take effect until the Supplier has signed the Tomua Deed.*
>
> *9.2 The Grower acknowledges that it is necessary for the Supplier to enter into the Tomua Deed in order for the Supplier to be able to supply Kiwifruit provided by the Grower to ZGL.*
>
> *9.3 The Grower acknowledges the terms of the Tomua Deed and agrees that the price for Kiwifruit supplied by the Grower to the Supplier received from the Supplier will be reduced in accordance with the Tomua Deed and clause 1.5 of Section A and clause 3.2 of Section B of the Pricing and Payment Manual.*
>
> *9.4 If there is any conflict between the terms of the Tomua Deed entered into by the Supplier and the ZGL Contract the Grower agrees that the Tomua Deed shall prevail and this Grower Contract shall be modified accordingly.*

All of this meant that although [redacted] had never been involved in the growing or sale of Tomua, they were being requiring by Zespri's Supply Agreement with IKL, then in turn by IKL's supply agreement with [redacted], to contribute to the Tomua liability. By this means payment was being required from [redacted] as it was being required of all growers, whether or not they agreed with the Tomua settlement or with their being required to contribute to it.

The Issue

The issue is therefore whether Zespri's decision to purchase kiwifruit from [redacted] through IKL, only if the terms of the Tomua Deed were incorporated into [redacted] contract with IKL, amounts to an unjustifiable discrimination among suppliers.[2]

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[2] In terms of Regulation 9 of the Kiwifruit Export Regulations 1999

Or, as [redacted] puts it – by refusing to accept a growers' fruit for export unless a grower agreed to be bound by the terms of the Tomua Deed, has Zespri breached Regulation 9 of the Regulations?[3]

[redacted] suggest that it is patently obvious that Zespri is discriminating against them in making that demand, but we believe that in order to decide whether Zespri's requirement amounts to a breach of the Regulations involves an inquiry into what happened during 1999/2000 when the kiwifruit industry was restructured and the effect of the restructuring legislation on responsibilities and obligations that had been established by the Tomua Grower Licence Agreements, and an inquiry into the meaning of *unjustifiably discriminating* in the Regulations.

1999 Industry Restructuring

Prior to the 1999 restructuring[4] the kiwifruit industry was governed by the Kiwifruit Marketing Regulations 1977[5]. 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

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[3] [redacted] letter dated 30 May 2001
[4] By the Kiwifruit Industry Restructuring Act 1999
[5] Made under the Primary Products Marketing Act 1953

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
- help the general development of the kiwifruit industry.[6]

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[7].

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[8]; 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[9] and that the deemed registration of the company did not create a new entity. It was made clear that

- 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;

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[6] Regulation 12A(1)(a), (b) and (c) of the Kiwifruit Marketing Regulations 1977
[7] Regulation 30 of the Kiwifruit Marketing Regulation 1977
[8] Section 20 of the Kiwifruit Restructuring Act 1999
[9] Section 21 (1), (2) and (3) of the Kiwifruit Restructuring Act 1999

- all transactions entered into by the NZKMB before the conversion were deemed to have been entered into by or to be those of Zespri;
- all agreements and undertakings entered into by the NZKMB were binding on and enforceable against Zespri:[10]

As the obligations that arose under the Grower Licence Agreements (and that subsequently gave rise to the need for the Tomua Deed) were entered into while the NZKMB had responsibility for the industry, they became obligations of Zespri; obligations that Zespri inherited or acquired consequent upon the restructuring. In essence the obligations to Tomua growers under the Tomua Growers Licence Agreement were Zespri's responsibility; responsibilities that it inherited.

[redacted] say that:

> *The debt owed to the Tomua growers is a debt due by Zespri – it is a company debt.*[11]

Zespri on the other hand say that the Tomua settlement was made in the interests of Green growers because Tomua growers had been entitled to be paid for their fruit from the Green pool and so the financial risk of poor returns for Tomua lay with all Green and Tomua growers. Zespri say that because Tomua was included in the Green pool, the financial risk of poor returns from Tomua lay with growers/suppliers to this pool. Zespri further say that Zespri had no liability; that the Tomua settlement did not relieve Zespri of a liability and did not confer a benefit on Zespri's shareholders.

Mitigation Measure – The Regulations

After the 1999 restructuring this Board was required by the Regulations to grant an Export Authorisation to Zespri.[12] Zespri is the only holder of an export authorisation and therefore has the power of a monopsony for that purpose. The

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[10] Clause 1(c), (d), (e) and (f) of the Schedule to the Act

[11] [redacted]r letter of 12 December 2001

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

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.*

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[13]. That obligation is reinforced by clause 6.2.1 of the Export Authorisation granted to Zespri.

The Competing Contentions

[redacted] contends that the terms of Zespri's 2001 Supply Contract are discriminatory because they compel all Suppliers to agree to the terms of the Tomua Deed, whether they wish to or not. [redacted] say that it is unjustifiable for Zespri to impose those requirements on growers as a condition of allowing them to supply to Zespri, the sole exporter of kiwifruit; that it is only because Zespri imposes those terms upon IKL that [redacted] is being required, against its will, to contribute to the terms of the Tomua settlement. In particular it says:

> *The result of accepting the Zespri argument is tantamount to agreeing that any condition laid down by Zespri in relation to a decision to purchase kiwifruit or the terms of the purchase contract is not a discrimination as long as it is imposed on all growers even if the result is to treat growers differently depending upon whether they agree or not. Such an argument is clearly untenable in the present circumstances in terms of the Regulations. It is also tantamount to saying e.g. that Zespri could not make a condition that it would only accept fruit for export from growers who wore blue overalls! Quite clearly the Regulations are framed to restrict Zespri's powers and limit the grounds upon which it can discriminate.*

Zespri's responds that the non-discrimination rule is a familiar regulatory tool to mitigate the potential costs and risks arising from its monopsony power, but it does not prevent Zespri, as a monopsony, from insisting that *all* suppliers enter into *identical* supply agreements. It takes the view that it is requiring that all

[13] Regulation 34 of the Kiwifruit Export Regulations 1999

suppliers be treated alike and there is nothing in Zespri's conduct that discriminates against [redacted].

Discrimination

At the meeting on 12 June 2001 [redacted] 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". [redacted] have also submitted that these decisions are very much applicable to this complaint.

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 that we have 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.*[14]

Karere rejected that definition.[15] It said that discrimination is simply *differential treatment*. 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.*[16]

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.

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

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[14] Laws NZ, Discrimination paragraph 1.
[15] Comments in [redacted] letter of 12 September 2001 concerning the Provisional Decision of 27 August 2001
[16] Laws Australia, paragraph 19.6:50[50], and *Street v Queensland Bar Association* (1989) 168 CLR 461

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[17] 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.

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".

[17]Regulation 30 of the Kiwifruit Marketing Regulations 1977

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.

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