

## CYCLONE GABRIELLE – Discrimination Complaint

### *Introduction*

1. Following the receipt of a complaint by a grower (**Grower**) on 13 December 2024, an investigation was commenced by the Kiwifruit New Zealand Board. The investigation considered allegations by the Grower of discrimination by Zespri Group Limited (**ZGL**) in respect of ZGL's actions towards the Grower in March and April 2023 following Cyclone Gabrielle. Specifically, the Grower alleged that ZGL's actions breached [regulation 9](#) of the Kiwifruit Export Regulations 1999 (**Regulations**) and was not justified under [regulation 10](#).
2. The investigation was conducted in accordance with Part 6 of the [Export Authorisation](#).
3. In its complaint the Grower alleged:
  - 3.1. ZGL acted without good faith by applying a discriminatory and unfair test to whether or not to accept fruit from one of the Grower's orchards (the **Orchard**) in March and April 2023 following Cyclone Gabrielle. The Grower says that the test applied by ZGL to the Orchard:
    - 3.1.1. was not applied to other growers; and
    - 3.1.2. was inconsistent with the test that ZGL had previously committed to growers would be followed.
  - 3.2. ZGL also discriminated by failing to engage reasonably with the Grower because they sought legal advice.
  - 3.3. ZGL's behaviour cannot be justified on any commercial grounds.

### *Cyclone Gabrielle and its aftermath*

4. Cyclone Gabrielle was a major weather event that affected parts of New Zealand in mid-February 2023. It caused 11 direct fatalities, approximately 2,000 injuries, and the displacement of 10,500 people from their homes. The estimated cost of the Cyclone was up to \$14.5 billion.
5. Flooding from the Cyclone affected 95 kiwifruit orchards across Gisborne, Hawkes Bay, Te Puke, and the Coromandel (**affected orchards**). The impact on affected orchards varied widely, from demolished orchards through to some that suffered mid- or low-level flooding.
6. The Cyclone struck close to harvest time for the kiwifruit industry. The Orchard is in an "early harvest" region, which attracts KiwiStart payments. The Grower told KNZ that harvesting of the Orchard is normally completed by 22 March, which, in 2023, was only about a month after the Cyclone's impact.
7. ZGL told KNZ that its response to the Cyclone was initially set up internally as if for an "incident" but it soon became categorised as a "crisis", meaning it was managed at a higher level within the organisation. Past flooding events that had been managed by ZGL were on a much smaller scale, with generally only 1 or 2 orchards affected.
8. KNZ wishes to acknowledge that Cyclone Gabrielle was an extraordinary event that resulted in a crisis situation, and that the aftermath of Cyclone Gabrielle was an extremely difficult time for everyone in the kiwifruit industry.

#### *Development of risk assessment framework.*

9. Following the Cyclone, ZGL needed to act quickly to find a way to determine which fruit from affected orchards was safe to harvest. In late February 2023, it created a risk assessment framework “to determine the impact of the flooding on the fruit”. This was a system based on assessing fruit into three categories:
  - 9.1. Category A, being fruit that was acceptable for harvest.
  - 9.2. Category B, being fruit that required further risk assessment.
  - 9.3. Category C, being fruit that was marked “do not harvest”.
10. ZGL told KNZ that the risk assessment framework adopted was an attempt by ZGL to “work through 95 orchards in a systematic fashion”. Given the volume of fruit, it was physically impossible to assess each piece of fruit in an orchard, so a category system was preferred. Other options were considered, such as a 10m buffer from floodwaters, but were ruled out on the basis that they did not apply easily to kiwifruit.
11. The intention behind the risk assessment framework was that growers from affected orchards would use it to determine the impact of flooding on their fruit in conjunction with a ZGL Grower Liaison Manager or Auditor and assess fruit into one of the categories above. ZGL said that the primary reason for developing the risk assessment framework was to “ensure that food safety obligations were complied with”. Following the Cyclone, it was essential that ZGL could be sure that fruit was safe for consumption and was not affected by contaminants. The ongoing reputation of the Zespri brand was also a key consideration. KNZ acknowledges that there was industry consensus that managing risk to consumers and the Zespri brand were paramount considerations.
12. ZGL’s communications with growers generally about the risk management framework occurred via industry-wide guidance as well as communications with the Industry Supply Group and the Industry Advisory Council. There was also one-to-one correspondence between ZGL staff and growers on the ground.
13. ZGL told KNZ that while Categories A and C were generally “clear cut”, it became apparent that Category B was more difficult to apply and ZGL realised it needed to consider how it was going to support growers to undertake a robust risk assessment of fruit within that Category. ZGL decided that independent support was required to assist with this.

#### *Engagement of an Independent Auditor*

14. ZGL appointed an independent auditor (**Auditor**) to assist ZGL to assess how the framework was being applied by growers. The Auditor was a recognised independent expert in areas of Insurance, Research, Compliance and Orchard Assessment. He was instructed in mid-March 2023 to independently audit all affected orchards which had areas identified in Category B, with the purpose of the audit being to “verify that the grower has followed guidance and/or risk assessed the fruit originally in Category B into either Category A or Category C.”
15. The Auditor travelled between Gisborne and Hawkes Bay orchards assessing the risk posed by fruit that had been affected by floodwaters. The Auditor visited the Orchard four times, making it the most frequently visited orchard by the Auditor.

16. The Auditor produced reports for ZGL following his orchard assessments. All parties understood that it was not his responsibility to decide whether the fruit should be harvested; his role was only to provide recommendations to ZGL.

*First ground of complaint by the Grower.*

17. As set out above, the first ground of complaint by the Grower was that ZGL acted without good faith by applying a discriminatory and unfair test to whether to accept fruit from the Orchard following Cyclone Gabrielle. The Grower alleged that ZGL's approach to the Orchard was not consistent with the test applied to other affected orchards and not consistent with the test that ZGL had previously told growers would be used.

18. In terms of consistency with the guidance that had been issued by ZGL on the applicable test, KNZ accepts that ZGL's guidance documents for the industry in the aftermath of the Cyclone were intended to provide general guidance for the industry, not to lay out a rigid approach that was required to be adhered to regardless of conditions on the ground and an assessment of risk.

19. In terms of consistency with other affected orchards, KNZ heard from both the Auditor and ZGL about the risk assessment process that was adopted and how it was applied. KNZ accepts that the Auditor proposed (and ZGL agreed to) the concept of a contiguous bays assessment, where (in circumstances where it was difficult to confirm which fruit were touched by floodwaters) certain bays were classified as category C even without any evidence of fruit that was affected by floodwaters, if the immediately adjoining bays on each side were assessed as category C. ZGL confirmed that the contiguous bays method was referred to in the Auditor's reports for five affected orchards in total.

20. Both ZGL and the Auditor said that the Orchard was harder to assess by comparison with many affected orchards, including the orchard next door. The Auditor said that on the Orchard there were few physical indicators of where floodwaters touched fruit, unlike on other affected orchards where there were tide marks and/or splash marks on posts and other obvious signs that made the impact of the floodwaters easier to determine. In addition, the topography of this Orchard was relatively flat, which gave little indication of where the floodwaters had extended to.

21. Overall, KNZ has determined that no differential treatment of the Orchard occurred that constituted discrimination for the purposes of regulation 9 of the Regulations. KNZ is satisfied that:

21.1. The ZGL risk assessment framework was applied to the Orchard in the same way as it was applied to other orchards. As with other orchards, the Auditor visited the site and walked the orchard (four times). He then produced reports which were given to ZGL. These reports stated conclusions about the application of the relevant categories to fruit on the Orchard. Following this, ZGL made decisions about whether to release the "Not for Export" hold or not for parts of the Orchard.

21.2. The evidence available shows that the contiguous bays concept was not unique to the Orchard.

21.3. The outcome reflected the features of the Orchard, which was more difficult to assess than others and that the Auditor was able to reach a clear view about the risk profiles of other affected orchards more easily.

22. KNZ accepts that the risk assessment framework was created and applied by ZGL in a difficult and evolving crisis environment, where there was a genuine risk to the Zespri brand and the industry. In this context, a low tolerance to risk in a crucial export market is appropriate.
23. The Grower appears to have regarded ZGL's risk assessment framework as reflecting a prescriptive methodology applicable in all cases to achieve ZGL's objectives. However, this is not how KNZ reads the risk assessment framework. The framework provided guidance to industry participants only. It did not replace food safety regulations and requirements or obviate the need for detailed risk assessments on the ground. Given the large number of orchards affected by Cyclone Gabrielle and the wide variance of circumstances, it would not have been possible to adopt a framework with a rigid methodology that would still address risk appropriately and safely in each case. In particular, a rigid methodology could lead to the view that a bay that was clear of any discernible markings evidencing floodwater was acceptable to harvest, even if it was surrounded by contaminated bays. This could not have been appropriate if a risk-based approach to the same bay would lead to the conclusion that it should not be accepted for harvest. Again, this is not how KNZ reads the risk assessment framework.
24. KNZ notes that the industry and ZGL were dealing with a time critical and rapidly evolving situation in the aftermath of Cyclone Gabrielle. However, KNZ agrees with the Grower that ZGL could have provided more information to growers, particularly when it became clear that there were some orchards that did not easily fit the risk assessment framework. It also agrees that there were ZGL communications in respect of the Orchard that could have caused confusion for the Grower. But any insufficiency in terms of ZGL's communications and resulting confusion does not offend against regulation 9 unless it led to differential treatment that constitutes discrimination. KNZ is satisfied that this did not occur.

*Second ground of complaint by the Grower.*

25. The Grower's second ground of complaint is that ZGL discriminated against the Grower by "refusing to engage with the Grower in relation to the status of the bulk of the orchard ... as a direct consequence of the Grower choosing to seek legal representation."
26. In responding to this second ground, ZGL suggested that any failure by ZGL to engage with the Grower could not fall within the scope of regulation 9. However, KNZ does not accept this is correct. The context of the engagement between ZGL and the Grower was that ZGL had issued industry-wide guidance for growers on ZGL's risk tolerance about whether fruit was acceptable for harvest following the Cyclone and then had decided not to accept some fruit from the Orchard based on risk. In this context, any failure by ZGL to engage with further questions asked by the Grower about the application of this guidance to the balance of the Orchard must be in respect of "a decision [by ZGL] on whether to purchase kiwifruit". If the setting of a risk assessment framework for the acceptance of fruit following a major weather event was not in respect of "a decision whether to purchase kiwifruit", KNZ considers that it would be difficult to know what the purpose of the framework was (or when a decision by ZGL in respect of risk relating to fruit would fall within regulation 9).
27. Turning to the question of whether discrimination occurred, KNZ considers that differential treatment must cause some disadvantage or detriment or otherwise cause unfairness in order to be discriminatory under the Regulations.

28. KNZ acknowledges that at harvest time, a delay by even a day can be a long time and that the impact of any such delay was potentially significant for the Grower, given it applied to a large part of the crop. KNZ also notes that ZGL was operating at the time in crisis mode and in the harvest window, and that ZGL and the Auditor were dealing with many other affected orchards all at the same time. In this context, it was not unreasonable that ZGL was not able to respond to the Grower's queries immediately and it appears that ZGL progressed matters in respect of the balance of the Orchard with reasonable promptness.
29. Other than in the case of one email, the effect of which was limited, KNZ was also not persuaded that any delay that occurred was attributable to the Grower engaging its lawyers.
30. KNZ therefore has reached the view that there was not any delay by ZGL in engaging with the Grower which could be said to constitute discrimination for the purposes of regulation 9.

### *Summary*

31. Cyclone Gabrielle was a significant and extreme weather event. In the aftermath, the primary concern of ZGL and the kiwifruit industry generally was on ensuring that food safety requirements could be met. It was for this reason that ZGL developed a risk assessment framework for assessing fruit on affected orchards.
32. For reasons outside the Grower's control, the Orchard was one of the more challenging affected orchards that was assessed for risk, largely due to topography and a lack of clear physical indicators to confirm where floodwaters had affected fruit. The fact that the Auditor visited the Orchard four times is indicative of the challenges it posed.
33. KNZ acknowledges that the outcome of the Auditor's assessment and ZGL's decision about whether to accept fruit from the Orchard resulted in the loss of the majority of the Grower's crop. It also agrees that communications by ZGL could have been better and likely led to frustration for the Grower. However, KNZ considers that ZGL's assessment of the Orchard was consistent with its risk assessment framework, was based on the expert assessments carried out by the independent Auditor, and that ZGL reasonably erred on the side of caution when reaching a view on risk in respect of the Orchard. KNZ therefore has found that ZGL did not discriminate against the Grower in doing so.
34. KNZ considers that it was appropriate for the Grower to make this complaint in order to raise its concerns about potential discrimination with KNZ. This process has facilitated the exchange of a substantial amount of documentation and other information. This has provided greater clarity on what occurred during the Cyclone Gabrielle crisis, which created extraordinary challenges for the kiwifruit industry and caused such significant losses to a number of growers; and allowed KNZ to pass on suggestions to improve processes to industry participants.



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