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] on behalf of the [redacted] pursuant to clause 6.1.1 of that Export Authorisation.

INQUIRY: 2 July 2001
3 December 2001

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

APPEARANCES: [redacted] in person
[redacted] for Zespri
[redacted] as Counsel assisting the Board

FINAL DECISION

31 May 2002

The Complaint

[redacted] grows kiwifruit at [redacted] and supplies that fruit through [redacted]. [redacted] in effect makes his complaint on behalf of the [redacted] as a matter of principle. [redacted] grows Green and Gold conventional kiwifruit and has never grown Tomua. [redacted] is a Zespri shareholder.

By letter dated 29 April 2001 [redacted] complained that the Tomua Deed of Agreement discriminates against growers on two counts:

> *1. ZGL through the contents of the Tomua Deed of Agreement is discriminating between growers who have regrafted to Gold in the past 2 years, those who will be grafting to Gold over the next 3 years, and those who will not be regrafting to Gold during those periods.*
>
> *2. ZGL through section 3.3 paragraphs A & B of the Tomua Deed of Agreement discriminates between Suppliers who agree with and growers who disagree with the taking of money from the returns on growers' fruit via the pools.*

His complaint continued:

> *It needs to be understood that the decision to discontinue with the sale of the Tomua variety was a company decision. Consultation with growers was apparently not an option. Otherwise the action could have been different. Being a company decision it then became a shareholder problem and to avoid discrimination it would have been necessary to recover the compensation on the basis of a growers' shareholding in the company at the time the decision was made.*

and then:

> *Part 2 section 6 paragraph C. is being abused by, issuing a threat not to take a growers fruit for export unless the Supplier signs the Tomua deed of agreement. This threat was introduced into the supply contract when it became apparent that some post harvest operators and a large number of growers disagreed with the money for the Tomua compensation being taken from the pools to fund a Company decision. Therefore I consider the threat discriminates against growers who believe the company should be paying for their decision. .....I believe that Z.G.L. required the suppliers to obtain agreement from the growers through their packhouses and in a number of instances this was not forthcoming until the threat not to take fruit was introduced. This is against the principle of natural justice.*

> *The correct procedure I believe would have been to raise the money for compensation on the basis of a growers shareholding and failing that being an option then Z.G.L. could go to its shareholders and seek an increase in their commission rate, which would do away with any argument about insolvency.*

On 3 May 2001 the then General Manager of Kiwifruit New Zealand wrote to [redacted], confirming discussions they had in attempting to reformulate the complaint and to bring it squarely within the confines of the Kiwifruit Export Regulations 1999 ("the Regulations") and the Export Authorisation. He said:

> *We agreed that the thrust of your complaint was in your paragraph 2 and was that Zespri Group Limited have discriminated against you in the terms of a purchase contract without commercial justification. You contend that there is discrimination from Zespri in that they will not take fruit from contracted Suppliers, and therefore growers, unless they sign the Tomua Deed.*
>
> *Your paragraph 2 goes on to say that those growers who do not agree with the method of funding the Tomua settlement are discriminated against by the decision to fund the settlement in this way.*
>
> *You pointed out that should this funding formula be executed those who have regrafted to Zespri Gold or will graft over in the next 3 years will have little or no production and will not pay as much for the settlement relative to those growers who are in full production for the whole period. In this way you believe that the funding formula will result in a further discrimination under the terms of the current purchase contract.*

We paraphrase [redacted]'s complaint as being that Zespri has unjustifiably discriminated against [redacted] in three ways:

i. in requiring [redacted] and its contracted Supplier to sign up to and/or commit to the terms of the Tomua Deed;

ii. in requiring [redacted] to contribute to the Tomua settlement without its agreement or consent; and

iii. in differentiating between those growers who

   a. have re-grafted to Gold in the last 2 years;

   b. will be re-grafting to Gold in the next 3 years; and

   c. will not be re-grafting to Gold during these periods.

Zespri deny that there has been any discrimination. They add that if there has been discrimination, then it was justifiable, as being on commercial grounds[1]. But the prime thrust of Zespri's response is that there has been no discrimination.

The second question is whether Zespri has unjustifiably discriminated among growers, because growers who have regrafted to Zespri Gold or who will graft over in the next 3 years will have little or no production and, therefore will not pay as much for the settlement relative to those growers who are in full production for the whole period.

The Inquiry

We commenced our inquiry into [redacted] complaint on 2 July 2001 when we met with Zespri and [redacted]. At that time the quorum of the Board involved in the inquiry was the Chairman, Hendrik Pieters Deputy Chairman, Malcolm Cartwright, Bruce Abrahams and Terry Richards.

On 28 August 2001 we released our first provisional decision. We asked for and, received, submissions from both Zespri and [redacted] on that decision.

The inquiry reconvened on 3 December 2001 - it had not been practicable for all parties to meet prior to that date – when 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 Zespri reserved its position on whether, if there was discrimination, that discrimination 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[2] 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

[1] Pursuant to Regulation 10 of the Kiwifruit Export Regulations 1999
[2] Regulation 9 of the Kiwifruit Export Regulations1999

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 18 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. 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 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.
- 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 his submission on the second provisional decision in summary made the following points:

- A grower has no rights other than what he may negotiate with his suppler and that has to be carried out through his supply entity.
- While Zespri deals directly with suppliers and sets the same rules for all suppliers, there can be no discrimination that occurs between the supplier and the supply entity to the grower.
- It is not possible for the Board to achieve total impartiality due to the make up of the Board.

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 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 Tomua 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 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 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.

Consultation

Zespri then consulted with the Growers' Forum of New Zealand Kiwifruit Growers Incorporated who was not of the Zespri view. The essential disagreement was over the issue of:

Who pays?

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

So a Working Party was formed to develop a mutually agreed position on funding the support package.

There then followed what in our view was an extensive industry consultation and that consultation rejected Zespri's initial proposals. Instead a significant consensus of those growers who attended a comprehensive system of 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. It was agreed that Zespri would pay for the costs of conversion; that the growers of all pools would be responsible for other costs up to $5.2 million plus a contingency of 10%; that Zespri would be responsible for underwriting the cost re-grafting to Gold - up to $3.4 million; and that the growers' share of the cost of the package would 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.

[redacted] told us at our meeting on 2 July 2001 when those slides were presented to us all that he was not at the KGI meeting on 29 June 2000 and then initially that he did not attend the road show meetings, but he later confirmed that he was at the road show meeting in Katikati but he said about that meeting:

> *The package was delivered as a fait accompli. Zespri did not seek any feedback in relation to the package. I had recently been to a meeting of the gold product group. 175 people attended. All said no to contributing to the package. This was prior to the KGI vote of 13 to 3 in favour of it.*

The Board is of the view that consultation was extensive and that a significant consensus – not total agreement – was reached on the issues that subsequently became the Tomua settlement package.

The Tomua Deed

As a result of these discussions Zespri developed a document, a *Deed of Agreement (Proportionate Recovery of Tomua Payments)*, known as "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.*

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 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 growers were required to enter into with their supply entities. All of this meant that although [redacted] had never been involved in the growing or sale of Tomua, it was being required by its supply agreement to contribute to the Tomua liability. [redacted] was obliged to contribute to the Tomua settlement through back-to-back contracts entered into with its Supplier as envisaged by clause 3.2 of the Tomua Deed. 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 its Supplier G6, only if the terms of the Tomua Deed were incorporated into [redacted] contract with G6, amounts to an unjustifiable discrimination among suppliers.[3]

[redacted] suggests that it is clear that Zespri is discriminating against [redacted] in making that demand, but we believe that to decide whether Zespri's requirement involves a breach of the Regulations involves an inquiry into what happened during 1999/2000 when the kiwifruit industry was restructured and the effect of that restructuring legislation on responsibilities and obligations that had been established by the Tomua Growers Licence Agreements, and an inquiry into the meaning of *unjustifiably discriminating among suppliers* 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 objects, to perform its

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[3] in terms of Regulation 9 of the Kiwifruit Export Regulations 1999
[4] by the Kiwifruit Industry Restructuring Act 1999
[5] made under the Primary Products Marketing Act 1953

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;
- all transactions entered into by the NZKMB before the conversion were deemed to have been entered into by, or to be those of Zespri;

[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 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, as [redacted] asserts, Zespri's responsibility; responsibilities that the company inherited, and therefore that ought to have been borne by the company rather than by growers generally, through the imposition of an industry levy requiring all growers to contribute.

Mitigation Measure – The Regulations

After the 1999 restructuring this Board was required by the Regulations to grant an Export Authorisation to Zespri.[11] 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.*

[10] Clause 1(c),(d),(e) and (f) of the Schedule to the Act
[11] 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[12]. That obligation is reinforced by clause 6.2.1 of the Export Authorisation granted to Zespri.

The Competing Contentions

At the heart of [redacted] complaint is his view that the Tomua settlement should have been the responsibility of the shareholders of Zespri rather than one that is visited upon growers; that Zespri has been corporatised and should no longer to treated as a co-operative. He points out that grower returns vary and that some will contribute more than others to the Tomua settlement and he asserts that to avoid discrimination the

[12] Regulation 34 of the Kiwifruit Export Regulations 1999

Tomua compensation should be recovered on the basis of grower shareholding at the time the decision was taken. He also claims that inequities might arise among growers who have re-grafted to Gold as some did in the first year, the second year and so on.

He is concerned that if Zespri is permitted to delve into the growers' pools, it will obtain an advantage through growers' subsidisation of a corporate debt rather than an industry debt.

He sees the Zespri's contractual arrangements with Suppliers over the Tomua settlement as a means of bypassing growers as there was no cost to Suppliers agreeing with Zespri and no incentive for them to deny Zespri's requests.

He also refers to Zespri's 2001 Annual Report, in particular to note 28 to the Financial Statements set out at pages 54-55 of that report which says:

> ***28. Tomua Variety of Kiwifruit***
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> *During the reporting period the Company determined that the continued marketing of the Tomua variety was economically detrimental to suppliers, growers and the Company. The Company negotiated, with and on behalf of suppliers and growers, a support package designed to encourage Tomua growers to graft across to other varieties. These negotiations culminated in the Tomua payments deeds, which provide for the Company to make payments to Tomua grower over the 2001 to 2005 financial years. The amounts payable under the deeds are tied to production levels in future seasons.*
>
> *The Tomua payment deeds also provide for the Company to underwrite the returns that Tomua growers who graft to Hort I6A receive in each of the two seasons 2002-2003 and 2003-2004.*
>
> *Although uncertain, the Company believes that it is sufficiently probable that the returns likely to be obtained in those two years will require the Company to pay ex-Tomua growers of Hort16A for some of the underwritten return. A sum of $800,000 has been provided for to meet this obligation, from the Company's assessment of a realistic possible range of $nil to $2,800,000.*

The Company will require all suppliers in the 2001-2002 to 2003-2004 seasons to enter into deeds of agreement, as the mechanism to share the cost of the Tomua settlement between itself and suppliers/growers.

Despite there not being universal agreement of Tomua growers, the Company believes that there is sufficient acceptance to allow recognition in the financial statements of the full amount payable to growers of $9,200,000 (less $1,284,000 already paid). The full amount to be recovered from suppliers of $5,700,000 has been recognised in the financial statements.

A claim for damages has been lodged by a significant minority of Tomua growers who have not entered into payment deeds. The Company denies the claim and intends to defend it. The losses alleged in the claim are not fully particularised, but total approximately $16,500,000. A proportion of this claim has been provided for on the basis that all plaintiffs accept the Tomua payment deeds.

In any such litigation it is impossible to predict the final outcome. There is always the possibility of judgment being given or settlement being achieved at any figure up to the amount claimed.

A small number of growers have indicated their intention to continue to produce and supply Tomua in future seasons. The Company and the growers are required by the grower license agreements to negotiate the terms on which Tomua will be sold and purchased. It the Company is unable to find a market for the kiwifruit purchased (it any) it could incur losses. It is not possible to quantify the losses which could be incurred because the terms of sale and the market returns for the Tomua kiwifruit are not known at this time.

[redacted] is also concerned that the threat of insolvency was being used by Zespri to support an argument that the costs should be borne by growers rather than by the shareholders of Zespri.

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

Zespri say that it took account of and was motivated not by its own financial risks, but by the wider implications for the industry as a whole; that it was not motivated by its own financial risk in respect of Tomua because it had none and that the Tomua entitlement was to be paid from the Green pool and that the risk or liability rested with that pool.

Discrimination

At the meeting on 3 July 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".

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.*[13]

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.*[14]

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 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[15] 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,

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[13] Law NZ, Discrimination paragraph 1
[14] Laws Australia, paragraph 19.6:50[50], and *Street v Queensland Bar Association* (1989) 168 CLR 461
[15] Regulation 30 of the Kiwifruit Marketing Regulations 1977

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".

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.

At the start of our decision we paraphrased [redacted] complaint as being that Zespri has unjustifiably discriminated against [redacted] in three ways:

i. in requiring [redacted] and its contracted Supplier to sign up to and/or commit to the terms of the Tomua Deed;

ii. in requiring [redacted] to contribute to the Tomua settlement without its agreement or consent; and

iii. in differentiating between those growers who

a. have re-grafted to Gold in the last 2 years;
b. will be re-grafting to Gold in the next 3 years; and
c. will not be re-grafting to Gold during these periods.

Our decision is that Zespri has not discriminated amongst like suppliers by requiring all suppliers to contribute to the Tomua settlement for the reasons just stated in our decision. This disposes of the first two grounds of complaint.

Now turning to the third and last ground of complaint that Zespri have unjustifiably discriminated against [redacted] by differentiating between those growers who:

a. have re-grafted to Gold in the last 2 years;
b. will be re-grafting to Gold in the next 3 years; and
c. will not be re-grafting to Gold during these periods.

The complaint issue being that more established Gold growers will contribute more to the Tomua settlement than those who have recently regrafted. Here the relevant facts are that [redacted] never grew Tomua but does grow Gold.

In the context of the unique historical circumstances of the Tomua Settlement, we find that [redacted] have not been unjustifiably discriminated against based on the length of time since Gold growers have regrafted. In making this finding we note that [redacted] did not grow Tomua. If however this were in some way discriminatory against [redacted] then we would find that such conduct was justifiable in terms of Regulation 10. In our view it falls under the commercial grounds specified in Regulation 10(2) as the amount of the Tomua payments are determined based on quantity.

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