

DETERMINATION

In the Matter of a Complaint To
the New Zealand Kiwifruit Board
(KNZ) by [REDACTED] against
Zespri Group Limited (Zespri)
pursuant to the provisions of the
Kiwifruit Export Regulations 1999

1. Background

- 1.1. In November 2013 [REDACTED] 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 [REDACTED] of that Zespri response. Subsequently Mr Procter in a telephone discussion with [REDACTED] 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 [REDACTED] 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 [REDACTED] 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. [REDACTED] 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.”

2.4. By letter dated 30 January 2014 [REDACTED] was advised by Mr Procter that his e-mail of 13 January 2014 (including the substance of the complaint detailed in para 2.2 above) would be put before KNZ Board members at their meeting on 27 February for consideration. [REDACTED] was invited to give consideration to providing the Board with further information and asked to clarify whether he had put to Zespri the proposition that he sought “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.”

If he had put the proposition to Zespri, [REDACTED] was asked to advise KNZ of the response and how that response constitutes discrimination in terms of Regulation 9 of the Kiwifruit Export Regulations.

2.5. In a handwritten note on the foot of the letter referred to in para 2.4 above [REDACTED] wrote:

“They refused. Lain Jager reminded my brother at a meeting held at Aerocool two years ago that they Zespri could refuse to export the fruit at any time under the Regulations (i.e power to discriminate). I would not have thought that how this was discrimination needs explanation...The issue for KNZ is whether this is (commercially) justifiable.”

2.6. [REDACTED] did not put before the KNZ Board any other substantive submissions or material relevant to the complaint.

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 [REDACTED] and recorded above.

3.2. Essentially the complaint was that Zespri’s refusal to give the unequivocal assurance which [REDACTED] sought constituted a breach of the duty not to discriminate unjustifiably contrary to Regulation 9 of the Kiwifruit Export Regulations 1999.

3.3 Historically there had been tensions between [REDACTED] his parents and Zespri 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 [REDACTED] interests although [REDACTED] 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 [REDACTED] 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 [REDACTED]. No evidence was adduced by [REDACTED] 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 [REDACTED] 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, [REDACTED] 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