

Monitoring and enforcement of the transitional provisions and the non-diversification provisions

Monitoring Plan

Ownership of plant varieties activities

Background

1. This paper sets out a brief outline of the proposed process for KNZ's monitoring of Zespri's ownership of plant varieties.
2. In response to the Kiwifruit Export Amendment Regulations 2017, Zespri gave notice to KNZ on 25 January 2018 that it would rely on the transitional provisions (clauses 5 and 6) of Schedule 1 of the Regulations (**Transitional Provisions**) in relation to the activity of owning proprietary cultivars.
3. Under clause 5(2) of the Transitional Provisions

“(2) Despite regulation 11, ZGL may continue to carry out activities that consist of –

- (a) Performing the contract or receiving the benefit of the contract;
- (b) Owning or operating the asset.”

4. To rely on clause 5(2) Zespri must have clearly identified the contract or asset before 1 February 2018. If an identified contract ends, is extended or varied after 1 August 2017 or an asset is sold (in whole or in part) to any other person, the Transitional Provisions will no longer apply to that contract or asset.
5. Appendix 1 lists the contract and assets confirmed by Zespri and KNZ as existing contracts and assets under clauses 5 and 6 of the Transitional Provisions (**Confirmed Contract and Assets**).
6. In February 2019, Zespri also conducted a producer vote under Reg 11 (**2019 Producer Vote**). Resolution 2 (**Resolution**) of the 2019 Producer Vote was:

“That the producers agree to Zespri carrying out the following activity:

- (a) ownership of plant varieties: plant variety ownership including operating and owning (and otherwise having an interest in) plant varieties:

On the basis that:

- (b) the agreement will apply to the ownership of plant varieties, or to any component of that activity if Zespri, KNZ or any other relevant authority decides that the activity, or any component of the activity, does not support the core business, as defined in Reg 10A of the Kiwifruit Export Regulations.”

7. Zespri obtained the required number of votes in respect of the Resolution in the 2019 Producer Vote, however given the ‘contingent’ wording of clause (b), the Resolution only comes into effect if ‘triggered’ by Zespri, KNZ or any other relevant authority deciding that the activity, or any component of the activity does not support core business as defined in Reg 10A.
8. The Operating Agreement between Zespri and the New Zealand Institute for Plant and Food Research Limited (**PFR**) dated 17 May 2010 (**Operating Agreement**) provided for the

development and commercialisation of new kiwifruit varieties. The Operating Agreement was identified as a contract under the Transitional Provisions. On 1 October 2021, the terms of the Operating Agreement were largely replaced by a new joint venture arrangement between Zespri and PFR for the Kiwifruit Breeding Centre (**KBC JV**). Under clause 5(4) of Schedule 1, the Transitional Provisions cease to apply to a contract if the terms are varied after 1 August 2017. Zespri structured the KBC JV contracts with the intention of keeping the Operating Agreement 'alive' as it relates to the Existing PVRs¹. Accordingly, the Transitional Provisions cease to apply to any varied term of the Operating Agreement or the new KBC JV (including any intellectual property or kiwifruit varieties developed under KBC JV arrangement) but the unvaried terms of the Operating Agreement remain protected under the Transitional Provisions.

9. As a result of the above, Zespri has confirmed that Zespri intends to proceed on the basis that:
 - 9.1. the relevant provisions of the 2010 Operating Agreement with Plant and Food Research will remain in force for the PVRs applied for by ZGL in New Zealand as at 1 October 2021 and any applications in other jurisdictions for the same variety whether registered before, on or after that date, and that the transitional provisions will continue to apply to ZGL's ownership and operation of those assets (**Existing PVRs**); and
 - 9.2. ZGL will 'trigger' clause (c) of the 2019 producer vote resolution in relation to any ownership of a PVR applied for or assigned from 1 October 2021 (excluding registrations of PVRs owned by ZGL as at 1 October 2021 which fall under 9.1) (**Future PVRs**).

KNZ's Role

Existing PVRs

10. KNZ's role in respect of the Transitional Provisions is to ensure that the activities carried out by Zespri in relation to the Confirmed Contract and Assets consist only of:
 - 10.1. performing the contract or receiving the benefit of the contract; and
 - 10.2. owning or operating the asset.
11. KNZ also has the role of monitoring the Confirmed Contract and Assets in respect of any termination, expiry, extension or variation of a contract or any sale or assignment of an asset which may, under clause 5(4), result in the Transitional Provisions ceasing to apply to that contract, the variation of the contract or the asset.

Future PVRs

12. KNZ has an on-going function under Reg 33 of ensuring that any activities undertaken by Zespri do not stray outside of the parameters of:
 - 12.1. core business; or
 - 12.2. any activity approved as 'supports core business' under Reg 10A; or

¹ Zespri's letter dated 9 August 2021 confirms that intention.

- 12.3. any activity approved by a producer vote under Reg 11.
13. As a result of the producer vote, KNZ's function is to monitor all current and future activities undertaken by Zespri in respect of its ownership of PVRs activities to ensure the activities do not stray outside the parameters of the activities approved by the 2019 Producer Vote.
14. KNZ also has the role of monitoring whether Zespri has minimised, as far as reasonably practicable, the risks arising for producers who have not agreed to the activity (Reg 11(1)(c)).

Determining the parameters

15. The parameters identified below are not exhaustive and KNZ is responsible for monitoring all activities undertaken by Zespri under the Transitional Provisions and in respect of the 2019 Producer Vote Resolution.
16. For the avoidance of doubt, the parameters identified will not restrict Zespri's core business activities as defined in Regulation 2 of the Regulations.
17. Any deviation from the parameters detailed below may result in an activity falling outside the scope of the activities permitted under the Transitional Provisions or the producer approval, and further approval may be required (in advance of commencement) for those activities.

Parameters of PVR ownership activities permitted under the Transitional Provisions for Existing PVRs

18. Under the Transitional Provisions Zespri can continue with activities that comprise of 'performing the contract or receiving the benefit of a contract' and 'owning or operating the asset'. Based on the terms of the Confirmed Contract, the establishment of the new KBC JV and considering the rights of a registered proprietor under the Plant Variety rights Act 1987, KNZ has identified the key parameters of the PVR ownership activities permitted under the Transitional Provisions.
19. As at 1 October 2021 (the commencement date of the KBC JV), the terms of Operating Agreement only remain 'alive' as they relate to the Existing PVRs and no future kiwifruit varieties will be developed or commercialised under the terms of Operating Agreement.
20. 'Owning and operating the asset' in respect of the Existing PVR's includes:
- 20.1. lodgement and completion of an application for the grant of a plant variety right on kiwifruit varieties in New Zealand, or any equivalent IP registration overseas; and
- 20.2. exercising the rights of a registered proprietor under the Plant Variety rights Act 1987 regime, including licencing and receiving royalties.

Parameters of PVR ownership activities approved by producers in the 2019 Producer Vote for Future PVRs

21. Zespri will 'trigger' and KNZ will monitor any Future PVRs under the Producer Vote. Based on the terms of the Resolution, the materials provided to producers during the 2019 Producer Vote process and taking into consideration the context of general understanding by producers of what activities Zespri was undertaking in respect of PVR ownership activities at the time of the 2019 Producer Vote, KNZ has identified key parameters of the PVR ownership activities approved by producers in the Resolution.

22. PVR ownership activities for Future PVRs include:
- 22.1. lodgement and completion of an application for the grant of a plant variety right on kiwifruit varieties in New Zealand, or any equivalent IP registration overseas; and
 - 22.2. exercising the rights of a registered proprietor under the Plant Variety rights Act 1987 regime, including licencing and receiving royalties.
23. Producers can be taken to have voted based on their agreement to the following commitments or propositions made by Zespri.
- 23.1. Zespri's primary focus is protecting ownership of IP generated through its research and development activities.
 - 23.2. Zespri is not purporting to do any 'new' activities (at the time of the 2019 Producer Vote) in respect of PVR ownership.
 - 23.3. Zespri's focus is on delivering:
 - what the customer wants and meeting customer demand for new products;
 - kiwifruit attributes that complement Zespri's existing export portfolio and are most suitable for New Zealand growers to produce (e.g. varieties that are more PSA resistant, deliver superior value to growers and maintain quality during storage and shipping);
 - on-orchard advantages and greater value to growers; and
 - licence income stream to cover the costs of investment in developing PVRs.
 - 23.4. Licences will be released based on market demand, to keep demand ahead of supply and only Zespri growers will get the licence.
 - 23.5. Zespri ownership of PVRs include the following activities:
 - a) trialling of kiwifruit varieties both in New Zealand and overseas prior to commercialisation;
 - b) royalties being collected on the sale of fruit and revenue from licences in New Zealand;
 - c) licences granted to offshore growers with a royalty built into grower margin payments to Zespri; and
 - d) enforcing PVR rights against anyone that infringes the PVRs in New Zealand and in overseas countries where the PVR has been applied or registered.

Minimising Risks

24. Risks: Regulation 11(1)(c) requires Zespri to minimise, 'as far as reasonably practicable, the risks (arising from carrying out the proposed activities) for the producers who have not agreed'. Zespri noted the Regulations require consideration of the relevant risks to producers generally (ie Orchard Gate Return risk for all producers) rather than to Zespri or individual growers but

note that the mitigation measures employed by Zespri to manage commercialisation risks also protect producers generally.

25. The following were identified as risks in the materials provided to producers during the 2019 Producer Vote process:

25.1. Risks to individual growers who take up PVR licences include:

- a) inadequate protection of the asset (PVR);
- b) loss of value of licence and associated risk of lower returns due to a significant infringement;
- c) extensive trialling and information release; and
- d) commercialising a new kiwifruit variety before it has been fully evaluated and trialled, resulting in a variety that does not perform through the supply chain and results in costs and losses for licenced growers.

25.2. Releasing PVR licence at a rate which undermines the value of the Zespri portfolio approach.

26. Mitigation Measures: Zespri confirmed it would take the following mitigation measures to protect producers from the risk that the PVR ownership activities affects their returns:

26.1. Actively monitor the growing of PVR plants and enforce rights against any infringements.

26.2. Take steps against third parties that illegally obtain Zespri PVRs so as to prevent them from growing the plants or require the removal of plants to protect the integrity and value in the licences for the benefit of the New Zealand kiwifruit industry.

26.3. Ensure licencing agreements require supply be made to Zespri and linking with supply chain requirements that ensure kiwifruit meets the Zespri quality specifications.

26.4. Maintain trademarks associated with its kiwifruit varieties to ensure the integration of the Zespri brand and quality kiwifruit.

26.5. Conduct extensive trials of new varieties, from growing through to market, to identify and resolve potential issues.

26.6. Inform licenced growers of new varieties that there is no guarantee of a new kiwifruit varieties commercial success which ultimately depends on the consumer.

Monitoring Plan

27. The following details a proposed monitoring plan for KNZ.

28. Scope of the monitoring programme.

28.1. Zespri must not carry out any activities that are not within the parameters of the PVR ownership activities set out above at paragraphs 15-23 (**PVR Ownership Parameters**)

above and must, as far as reasonably practical minimise the risks for the producers as set out in paragraphs 24 - 26.

28.2. Without limiting KNZ's monitoring and enforcement functions under the Regulations, KNZ sets out below the scope of the monitoring programme for the PVR ownership activities undertaken by Zespri for Existing and Future PVRs:

- a) KNZ will assess whether any activities undertaken by Zespri are outside the PVR Ownership Parameters.
- b) KNZ will assess whether Zespri is, as far as reasonably practical minimising the risks for the producers who have not agreed.
- c) KNZ may request Zespri to supply information or documentation in respect of its PVR ownership activities.
- d) KNZ will continue to monitor Zespri's activities going forward, to ensure that these remain within the PVR Ownership Parameters and whether Zespri is, as far as reasonably practical minimising the risks for the producers who have not agreed.

28.3. KNZ may amend the scope of the monitoring programme as it considers necessary.

29. Assessment Process.

29.1. KNZ's assessment process should be efficient and proportionate in terms of scope and resources (i.e KNZ Board need to be satisfied to a reasonable standard that the activities fall within the PVR Ownership Parameters).

30. Information Request.

30.1. KNZ may:

- a) request information from Zespri in respect of Zespri's PVR ownership activities; and
- b) determine whether the information provided is sufficient to make an assessment of whether the activities are within the PVR Ownership Parameters. If not KNZ may:
 - request further information from Zespri; and/or
 - engage third parties to complete further investigations.

31. Preliminary Assessment.

31.1. KNZ will consider all information obtained and may make a preliminary assessment of whether any activity or component of an activity falls outside the PVR Ownership Parameters.

32. On-going monitoring.

32.1. KNZ will determine the scope of ongoing monitoring of the PVR ownership activities (including establishing Zespri's reporting requirements, ongoing risk assessments and mitigation measures and considering whether ongoing engagement of external consultants is necessary).

Timeframes

33. KNZ will confirm reasonable timeframes with Zespri in respect of the provision of information to KNZ and KNZ's assessment of the activities.
34. KNZ may amend the timeframes of the monitoring programme as it deems necessary.

Kiwifruit New Zealand

16 February 2022

APPENDIX 1

Confirmed Contract and Assets

1. Contract:

Operating Agreement dated 17 May 2010 between Zespri and the New Zealand Institute of Plant and Food Research (**Operating Agreement**);

2. Assets:

List of ZGL-owned PVRs applied for as at 1 October 2021:

VARIETY	INITIAL APPLICATION DATE / COUNTRY	STATUS
ZESY002 (GOLD 3)	25/06/09 / New Zealand	Granted
ZESY003 (GOLD 9)	25/06/09 / New Zealand	Granted
ZESH004 (GREEN 14)	25/06/09 / New Zealand	Granted
ZES005 (RED 6)	14/04/19 / New Zealand	Granted
ZES006 (RED 9)	09/12/14 / New Zealand	Granted
ZES008 (RED 19)	02/05/19 / New Zealand	Granted
ZES007 (GREEN 11)	25/11/14 / New Zealand	Granted
HORT22D	18/04/07 / New Zealand	Granted
BRUCE	09/07/08 / New Zealand	Cancelled in New Zealand (still in force in some jurisdictions)
TOMUA	15/04/94 / New Zealand	Expired in New Zealand (still in force in some jurisdictions)
HORT16A	15/04/94 / New Zealand	Expired in New Zealand (still in force in some jurisdictions)