

Summary of the Reasons for the Tomua Settlement Complaint Decisions

for Complaints made by:

- [REDACTED];
- [REDACTED]; and
- [REDACTED] on behalf of the [REDACTED]

Final Decision for all complaints released on 31 May 2002.

Kiwifruit New Zealand's Definition of "Unjustified Discrimination"

- Once a monopsony power has been granted, as it has for Zespri, the object of the regulatory regime becomes the protection of growers/suppliers from discriminatory action by the holder of the monopsony power that cannot be justified on commercial grounds.
- 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.*¹
- To decide what "unjustified discrimination" is under Kiwifruit Export Regulation 9 the question is *whether Zespri treated all "like suppliers" alike or whether it discriminated among suppliers by treating some like suppliers differently.*
- It is not a question of whether Zespri treated all suppliers alike or whether Zespri compelled suppliers to contribute to the Tomua settlement.

Kiwifruit New Zealand's Factual Findings

- 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. Kiwifruit New Zealand decided that it is appropriate therefore for this liability to remain with growers – at least to some extent – rather than to fall entirely on Zespri.

¹ Laws Australia, paragraph 19.6:50[50], and *Street v Queensland Bar Association* (1989) 168 CLR 461

- 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. Kiwifruit New Zealand decided that it is appropriate to view defrayment of the cost of settlement of an inherited Zespri liability in the same light.
- The terms that Zespri imposed were imposed after widespread industry consultation. Kiwifruit New Zealand 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 in Kiwifruit New Zealand's view clearly made to protect the industry from risks that were then very real.
- 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.
- 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 and sustaining significant market losses. 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.

Kiwifruit New Zealand's Decision

1. In the context of the Tomua Settlement all suppliers are like suppliers.
2. In the Tomua settlement Zespri treated all "*like suppliers*" alike and Zespri did not discriminate among suppliers by treating some like suppliers differently.