

KIWIFRUIT EXPORT REGULATIONS 1999

IN THE MATTER OF an Appeal BY **Fruitlynx Marketing Limited** ("FML") relating to the conditions of a second indicative approval issued by **Kiwifruit New Zealand's European and MEIOSA Collaborative Marketing Committee** ("KNZ") dated the 17 February 2006.

APPEAL COMMITTEE: Sir Brian Elwood (Chairman)
Hendrik Pieters
Ian Greaves

DECISION: 23 March 2006

Status of Appeal

1. The Board of Kiwifruit New Zealand ("the Board") constituted pursuant to the provisions of the Kiwifruit Export Regulations 1999 ("the Regulations"), has all the powers necessary to enable it to carry out its functions: Regulation 38 refers.
2. One of the functions of the Board is to determine collaborative marketing applications pursuant to Part 4 of the Regulations: Regulation 33 refers.
3. The Board can establish Committees and delegate any of the Board's functions to any of its committees: clauses 10 and 11 of the Schedule to the Regulations refer.
4. The Board may regulate its own procedure in a way that is consistent with the rules of natural justice: Regulation 31 refers.
5. The Board in approving an application may impose any reasonable and necessary conditions: Regulation 28 refers.
6. The Board established committees to consider collaborative marketing applications and a committee was so established (KNZ) comprising Ruth Lee (Chair) and Mark Bayly to consider the application of FML and others. On 5 December 2005, KNZ met with FML and Zespri to consider FML's application to export New Zealand grown kiwifruit to the UK for retailing by Waitrose Limited ("the Waitrose UK programme").
7. On 23 December 2005, KNZ declined the application of FML for the Waitrose UK programme ("first indicative decision") and advised its reasons for declining the Waitrose UK programme by a written decision dated 8 February 2006. The written decision noted that "The reasons for declining this programme are given in accordance with the timetable for the overall Collaborative Marketing process for this season. The Committee is prepared to consider, on or before 28 February 2006, any alternative or supplementary information that would enhance programme returns sufficiently to warrant the Committee reconsidering the application."
8. KNZ advised all applicants for collaborative marketing approvals that if dissatisfied with a decision of any of its committees relating to collaborative marketing

decisions, the Board would allow an appeal to an Appeal Committee of the Board, consisting of members of the Board who had not considered the application at issue. Any right to appeal any decision of the Committee terminated 14 days from the date of the issue of reasons for declining approval. The notice was issued on the 8 February, with appeals due by the 22 February 2006. The Appeal Committee established for this purpose is the Committee that heard this Appeal, as set out in page one of this determination.

9. On 13 February 2006, FML provided a worksheet ("Lynx worksheet one") showing various CM Market Contributions for the Waitrose UK programme for Class I kiwifruit of between 66% and 87% of Zespri's final returns for the UK market for 2005, and for Class I Organic of 91%. Following further clarification, it was established these figures were a restatement of the CM Market Contributions for 2005 as if the programme undertaken in 2005 had been modified and significantly reduced (that is, different to that actually undertaken). The modified programme involved removal from the programme of IFCO crate costs, processing, and the assumptions around soft fruit costs.
10. In subsequently examining the Lynx worksheet one after the meeting, the Chief Executive of KNZ and the Zespri Collaborative Marketing Manager found that when commission calculations were incorporated into the Lynx worksheet one, otherwise maintaining the same changes assumed by FML, the re-cast 2005 CM Market Contribution improved to between 75% and 100% for Green Class I and to 103% for Green Class I ("Lynx worksheet two")
11. The Lynx worksheet two and further submissions by Zespri were considered by KNZ. On 17 February 2006, on the basis of the Lynx worksheet two, KNZ issued an indicative approval (the "second indicative decision") for the Waitrose UK programme. This second indicative decision, indicative approval of the Waitrose UK programme for the 2006 season, included the general conditions issued with all indicative approvals and some additional special terms of trade conditions, namely:

"Minimum of Fixed Price FOBS (to be agreed by Zespri to achieve equivalent or better returns than Zespri UK)
Payment in accordance with Zespri standard terms of trade for the UK
The programme will be cancellable at any time if the above conditions are breached.
Clauses regarding the above are to be inserted in the Collaborative Kiwifruit Marketing Agreement, and approved by KNZ. "
12. The Appeal Committee decided that in this instance that the appeal should be conducted by way of a review, particularly for the reason that FML restricted its appeal to the conditions imposed in the indicative approval.

Substance of the Appeal

13. By letter dated 20 February 2006, FML advised that it wished to Appeal the decision on the basis set out in the letter.
14. On the 10 March 2006, KNZ circulated a memorandum (dated 9 March 2006) with documents attached, to the Appeal Committee and FML that outlined context and provided other information and documentation relevant to the Appeal. On the 13 March 2006, FML provided comments by email, and attached a further worksheet ("Lynx worksheet three").
15. The Appeal Committee met on 15 March 2006. FML and Zespri were invited to meet with the Appeal Committee. FML was represented by Allan Dawson, Michael Ahern and Tracey Burns. Zespri was represented by Warren Young.

16. At the Appeal Committee meeting, FML confirmed that it had no matters to raise in respect of the 10 March 2006 memorandum, and Warren Young confirmed the FML view that the modified collaborative marketing programme would achieve returns approximating the average returns achieved by Zespri from the sale of kiwifruit in the UK in 2005 as set out in Lynx worksheet three.
17. The representatives of FML confirmed that its appeal related to the proposed condition that it purchase kiwifruit at a fixed price FOBS. FML argued that an FOBS fixed price was not necessary, not workable, and was inefficient.
18. In support of its appeal FML said, in summary:
 - a. That the UK market was different to other markets for kiwifruit and in particular, that the customer with which FML had a long term relationship was not willing to purchase fruit (including kiwifruit) on the basis of a fixed price,
 - b. That FML was not itself prepared to underwrite the sale price of kiwifruit, which was inherent in an FOBS fixed price transaction. FML saw itself as a commission agent.
 - c. FML were of the view that Zespri would support the modified collaborative marketing programme placed before the Appeal Committee.
 - d. That the figures in Lynx worksheet three demonstrated that the modified collaborative marketing programme would be successful, being based on actual returns achieved in the 2005 season, and achieve returns approximating the average returns achieved by Zespri from the sale of kiwifruit in the UK for the same season.

Consideration of the Appeal

19. The Appeal Committee carefully considered the KNZ decision of 17 February 2006, the matters raised in the letter dated 20 February 2006 notifying of appeal, the Lynx worksheet three, and the submissions made at the Appeal Committee meeting on 15 March 2006. The appeal Committee also considered the matters raised by the Zespri representative, Warren Young.
20. Warren Young indicated Zespri's willingness to abide by the decision of the Appeal Committee, but was supportive of the FOBS fixed pricing.
21. The Appeal Committee was advised by FML that its client in the UK was a premium market operator, requiring premium quality fruit. The Appeal Committee was concerned that the anticipated return to the kiwifruit Growers pool to be achieved by FML was anticipated to be equivalent to the average kiwifruit price achieved by Zespri in the UK 2005 season. In other words, the NZ kiwifruit grower would at best receive average financial returns for the supply of premium quality fruit to Waitrose through FML.
22. The Appeal Committee was grateful for the effort made by FML and Zespri to reach agreement on a modified programme as referred to in paragraph 16, which removed those parts of the original programme which past experience had shown could not be marketed profitably and had contributed to a loss being incurred in grower pool returns.

FML argued that their modified programme would produce returns equal to the average return to the grower pools that would be achieved by Zespri, but were not prepared to back the returns received on the basis of a FOBS fixed price. To do so

would leave the risk attached to the marketing of the kiwifruit involved with FML, rather than with the kiwifruit growers.

23. The purpose of collaborative marketing identified in Regulation 24 is as follows: "The purpose of this Part is to enable the Board to require ZGL to enter into collaborative marketing arrangements for the purpose of increasing the overall wealth of New Zealand kiwifruit suppliers." FML did not establish to the satisfaction of the Committee that the statutory purpose of increasing the overall wealth of kiwifruit suppliers would be achieved by selling premium grade kiwifruit at a price that was expected to yield an average return through the UK Waitrose programme.
24. The Appeal Committee acknowledges that considerable effort has been expended by all parties in attempting to make successful the Waitrose UK programme. In the development of the Waitrose UK programme so far, the risk has fallen on the grower pools and in the past has resulted in returns decreasing rather than increasing the overall wealth of kiwifruit suppliers. The question which the Appeal Committee needed to address was should the risk that the Waitrose UK programme would continue to result in returns that decrease rather than increase grower pool returns, continue to remain with the grower pools, or should FML support their confidence in the future outlook of the Waitrose UK programme by moving to a FOBS fixed price contract in the 2006 season. The Appeal Committee believes that the time has arrived for FML to express its confidence in the future of the programme by moving it to an FOBS fixed price contract. In that regard the grower pools would have an assured return whilst FML has the potential for additional profits above their commission. This arrangement would be for one year. As a result, all parties would be better informed about the performance of the modified programme, its advantages and disadvantages, and of the longer term alternatives for the collaborative marketing arrangements for this programme.

25. The Appeal is not successful.

On behalf of the Appeal Committee

Sir Brian Elwood
Chair