

24 May 2022

Zespri Group Limited  
400 Manganui Road  
Mt Manganui

Attention: Dan Mathieson, Chief Executive Officer  
CC: Carol Ward, Chief Grower, Industry & Sustainability Officer  
Annabelle Robb, Senior Legal Advisor

Dear Dan,

**Re: Complaint lodged by letter dated 13 February 2022**

We write further to our recent correspondence in respect of the formal complaint by COKA about the decision made by Zespri to exclude Organic SunGold fruit from the China market in the 2021 season.

Regulations 9 and 10 of the Kiwifruit Export Regulations 1999 (Regulations) state that Zespri must not unjustifiably discriminate among suppliers in respect of a decision on whether to purchase kiwifruit or the terms of the purchase contract, unless that discrimination is justified on commercial grounds.

In accordance with clause 6.1.3 of the Export Authorisation (EA), the Committee decided to conduct a preliminary assessment to assess whether there were sufficient grounds to justify an investigation under the enforcement procedure in clause 6.2 of the EA.

As part of the preliminary assessment and in accordance with clause 6.1 of the EA, the Committee requested and received further information from both COKA and Zespri. The Committee has carefully considered the information provided by COKA and Zespri in the context of the Regulatory framework.

*The complaint*

1. The key aspects of COKA's complaint is whether Zespri acted in a discriminatory manner:
  - a) in making the decision to exclude Organic SunGold fruit from the China market in the 2021 season; or
  - b) in respect of the process to consider whether compensation, cross subsidisation or discretionary payment should be made to the Organic SunGold pool from the conventional pools or from Zespri for the financial loss suffered by the Organic SunGold pool as a result of the decision to exclude Organic SunGold fruit from the China market.
2. COKA also noted that there is a lack of a structured and documented complaints resolution process that fairly and equitably addresses the position of minority groups, such as organic growers. COKA seeks compensation on the basis that the decision to prevent market access not only resulted in lower returns for organic growers for the 2021

season but has an ongoing financial impact in respect of price signals and estimates for future seasons.

### Regulatory Framework

3. KNZ has the function of monitoring and enforcing the non-discrimination rule under Regulation 33(1)(b)(i) and must do so in a way that best achieves the purpose in Regulation 8. The purpose of Part 3 is to mitigate potential costs and risks arising from Zespri's monopsony position and each of the mitigation measures are intended to contribute to achieving the purpose of Regulation 8. However, KNZ's role is limited to monitoring the specific mitigation measures, Regulation 8 does not set out standalone obligations on Zespri and KNZ has recognised in a past decision that it is not empowered to inquire as to whether Zespri's conduct in and of itself meets the objectives of Regulation 8, nor assess the general merits of Zespri's commercial decisions and judgements<sup>1</sup>.
4. The non-discrimination rule is one of the mitigation measures set out in Part 3 of the Regulations. Regulation 9 is limited to unjustifiable discrimination among suppliers and potential suppliers in respect of either (a) a decision on whether to purchase kiwifruit or (b) the terms of the purchase contract. The basis of this complaint falls under (b), discrimination among suppliers in respect of the terms of the purchase contract.
5. The purchase terms are set out in Zespri's standard 'Supply Agreement' which is negotiated and entered into by Zespri and Registered Suppliers (being post-harvest operators who act as intermediaries between ZGL and growers). The Committee notes that for the purposes of Regulation 9 it is accepted that the term 'supplier' includes growers<sup>2</sup>.
6. Past decisions have confirmed that in the context of the Regulations 'discrimination' can manifest itself in Zespri offering one supplier different purchase terms to another supplier but also includes 'indirect discrimination' which can manifest in circumstances whether the same terms are offered, or parties treated in the same way, but because of the different characteristics of the group, the same treatment results in different outcomes for them<sup>3</sup>. To be clear, this does not mean that all suppliers of kiwifruit must obtain an equal outcome, but simply that it is possible that the same terms offered to all suppliers may have discriminatory effects for some of those suppliers because of their particular characteristics.
7. KNZ accepts that the non-discrimination rule is limited in scope. The limits on KNZ's function of monitoring and enforcing non-discrimination rule arise by virtue the text of Regulation 9(a) and (b) and Regulations 4 to 7 under which KNZ must comply with the enforcement regime in the EA<sup>4</sup>. Of particular relevance is Regulation 6(1)(f) that states

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<sup>1</sup> KNZ Decision '2017 November – Supplier Complaint – Non-discrimination (MTS)', paragraph 24

<sup>2</sup> Winkelmann J in *Aoteroa Kiwifruit Export Limited v McNaughton* HC Auckland CIV 2003-470-478, 3 February 2006 [60] held that the definition of supplier includes all parties in the contractual chain through which title in kiwifruit passes from the grower to Zespri.

<sup>3</sup> KNZ Decision '2017 November – Supplier Complaint – Non-discrimination (MTS)', paragraph 37

<sup>4</sup> KNZ Decision '2016 June- Grower Complaint – Non-Discrimination and Non-Diversification (Hayward v ZGL PVR and pools)', paragraphs 4.9 - 4.18 and 5.32 – 5.35

that the EA cannot provide the Board any rights or powers in respect of kiwifruit pool administration or control (other than in respect of collaborative marketing).

The decision to exclude Organic SunGold fruit from the China market in the 2021 season

8. Zespri's decision to exclude Organic SunGold fruit from the China market in the 2021 season was a considered response relating to China market access sensitivities. Zespri's decision appears to be made on reasonable commercial grounds, in the best interests of growers overall, but to the detriment of Organic SunGold growers.
9. Zespri has not acted in breach of the Supply Agreement as, under clause B2.2 of the 2021 Supply Agreement, 'ZGL has the absolute discretion to determine the destination of any Kiwifruit acquired by it under this Agreement'<sup>5</sup>. The Committee notes that there is no express obligation in the Supply Agreement terms or Regulations for Zespri to optimise, or use its best endeavours to optimise, returns for all growers.
10. KNZ has accepted the limited scope of the non-discrimination rule in a past decision and noted that KNZ "does not govern how Zespri markets and distributes kiwifruit once purchased from New Zealand Suppliers"<sup>6</sup>. The Committee therefore considers it outside KNZ's powers to monitor and enforce Zespri's marketing and allocation decision to exclude Organic SunGold fruit from the China market.

The process to consider whether compensation, cross subsidisation or discretionary payment should be made

11. The amount paid to each supplier for each variety is determined by Zespri's pricing and payment methodology which is set out in the Pricing and Payment Manual, a schedule that forms part of the terms of the Supply Agreement.
12. COKA does not allege discrimination in respect of the calculation of the 'fruit return' for the Organic SunGold pool, but queries whether there was discrimination in the decision making process to compensate the Organic SunGold pool on the basis the decision was made by Zespri for the benefit of the conventional pools and resulted in a lower fruit return for the Organic SunGold pool.
13. The Supply Agreement does not make express provision for considering whether compensation should be paid between pools (nor is this clearly documented elsewhere). Any decision for one pool to compensate another pool is a variation to the allocation of funds and would require a variation to the Supply Agreement terms (Pricing and Payment Manual) under clause 14 of the Supply Agreement.
14. The Committee understands that under clause 14, any such proposed variation would be put forward by Zespri (on a recommendation by the Industry Advisory Council (IAC) after consultation with the New Zealand Kiwifruit Growers Incorporated (NZKGI) forum) and would need to meet the voting thresholds set out in the Supply Agreement (70%). KNZ has noted in a past decision that the industry subgroups, IAC and ISG, are

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<sup>5</sup> 2021 Zespri Supply Agreement

<sup>6</sup> KNZ Decision '2016 June- Grower Complaint – Non-Discrimination and Non-Diversification (Hayward v ZGL PVR and pools)', paragraph 5.33

committees of Zespri and that the composition and voting rights of those committees particularly may result in a difference in the balance of power given ISG and IAC act as delegates on behalf of growers and make recommendations and agree on any variation to the Supply Agreement terms (including those which have financial consequence for growers)<sup>7</sup>.

15. The issue of compensation in respect of this complaint was raised at the NZKGI forum but did not receive the required endorsement to proceed further. The Committee notes that Zespri provided information for the industry to consider and that the NZKGI forum decision was outside Zespri's control.
16. Zespri advised that any payments made by Zespri corporate generally occur in circumstances where one party believes Zespri has breached an obligation in the Supply Agreement or where there has been a significant event (without cause attributable to Zespri or other party that has an undue effect on the industry or some portion of it). Any such discretionary payment in these circumstances is not provided for in the Supply Agreement and no variation to the Supply Agreement would be required if Zespri decided to exercise this discretion.
17. COKA's complaint appears to relate to the *absence* of terms in the Supply Agreement, in particular, terms providing for a complaint resolution process that fairly and equitably takes in to account the position of minority groups. The Committee considers that, in principle, the absence of terms reasonably required to fairly protect the interests of minority groups may potentially be discriminatory.
18. However, the Committee does not consider there to be sufficient grounds to investigate this potential discrimination further under clause 6.2 of the EA, in the context of COKA's claim for compensation, as KNZ must operate within the enforcement regime in the EA and, as noted in paragraph 8 above, Regulation 6(1)(f) that states that the EA cannot provide the KNZ Board any rights or powers in respect of kiwifruit pool administration or control. The Committee agrees with the position held in the KNZ decision dated June 2016 that "*resolving complaints in respect of marketing and allocation decisions would come perilously close to asserting powers in respect of the administration and control of kiwifruit pools*"<sup>8</sup>.
19. The Committee has a discretion whether to conduct an investigation under 6.2. If it did so, and found that Zespri had breached the non-discrimination rule, any order by Committee under 6.3.4 of the EA must have regard to the considerations set out in 6.3.3. Whatever the findings, the Committee would not be in a position to make an order of compensation from the conventional pools as that would likely amount to a reallocation of funds between pools contrary to Regulation 6(1)(f)..
20. The Committee also considered the possibility that it may have the power to require Zespri to take reasonable steps to include suitable terms in the Supply Agreement that provides for a complaint resolution process that fairly and equitably addresses the

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<sup>7</sup> KNZ Decision '2007 February – Grower Complaint – Non-Discrimination (IAC & ISG)' paragraphs 26-29

<sup>8</sup> KNZ Decision '2016 June- Grower Complaint – Non Discrimination and Non-Diversification (Hayward v ZGL PVR and pools)'

position of minority groups (including for compensation to be paid where appropriate). The Committee has made a recommendation below at paragraph 23 and does not need to decide this point in this case.

Conclusion and additional comments

21. In conclusion, after considering all of the information provided as part of the preliminary assessment and based on the reasons outlined above, the Committee does not consider that there are sufficient grounds to justify an investigation under clause 6.2 of the EA in respect of COKA's complaint.
22. However, the preliminary assessment has highlighted the fact the purchase terms do not document a process for complaint resolution or consideration of payment of compensation to a grower or a group of growers and there is therefore a risk of inconsistent treatment of such issues which, in some cases, might unfairly disadvantage minority groups. The Committee recommends that Zespri take reasonable steps to include suitable terms in its Supply Agreement that provide for a transparent complaint resolution process that addresses the position of minority groups. The Committee notes that the response to this recommendation may, if appropriate, be taken into account for any future complaints of similar nature.
23. KNZ intends to provide a copy of this letter to COKA when informing COKA of the outcome of the preliminary assessment for this complaint. The KNZ Board is considering whether this letter will be published on the KNZ website and will take into account Zespri's request for redactions.

Yours faithfully,

A handwritten signature in blue ink, appearing to read 'Geoff Morgan', followed by a period.

Geoff Morgan  
Chief Executive