

***FINAL DECISION***

**To: Zespri Group Limited**  
**Seeka Limited (Complainant)**

**From: KNZ Board**

***INVESTIGATION INTO COMPLAINT BY SEEKA***

***Background to the complaint***

*Introduction*

1. Following the receipt of a complaint by Seeka Limited (**Seeka**) on 8 May 2023, an investigation was commenced by the Kiwifruit New Zealand Board into a Service Level Agreement (**SLA**) between Zespri Group Limited (**ZGL**) and [REDACTED] for a bin trial to Italy, which was carried out in late April and May 2023. The investigation was delegated to a sub-committee of the KNZ Board comprising Directors Andrew Fenton and Sarah Paterson.
2. In making its complaint, Seeka says it did not learn about the trial until after it took place, and only via [REDACTED] grower newsletter. Seeka's complaint is that it was not offered the opportunity to participate in the bin trial despite (it says) previously indicating to ZGL that it would be interested in a shipping program to Italy. Seeka says that, in response to those indications, it had been told that ZGL "*did not support shipping in bulk to the market.*"<sup>1</sup>
3. Seeka alleges that:
  - 3.1. The failure to give Seeka an opportunity to participate in the bin trial is unfair.
  - 3.2. The terms for the trial undertaken by [REDACTED] were more favourable to [REDACTED] than terms previously adopted for trials undertaken by Seeka.
4. Seeka is also concerned that, at the time of the complaint, the bin trial had not been notified to the industry.
5. The purpose of the investigation by KNZ was to determine whether, in entering the SLA with [REDACTED] for the bin trial, ZGL had, on the balance of probabilities, failed to comply with the non-discrimination rule and the information disclosure requirements.<sup>2</sup>

*Development of trial*

6. The trial reflected [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

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<sup>1</sup> Seeka complaint, dated 8 May 2023.

<sup>2</sup> Refer to clause 6.2.1 of the Export Authorisation, and regulation 33(1)(b)(i) of the Kiwifruit Export Regulations 1999.



copy of the SLA was provided by ZGL to KNZ on 5 May 2023. It was made publicly available by ZGL on 2 June 2023.

11. The key terms of the SLA were as follows:

- 11.1. The single supplier participant was [REDACTED]
- 11.2. The bin trial was for both [REDACTED]  
[REDACTED]
- 11.4. The effective date of the SLA was 22 April 2023, with shipping from New Zealand to occur in the week of 8 May 2023.
- 11.5. The "*resulting data and information*" would be shared with the industry.  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

*Fluctuation in size of trial*

12. It appears that the volume of fruit to be shipped changed several times throughout the development of the trial. According to ZGL:
- 12.1. During initial discussions in October 2022, the intention was that the trial would incorporate around [REDACTED]
  - 12.2. In December 2022, the trial volume increased to [REDACTED]  
[REDACTED]
  - 12.3. By late February 2023, the "*decision [had been] made to cut the trial in half*" [REDACTED]
  - 12.4. "*However, Project Horizon work meant no new digital systems could be developed to support the trial and this saw the reduced trial size of [REDACTED] total confirmed around 20 April 2023.*"<sup>8</sup>
13. The sub-committee understands that Project Horizon is ZGL's multi-year project to replace its key internal systems for finance and the supply chain. The scope of the programme addresses global finance, grower enablement, supply chain, sales processes and systems, and digitise the sales and operations planning processes and system.

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<sup>6</sup> Letter from ZGL, dated 30 August 2023.  
<sup>7</sup> Letter from ZGL, dated 30 August 2023.  
<sup>8</sup> Letter from ZGL, dated 30 August 2023.

14. █████ confirmed it was ZGL's technical issues that had led to the reduction in the trial volume.
15. ZGL told the sub-committee that, in late February 2023, it seriously considered cancelling the trial altogether because of these issues but decided to proceed with the trial at reduced fruit volumes on a "proof of concept" basis.

#### *Involvement of █████*

16. ZGL told the sub-committee that it did not proactively consider whether the trial should be opened up to other post-harvest suppliers.
17. The sub-committee was told that █████ heard about the trial from █████ through its involvement in █████ and that █████ asked if █████ could become involved in late 2022. Even after █████ became involved, ZGL saw the trial as a supplier-led trial and did not consider opening it up to other post-harvest participants.
18. Although █████ was involved in discussions as the development of the trial progressed throughout late 2022 and early 2023, it ceased its involvement shortly before the trial went ahead "*when volumes decreased to a point that it was unviable for multiple suppliers to participate in the trial.*"<sup>9</sup>

#### *Completion of trial*

19. After █████ withdrew, the trial resorted to a single-supplier trial.
20. Packing of the fruit for the trial started on 22 April 2023, being the effective date nominated in the SLA. The fruit shipped in early May 2023.
21. The data from the trial is due to be shared with the industry at the ISG meeting in October 2023. █████ has been involved in reviewing and assessing the data so has had access to it prior to the ISG.

#### *Past trials undertaken by ZGL with Seeka*

22. As noted, one of Seeka's concerns was that the terms of the SLA were not comparable with previous SLAs for trials undertaken by Seeka. Seeka pointed to trials undertaken in 2010 and 2011 and stated that its "*recollection*" was that ZGL had "*invited all suppliers to participate in the trial via formal expression of interest process – a process not undertaken this time [with the █████-led trial]*".
23. ZGL has referred the sub-committee to two trials undertaken in 2010 and 2011 to █████ both of which had been led by Seeka but with other post-harvest suppliers participating.

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<sup>9</sup> Letter from █████, dated 3 August 2023.

24. Like the current bin trial, those earlier trials required data to be shared with other industry participants. However, the cost burden was allocated differently. Seeka commented on how costs were allocated in those earlier trials as follows: [REDACTED]

### ***This investigation***

#### *Receipt of complaint and commencement of investigation*

25. Seeka's complaint was received by KNZ on 8 May 2023. On 20 June 2023, the KNZ Board decided to investigate the complaint. It formed a sub-committee of the Board, comprising two Directors, Andrew Fenton and Sarah Paterson.

26. Because the complaint is an "*enforcement event*" under clause 6.1.1(a) of the Export Authorisation (**EA**) made under the Kiwifruit Industry Restructuring Act 1999 and under Part 2 of the Kiwifruit Export Regulations 1999, the investigation was carried out in accordance with Part 6 of the EA.

27. Consistent with clause 6.2.2 of the EA, KNZ gave notice of the investigation to ZGL (and Seeka as the complainant) on 28 June 2023. The notification specified that the investigation would consider:

- 27.1. Whether the decision by ZGL not to extend the bin trial to other post-harvest entities constitutes discrimination in respect of a decision on whether to purchase kiwifruit for the purpose of regulation 9 of the Regulations.
- 27.2. If so, whether the discrimination is justifiable on commercial grounds.
- 27.3. Whether the terms of the SLA between ZGL and [REDACTED] are more commercially favourable than past trials undertaken by ZGL, and whether they thereby constitute discrimination in respect of the terms of a purchase contract for the purpose of regulation 9.
- 27.4. If so, whether the discrimination is justifiable on commercial grounds.
- 27.5. Whether the failure by ZGL to disclose publicly the terms and conditions of the SLA in advance of the SLA taking effect constitutes a breach of the information disclosure requirements in regulation 14(2) of the Regulations.<sup>10</sup>

#### *Information obtained and process adopted*

28. As part of its investigation into this matter, the sub-committee sought information from:

28.1. ZGL.

28.2. Seeka.

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<sup>10</sup> Noting that a redacted version of the SLA was, by the date of the notification, available on ZGL's website.

29. This information was provided to the sub-committee for its review and was relevantly summarised or referred to in this report.
30. The sub-committee took steps to ensure that the natural justice rights of both ZGL and Seeka were met throughout the process of investigating this complaint.

#### *Kiwifruit Export Regulations 1999*

31. Regulation 9 of the Kiwifruit Export Regulations 1999 provides that ZGL “*must not unjustifiably discriminate among suppliers and potential supplies in respect of (a) a decision on whether to purchase kiwifruit, or (b) the terms of the purchase contract.*”
32. However, regulation 10 provides that discrimination is justifiable on commercial grounds, which includes, but is not limited to, “*matters relating to product features, quality, quantity, timing, location, risk, or potential returns.*”
33. Regulation 14 requires ZGL to disclose terms and conditions (as well as amendments to those terms and conditions) for the purchase of kiwifruit grown domestically, as well as the period for which the terms and conditions are applicable. The Regulation requires ZGL to disclose these matters publicly at least one month before the terms and conditions come into effect. If that is not practicable, ZGL must disclose as soon as practicable and no later than the date of coming into effect. This is generally done by ZGL publishing SLAs on its website.<sup>11</sup>

#### ***Matters under investigation***

*Whether the decision by ZGL not to extend the bin trial to other post-harvest entities constitutes discrimination in respect of a decision on whether to purchase kiwifruit for the purpose of regulation 9 of the Regulations*

34. Seeka’s view is that, by participating in the trial, ██████████ benefited by obtaining crucial information (that was not available to other post-harvest suppliers) about the logistics of sending fruit in bins to offshore cool store. This included information about ██████████. Seeka believes that a single-supplier trial which looks to address a problem that is facing the whole industry disrupts the competitive post-harvest model by transferring commercial advantage to one supplier. Given ██████████ is an issue that faces the industry generally, Seeka considers that “*any advantage is an advantage.*” Seeka does not consider that the provision of data from the trial to all post-harvest suppliers would overcome the benefits obtained by ██████████ because a supplier would obtain considerably more understanding if they were involved in the trial from the beginning.

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<sup>11</sup> <https://www.zespri.com/en-NZ/corporate-information/regulatory-affairs>; regulation 2 stipulates that “publicly disclose” means making information available free of charge on a ZGL website that is publicly available.

35. ZGL does not consider that any advantage was obtained by [REDACTED] from its participation in the trial because:

35.1. In accordance with the SLA, the data from the trial will be made available to the industry – as noted, this is due to be reported to ISG in October 2023. ZGL has confirmed that [REDACTED] is part of the team that is analysing the data so has had access to it before other post-harvest suppliers.

35.2. There would be no operational benefit for [REDACTED] – most suppliers could set themselves up to operationalise the work that was undertaken in the trial within a short timeframe.

35.3. There would also be no commercial advantage to [REDACTED] – the volume of fruit shipped was not material enough to make a difference to [REDACTED] bottom line.

36. ZGL acknowledged that [REDACTED] is a concern for post-harvest suppliers generally but did not regard this as a large-scale commercial trial. Rather they described it as a small “proof of concept” test which was appropriate to run with one supplier, on the basis that, if successful, a larger commercial trial involving other suppliers could be considered in future. ZGL therefore did not proactively consider whether it should open the trial up to other suppliers.

37. The sub-committee accepted that ZGL faced genuine internal limitations which impacted the trial. These limitations arose reasonably late in the development of the trial (ZGL acknowledged that this was due to sub-optimal internal processes, whereby key teams only became involved towards the end of development) but were clearly significant enough that ZGL considered cancelling the trial altogether. It appeared to the sub-committee that, given those limitations and the resulting size of the trial as well as the fact that it was initiated by [REDACTED] ZGL may not have turned its mind to the non-discrimination rule and whether it applied in this case.

38. However, the sub-committee did not agree with ZGL that [REDACTED] would not have obtained any benefit from its participation in the trial, given the trial was designed to address an industry wide issue regarding [REDACTED]. The sub-committee considered that [REDACTED] had the potential to obtain some commercial benefits over other post-harvest suppliers, in the form of commercially valuable information. The sub-committee did not have sufficient information to confirm the materiality of any advantage at this point in time, but considered [REDACTED] may have obtained the following benefits:

38.1. [REDACTED] has obtained the data from the trial before other post-harvest suppliers. They have also been involved in the team that is assessing it. This potentially confers a commercial advantage over other suppliers with concerns about [REDACTED] going forward. The results of the trial are not yet known but regardless of its outcome, [REDACTED] will have advance information on which it could potentially base any decision to [REDACTED] (or not). Whether this is a material benefit to [REDACTED] will only become clear over time but the sub-committee was satisfied that there is at least the potential for benefit.

38.2. Although ZGL confirmed it managed the relationship with the Italian packhouses for the purpose of the trial, [REDACTED] was able to visit the Italian

packhouse at the time the fruit arrived in Italy. This gave [REDACTED] the opportunity to gain commercially useful information and establish relationships which would not be available to other non-participating post-harvest suppliers. Again, this has the potential to confer a benefit on [REDACTED] albeit not one that was able to be quantified by the sub-committee.

39. Because of these benefits, the sub-committee therefore reached the view that the decision by ZGL not to extend the bin trial to other post-harvest suppliers does constitute discrimination against non-participating suppliers.

*If so, whether the discrimination is justifiable on commercial grounds.*

40. As noted above, ZGL justifies its decision not to give other post-harvest suppliers the opportunity to participate in the trial due to:

40.1. The size of the trial.

40.2. The trial had been initiated by [REDACTED] and was therefore "supplier-led".

41. The sub-committee had concerns about ZGL's reliance on the size of the trial as a justification for only proceeding with a single supplier. This is because:

41.1. Any commercial justification must be considered in the context of the initiative as a whole. The issues that the trial was designed to address are industry-wide concerns relating to [REDACTED] – they are not specific to a single supplier. Unlike other supplier-led SLAs where a supplier wishes to test an initiative or equipment that is unique to them, and there is therefore clearly a strong justification for restricting the parameters of the trial to that single supplier, all suppliers are interested in the outcome of this issue and (as ZGL itself has noted) all would have been capable of meeting the operational requirements of the trial (packing fruit into bins). Seeka asserts that it has asked ZGL for a program to Italy to test the issue that the bin trial was targeted at. ZGL and Seeka appear to have no written record of any such request.

41.2. The definition of commercial grounds in the Regulations includes both timing and quantity. ZGL has effectively relied on both timing and quantity as justifications for only involving [REDACTED] in the bin trial. They say there was no consideration of involving other post-harvest suppliers because of the quantity of the fruit involved, which was dictated by the limitations posed by Project Horizon and the capacity of the digital team at the time the trial was underway. However, in the sub-committee's view, these limitations could have been overcome by, for instance, making it known to ISG that a small scale trial was being considered for 2023, delaying the trial until these matters were resolved, at which point the trial could have been larger, and other participants could have been involved.

41.3. In any case, the sub-committee queries whether the size of the trial was adequate to enable the parties to meet the objectives set out in the SLA (and above). Given the scale of the issue, it would undoubtedly have been preferable to have run a larger trial, with other suppliers and supply lines involved. This would have given a clearer idea whether shipping in bins to Italy was a viable alternative to packing fruit domestically. The sub-committee



notes ZGL's comment that the trial shrunk in February 2023 because insufficient Hayward could be sourced; this could presumably have been remedied had more than one packhouse been involved.

42. The sub-committee also had concerns about ZGL's reliance on the trial being "supplier-led" as a basis for not offering it to other post-harvest suppliers, given [REDACTED] involvement. It seems inconsistent to have expanded the trial when another supplier was available and seemingly eager to participate, but then to rely on this as a basis for not inviting other suppliers to become involved. In the sub-committee's view, the involvement of [REDACTED] (through discussions at [REDACTED] should have been a red flag to ZGL that it was obliged to consider its obligations under the non-discrimination rule. In effect, by offering a spot in the trial up to another [REDACTED] participant, preferential treatment was being given to [REDACTED] suppliers over non-[REDACTED] participants.
43. The sub-committee therefore reached the view that although commercial grounds existed (e.g. volume, timing, and ZGL capacity) these were not sufficient to justify the discrimination in this case.

*Whether the terms of the SLA between ZGL and [REDACTED] are more commercially favourable than past trials undertaken by ZGL, and whether they thereby constitute discrimination in respect of the terms of a purchase contract for the purpose of regulation 9.*

44. Seeka's view is that the terms of the SLA for the bin trial were favourable to [REDACTED] as compared with past trials undertaken by Seeka and other post-harvest suppliers. In particular:
- 44.1. Seeka refers to the costs that it and other participating suppliers were expected to cover in past trials, but which are being paid for by ZGL for the bin trial.
- 44.2. Seeka asserts that, in past trials, it was expected to "invite the other industry suppliers to participate"<sup>12</sup> whereas this was not required in this case.
45. Seeka also raised concerns about an absence of [REDACTED] for [REDACTED] and the sub-committee noted the exceptions in paragraph 11.6.

46. ZGL disagrees that the terms of the bin trial were favourable to [REDACTED]. Again, it relies on the fact that [REDACTED] is included in the SLA and that the data from the bin trial is to be made available to the whole industry (not limited to trial participants) consistent with past trials. ZGL also noted that "[REDACTED] is not material enough to make a difference to their bottom line".

47. The sub-committee accepted that the terms of the bin trial are not the same as past trials. However, it noted that 12 years have passed since the last comparable trial involving Seeka. Trial terms will always involve some negotiation and terms will never be identical between different trials. It did not consider it reasonable to hold ZGL to commercial terms used over a decade ago. Seeka accepted those commercial terms at

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<sup>12</sup> Seeka email to KNZ dated 8 May 2023.

that time. Quite possibly if Seeka were to negotiate an SLA with ZGL now, the terms would be different to those it accepted in 2010 and 2011. The sub-committee therefore reached the view that the terms of the SLA did not discriminate against Seeka or other non-participating post-harvest suppliers.

48. The fact that the bin trial proceeded without ██████████ being required to invite other post-harvest suppliers to participate has already been considered above and is not addressed again here.

*If so, whether the discrimination is justifiable on commercial grounds.*

49. Because the sub-committee reached the view that no discrimination arose in respect of the terms of the SLA, it did not need to consider this point.

*Whether the failure by ZGL to disclose publicly the terms and conditions of the SLA in advance of the SLA taking effect constitutes a breach of the information disclosure requirements in regulation 14(2) of the Regulations (noting that a redacted version of the SLA is now available on ZGL's website).*

50. As noted above, the effective date of the SLA was 22 April 2023. KNZ received notification of the trial from ZGL on 5 May 2023. KNZ approved the redactions on 25 May 2023 and the SLA was notified publicly by ZGL on 2 June 2023.

51. This notification is not consistent with the requirements of regulation 14.

52. ZGL has explained that it has a "project underway to improve its SLA processes in general"<sup>13</sup> including to ensure that SLAs are disclosed in accordance with the Regulations.

53. ZGL has also asserted that it nominated the effective date for the SLA as 22 April which was the date that the fruit was packed into bins, but that the effective date could have been the date of shipping of the fruit (10 May) which was after disclosure of the SLA to KNZ on 5 May (albeit not after it was publicly notified).

54. The sub-committee was not persuaded by these points. ZGL's internal processes (including any steps taken to improve current digital limitations) are not relevant to whether it has complied with its regulatory requirements or not. As for the possibility that the effective date could have been the shipping date rather than the packing date for the fruit, the sub-committee disagreed that an effective date for an SLA can be subject to fluctuating interpretations in this way. Regulation 14 requires public notification to occur "no later than the date of coming into effect." It is nonsensical to suggest this was only once the fruit shipped – packing of the fruit would not have occurred unless the SLA was "in effect".

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<sup>13</sup> Letter from ZGL dated 12 July 2023.

55. In any case, even if ZGL is correct that the SLA came into effect when the fruit shipped, it had not disclosed the SLA publicly by that date and thereby had not complied with the requirements of the Regulation.

### ***Provisional Decision by the KNZ Board***

On 25 September 2023, the Board reached a provisional decision on this complaint (**Provisional Decision**), which provisionally confirmed the findings of the sub-committee, as set out above.

### ***Responses by ZGL and Seeka to the Provisional Decision***

56. In accordance with the EA, the Provisional Decision was provided to ZGL and Seeka for comment on 2 October 2023. Both Seeka and ZGL responded. The Board has now considered those responses in full.

57. The Board does not intend to comment on all aspects of the responses received from Seeka and Zespri. However, it is confident that, when the sub-committee investigated the complaint, it considered all points now raised by Zespri and Seeka in their responses to the provisional decision.

58. Specifically, as acknowledged in paragraph 38 above, the sub-committee acknowledged there were uncertain or unquantifiable benefits to [REDACTED]. The Board believes that discrimination can be ascertained where a benefit to a supplier is potential or likely. The essential element of discrimination is that one party is unjustifiably treated differently to other parties by ZGL.

59. On the sufficiency requirement the Board believes that the commercial ground or grounds used to justify the discrimination must outweigh the effect or potential effects on the parties discriminated against. If the Board accepts that “any” commercial ground/s justifies discrimination, then this would have the effect of making the non-discrimination rule redundant.

### ***Results of investigation***

60. The KNZ Board confirms the sub-committee's findings:

60.1. that ZGL's failure to invite other post-harvest suppliers to participate in the trial constituted discrimination contrary to the non-discrimination rule in regulation 9 for which the commercial grounds stated by ZGL were not sufficient to justify discrimination under regulation 10. The Board acknowledges that ZGL is currently undertaking work on its SLA programme which is expected to improve ZGL's internal processes including its consideration of the non-discrimination rule when SLAs are under development.

60.2. that the terms of the SLA for the bin trial did not advantage [REDACTED] in a way that constituted discrimination contrary to the non-discrimination rule.

60.3. that the effective date of the SLA was 22 April 2023, and that by failing to publicly notify the SLA prior to the effective date, ZGL did not comply with the information disclosure requirements in regulation 14.

61. As noted, ZGL has confirmed that it intends to share the data from the trial with ISG at the October meeting, which means all post-harvest suppliers will have access to it at that time. As the Board does not know the extent of the information that will be shared, it is of the view that ZGL should release comprehensive findings and data to ensure full disclosure to the post-harvest suppliers.

62. The Board acknowledges that compliance with these requirements is expected to improve through ZGL's work to improve its SLA processes, but it notes that ZGL has been bound by the information disclosure requirements (like the non-discrimination rule) for many years and should be able to comply with it.

63. It appears that ZGL does not have a robust process in place for considering SLAs, in particular SLAs that are initiated by suppliers. Its first step should be to ensure that there are genuine commercial reasons for a particular trial to only involve a single supplier – it appears that ZGL simply did not turn its mind to this issue in this case.<sup>14</sup>

#### **Orders**

64. The Board makes the following orders under clause 6.3.4 of the EA:

- 64.1. This decision, including the orders made, will be published on the KNZ website.
- 64.2. A copy of this decision will be sent directly to all post-harvest suppliers who are signatories to the Supply Agreement.
- 64.3. ZGL is required to provide the following undertaking to KNZ:

*Zespri Group Limited undertakes to:*

- *Take reasonable steps to ensure that its processes are sufficient to ensure ZGL's compliance with regulation 14 of the Kiwifruit Export Regulations 1999; and*
- *inform Kiwifruit New Zealand in writing by 15 December 2023 of the steps (in addition to those set out by ZGL in its response to the provisional decision) that it intends to take to achieve this.*

65. In addition, under clause 6.4.1 of the EA, the Board orders ZGL to cover the costs of this investigation, which are to be calculated at the conclusion of this process.

#### **Kiwifruit New Zealand Board**

*Dated: 14 November 2023*

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<sup>14</sup> It appears that ZGL does not have a process in place for tracking post-harvest suppliers requests for trials and this should be considered for the future.