KNZFILE

DETERMINATION

In the Matter of a Complaint To

the New Zealand Kiwifruit Board

(KNZ) by against

Zespri Group Limited (Zespri)

pursuant to the provisions of the

Kiwifruit Export Regulations 1999

1. Background

- 1.1. In November 2013 requested that KNZ "approach Zespri informally "regarding his concern about Zespri's "historical discrimination against my parents as suppliers" of NZ grown kiwifruit.
- 1.2. Later that month, Richard Procter, KNZ Chief Executive pursuant to its informal enquiry process, made informal enquiries of Zespri about the security of supply for existing growers of the Wilkins variety of kiwifruit.
- 1.3. On 13 December 2013 Zespri, through its Collaborative Marketing Manager, advised KNZ "...regarding clarification of Zespri's position re submission of Wilkins fruit into the Zespri system and being part of the Zespri Hayward pool, I can confirm that Wilkins fruit has been part of the Hayward pool for over 10 years and as such there is no reason, from Zespri perspective to change this arrangement at this time."
- 1.4. By letter dated 8 January 2014 KNZ advised of that Zespri response. Subsequently Mr Procter in a telephone discussion with advised that KNZ in light of the Zespri response did not intend to take the matter any further without a formal complaint.

2. The Complaint

2.1. By e-mail to Richard Procter dated 13 January 2014 made a formal complaint to KNZ "that Zespri is breaching the non-discrimination rule [in the Kiwifruit Export Regulations 1999] by refusing to give an unequivocal assurance that they will accept the Wilkins variety kiwifruit for export on the same basis as Zespri Green (Hayward) for as long as they have the sole authorisation to export kiwifruit from NZ."

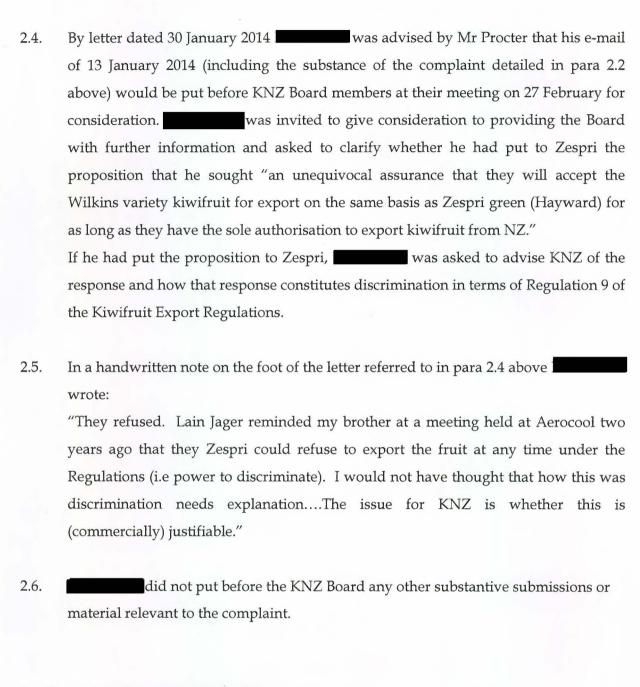
2.2. In support of the complaint asserted that:

- As a grower of the variety I believe that I am entitled to an unequivocal assurance in writing for the purpose of long term business planning and, in the event that we choose to sell the orchard, for the benefit of purchasers of the orchard.
- As an authorised agent of my parents as owners of the variety, I believe that
 they are entitled to an unequivocal assurance in writing that any growers of
 the variety will be able to export their fruit and receive the same returns as
 Hayward growers.
- What Zespri has put in writing to KNZ is not an unequivocal assurance. It is
 merely a statement of their historical actions and current intentions. What we
 need is an open letter to myself and my brother as existing growers and a
 second open letter for the benefit of our parents as variety owners giving
 unequivocal assurances without qualification and without Zespri speak or
 wriggle room.
- 2.3. identified what he saw as an appropriate open letter in the following terms:

"Notification to all growers of Wilkins Variety Kiwifruit and to anyone else, whom it may concern.

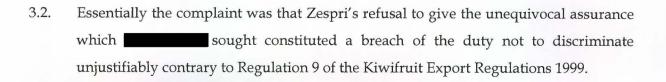
Zespri Group Limited hereby confirms that all kiwifruit of the Wilkins variety produced in New Zealand will be accepted into Zespri inventory and paid for on the same basis as Hayward Green kiwifruit without discrimination for so long as Zespri

is the sole authorised exporter of kiwifruit from New Zealand."



3. Consideration of the Complaint

3.1. The complaint was considered by the full KNZ Board at its meeting on the 27th February 2014 on the basis of the information supplied by and recorded above.



3.3 Historically there had been tensions between about the suitability of the Wilkins variety kiwifruit for export from New Zealand. However those tensions appear to have been resolved with the completion of a Deed of Settlement dated 23 February 2005 between Zespri and the interests although suggested it had been completed under duress. Be that as it may, it is not a matter for determination by the Board, but the regime set in place by the terms of the Deed appear to have been followed through. The Board did not consider the terms of the Deed to be relevant to its consideration of complaint to it.

3.4. Regulation 9 provides:

"ZGL (Zespri), and its directors and managers, must not unjustifiably discriminate among suppliers (of kiwifruit) and potential suppliers in respect of –

- (a) A decision on whether to purchase kiwifruit; or
- (b) The terms of the purchase contract."
- 3.5. The Regulations do not oblige Zespri to purchase all kiwifruit grown in New Zealand, only create a duty not to discriminate unjustifiably in respect to the matters identified in Regulation 9. What is justifiable discrimination is identified in Regulation 10 on the basis of commercial grounds. If there was discrimination, and that would likely be based on factual evidence, Zespri would be called upon to justify it. In this instance the alleged discrimination is Zespri's unwillingness to give the "unequivocal assurance" sought by No evidence was adduced by that such an assurance has been given to any other supplier of green kiwifruit to Zespri or that the Wilkins variety green kiwifruit is treated any differently from the Hayward green kiwifruit. The evidence received by the Board is that the Wilkins variety kiwifruit has been part of the Hayward pool for over 10 years. What is seeking is something which no other kiwifruit supplier has and if granted could be seen to create a discrimination in his favour and for other Wilkins variety growers. To survive a challenge that would require justification on commercial grounds. did not put before the Board any evidence to suggest that such discrimination could be justified on those grounds.

3.6. The complaint is not upheld.

For and on behalf of the Kiwifruit New Zealand Board

Chairman

17 March 2014