



KIWIFRUIT EXPORT REGULATIONS 1999 (the “Regulations”)

Decision of the Collaborative Marketing Appeal Committee of Kiwifruit New Zealand (“KNZ”) relating to the Application by Fruitlynx Marketing Limited (“Fruitlynx”) to export kiwifruit to Malaysia in collaboration with Zespri Group Limited (“ZGL” or “Zespri”).

HEARING DATE: 21 March 2012

PRESENT: Kiwifruit New Zealand (Appeal Committee)

Sir Brian Elwood

Ruth Lee

Alister Hawkey

Fruitlynx Marketing Limited

Allan Dawson

Tracey Burns

Zespri Group Limited

Katherine Evans

Dan Matheson

In attendance: Richard Procter

1. Introduction

- 1.1 In October 2011, Fruitlynx Marketing Limited (“Fruitlynx”) applied to KNZ for approval to export 300,000 tray equivalents Hayward green class 1 of sizes 25 and 33, to be supplied into wholesale (50-30%) and retail (50-70%) markets in Malaysia through Fruitlynx’s distributor Chop Tong Guan Sdn Bhd.
- 1.2 The Kiwifruit New Zealand Collaborative Marketing Committee for South East Asia and India (the “Committee”) declined the Fruitlynx application, and issued its reasons for declining the application on 31 January 2012.
- 1.3 By letter dated 23 February 2012, Fruitlynx appealed the Committee decision.
- 1.4 The KNZ Appeal Committee (“Appeal Committee”) heard the Fruitlynx Appeal on the 21 March 2012.
- 1.5 The general background to the Regulatory provisions applicable to collaborative marketing applications is set out in Paragraphs 2 to 4 of the KNZ decision made in respect to three appeals by Turners & Growers Limited in respect of applications to export kiwifruit to Japan, Mexico and the USA, heard on 5 May 2009. A copy of those paragraphs is attached as an Appendix to this decision for the information of Fruitlynx.

2. Fruitlynx Appeal

- 2.1 Fruitlynx advised the Appeal Committee that it was aware of the Regulatory Regime applicable to the single desk marketing structure which it saw as a cornerstone for the NZ kiwifruit industry.
- 2.2 The details of the Fruitlynx Appeal are set out in the letter dated 23 February 2012 referred to in paragraph 1.3 above. In essence the appeal centred around the following matters:
 - That Zespri’s proposed marketing structural changes in Malaysia were predetermined by Zespri before the Committee collaborative marketing renewal process was under way.
 - It is not acceptable that Zespri is able to make recommendations on the life span of a collaborative marketing agreement independently of KNZ.

- There was manipulation by Zespri of the “legislative process that is managed by KNZ”, resulting in a predetermination of the Fruitlynx collaborative marketing application.
- Fruitlynx has been a reliable collaborator and has “added wealth to growers for ten years”, and “Grower wealth will be eroded if this relationship ceases”.

3. The Committee Decision

3.1 The Fruitlynx application was declined by the Committee for the reasons set out in its decision dated 31 January 2012.

3.2 In summary, the reasons were:

- Zespri had adopted from the 2006 kiwifruit season an overall market strategy for the development of the Malaysian market initially based on its branding and transitioning the market to larger Class 1 kiwifruit. As a result market growth ensued and in 2008 Zespri appointed a market manager to coordinate its overall marketing strategy in South East Asia, including Malaysia.
- From the 2006 season, Fruitlynx’s collaborative marketing approvals for Malaysia specified that it was obliged to cooperate with Zespri to implement Zespri’s market strategy. That condition was subsequently modified by, in part, including the following: “This approval is subject to cancellation at any time, including if Zespri indicated that it is no longer willing, or withdraws its willingness to act in a market coordination role for a particular application or market...”
- As a result of Zespri’s in market growth strategy for Malaysia evolving, the historical role of Fruitlynx in that market changed to the extent that in Zespri’s view it was no longer adding value to NZ kiwifruit suppliers by continuing its historical collaborative marketing programme. Since the 2009 KNZ approval of a collaborative marketing arrangement for a term of three years and with the advent of Zespri in market personnel and other activity, Fruitlynx’s direct involvement in the day to day ordering promotion and sales functions had been diluted.

- As a result the Committee sought to establish the nature of Fruitlynx's current role in light of the changes to Zespri's role in the Malaysian market and how it would manifest itself in increased overall wealth of NZ kiwifruit suppliers. Over time, the historical operational requirements on Fruitlynx had diminished relative to its commission, and there was no evidence provided to the Committee that suggested this situation would change.
- Each collaborative marketing application is considered on its merits on a case by case basis, and assessed relative to the purpose of the collaborative marketing regime established by the Regulations of "increasing the overall wealth of NZ kiwifruit suppliers." The evidence available to the Committee seemed to point to the increasing involvement of Zespri as a significant factor in the successful development of the Malaysian market. There was nothing in the information made available by Fruitlynx which convinced the Committee that an ongoing approval of Fruitlynx as a collaborative marketer into the Malaysian market would increase the overall wealth of NZ kiwifruit suppliers.

4 The Appeal Committee's Consideration of the Appeal

- 4.1 From the papers available to the Appeal Committee, it was clear the Committee had concerns with the consequence to grower wealth of a situation where Fruitlynx involvement in the Malaysian market was changing and diminishing, but commission levels were no longer commensurate with Fruitlynx's level of activity. This was a consequence of the evolution of Zespri's involvement in that market first signalled in 2006 and made known by Zespri.
- 4.2 The Committee had the benefit of submissions from Fruitlynx and Zespri and clearly sought from Fruitlynx the exact nature of its current role in Malaysia in light of the evolving role of Zespri in that market, and how in the future would a further approval of Fruitlynx as a collaborative marketer in that market increase the overall wealth of NZ kiwifruit suppliers.
- 4.3 The Committee's focus in its consideration was on the future in light of the changed circumstances where Zespri were more active in the market. As the market potential in Malaysia was expanding and maturing, Zespri saw the

need to extend its presence market wide in order to realise its potential. Zespri's approach was to build the Malaysian market with a view to increasing grower wealth.

- 4.4 Extending the Fruitlynx historical collaborative marketing approval in the changed circumstances required evidence to convince the Committee that this would increase the overall wealth of NZ kiwifruit suppliers.
- 4.5 It is clear from the Zespri response to the Fruitlynx notice of appeal that the contribution made by Fruitlynx in the historical development of the market was valued by Zespri, but that the role of Fruitlynx had been diminishing over the years, as Zespri assumed more responsibility for in market coordination, onshore logistics ,ordering and other activities.
- 4.6 The Appeal Committee is satisfied that the Committee took into account relevant considerations on the basis that a collaborative marketing application should be made relevant to existing rather than historical circumstances. Although historical performance by a collaborative marketer can and should be taken into consideration, that does not mean that the historical construct of a collaborative marketing application should remain without modification or justification measured against the relevant Regulatory parameters. Fruitlynx appear to have failed either to appreciate the relevance of the Committee's questioning on this matter or to provide the Committee with the evidence it sought on how Fruitlynx current role would manifest itself in achieving the increased overall wealth of NZ kiwifruit suppliers.
- 4.7 In all the circumstances the Appeal Committee is satisfied that the application as presented to KNZ was correctly understood by the Committee and on the evidence available to it there was no basis upon which it could have approved the application.
- 4.8 Turning now to the essence of the Fruitlynx appeal identified in paragraph 2.2:
 - The appeal alleged that there was predetermination of the structural changes in Malaysia before the collaborative marketing renewal process was under way. The Appeal Committee is of the view that at all times Zespri was able to develop a marketing strategy for Malaysia. That cannot be seen as a predetermination which affects KNZ's ability to consider and determine a collaborative marketing application. The Zespri marketing strategy is for it to determine. That strategy is not determinative of the KNZ

consideration or determination of a collaborative marketing application. It is but one of the matters that KNZ should consider. The Appeal Committee is satisfied that there was no predetermination on the part of KNZ or the Committee or in any way to prevent them from properly considering the application.

- In the Appeal Committee's opinion it is acceptable for Zespri to express its views to KNZ or its Collaborative Marketing Committees on how it views any particular collaborative marketing application. Indeed, in terms of natural justice as Zespri is a participant through collaboration in the implementation of a collaborative marketing approval, Zespri's views should be given proper consideration but are not determinative. Decisions on collaborative marketing applications are made by KNZ.
- The Appeal Committee is satisfied that there was no manipulation by Zespri of the "legislative process" that is managed by KNZ. Collaborative marketing applications are considered by and determined by KNZ against the Regulatory parameters set by the Regulations, in particular (1) that the purpose of collaborative marketing is to increase the overall wealth of NZ kiwifruit suppliers, and (2) the collaborative marketing arrangement is in collaboration with Zespri. The Appeal Committee is satisfied that the Zespri involvement in the consideration of the Fruitlynx collaborative marketing application was in accord with normal practice and did not result in a predetermination of its application by the Committee.
- The Appeal Committee is satisfied that Fruitlynx has been a reliable holder of a collaborative marketing approval for Malaysia and has helped add wealth to NZ kiwifruit growers for some years, particularly in the formative stages of introduction of kiwifruit to the Malaysian market. However, Fruitlynx does not appear to have accepted the extent to which the Malaysian market is growing or the significance of Zespri's development of an overall market strategy for Malaysia, which has been evolving since 2006. The conditions against which a collaborative marketing application must be considered in 2012 whilst constant in Regulatory terms has changed significantly in market terms and the appropriate role of Zespri in a growing and maturing market subject to changing logistical, financial, and

other dynamic terms. The Appeal Committee will have some general observations to make at the end of this determination.

5. Outcome of the Appeal

5.1 The Appeal Committee is of the view that Fruitlynx has not established any ground that would enable the Appeal Committee to come to a view that an error has occurred in the Committees consideration of the application. The Appeal is not upheld.

For and on behalf of the Kiwifruit New Zealand Appeal Committee



Sir Brian Elwood

Chairman

Dated: 28 March 2012

Supplementary Observations, not part of the Determination

- 1 The Appeal Committee is satisfied that the Malaysian market has grown significantly in volume of NZ grown kiwifruit sold in recent years. It is also satisfied that it has been appropriate for Zespri to develop its own marketing strategy applicable to Malaysia as a whole in the wider context of its ability to export NZ grown kiwifruit. Increases in the overall wealth of NZ kiwifruit growers do not just result from increasing the volume of fruit into the international market place. The Zespri strategy which it has applied to having increased production of kiwifruit profitably accepted into that marketplace has been through managing supply of high quality product distributed in association with a brand which has become among the top five most recognised fruit brands worldwide. Given its experience of developing markets for a growing volume of NZ grown kiwifruit, Zespri is best placed to determine the pace and manner by which potential new markets are developed.
- 2 Clearly Fruitlynx has played an important part in the initial development of a market in Malaysia for NZ grown kiwifruit and this has been acknowledged by Zespri. However, it appears that market related events have overtaken the environment which enabled KNZ to issue an initial collaborative marketing approval to Fruitlynx and to renew it on a number of occasions.
- 3 Should Fruitlynx decide to make a further collaborative marketing application for Malaysia it will need to have regard to the current market dynamics as well as the Regulatory parameters applicable to such applications and illustrate how the growth in the overall wealth of NZ kiwifruit suppliers will be achieved.

Appendix

Extract of Paragraphs 2 to 4 of the KNZ decision made in respect to 3 appeals by Turners & Growers Limited in respect of applications to export kiwifruit to Japan, Mexico and the USA, heard on 5 May 2009:

2 . Regulatory provisions applicable to collaborative marketing

- 2.1 Collaborative marketing of New Zealand grown kiwifruit is authorised by Part 4 of the Regulations.
- 2.2 Regulation 24 sets out the purpose of Part 4 as “... 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.”
- 2.3 A “Supplier” for the purposes of the Regulations is defined as “...a person from whom ZGL acquires the property in kiwifruit grown in New Zealand:”. See Regulation 2.
- 2.4 A “Collaborative marketing arrangement” is defined as “... an arrangement by which a person may export New Zealand grown kiwifruit in collaboration with ZGL:”. See Regulation 2.
- 2.5 Regulation 25 states, “The powers and functions of the Board under this Part [Part 4] are to be exercised in a manner that seeks to best achieve the purpose in regulation 24.”
- 2.6 Regulation 26 enables the Board, to “...no later than 1 month after the commencement of each kiwifruit season, direct ZGL to make a certain volume of kiwifruit available for collaborative marketing arrangements in that current season.”
- 2.7 Regulation 28(2) provides that the Board, in making a decision on an application made under Regulation 27 for a collaborative marketing approval:
 - “(a) May before deciding whether to approve the application indicate to the applicant possible changes to the application which, if included, would improve the prospects of the application being approved; and
 - (b) May, in approving an application, impose any reasonable and necessary conditions;”

3. Regulatory regime for the export of New Zealand kiwifruit

- 3.1 Regulation 3 imposes an export ban on the export of kiwifruit from New Zealand "...otherwise than for consumption in Australia except as authorised or approved by the Board in accordance with these regulations."
- 3.2 Regulation 4 (1) requires that "(1) The Board must authorise ZGL to export kiwifruit."
- 3.3 Part 4 of the Regulations enables the Board to receive and consider applications for collaborative marketing approvals and require ZGL to enter into collaborative marketing arrangements which the Board approves.

4. Effect of the Regulatory regime

- 4.1 The Regulations create what is commonly known as a "single desk" export regime for the export of kiwifruit from New Zealand other than for consumption in Australia.
- 4.2 ZGL is effectively that single desk, allowing for the consolidation of the New Zealand kiwifruit crop which is to be exported to other than Australia for consumption in that country, to be largely channelled through a single source of supply. This consolidation has allowed for the development of the Zespri brand for kiwifruit and the Zespri system for handling kiwifruit from orchard gate to overseas buyers.
- 4.3 The Zespri system has focused upon the market requirement for kiwifruit and enables New Zealand kiwifruit to be sold into the high end or premium grade fruit market place to the advantage of kiwifruit suppliers. Individual kiwifruit growers whose fruit is to be exported are required to comply with the general quality standards set by Zespri affecting such matters as fruit size profile and dry matter content. This has been supported by brand development and in market promotional expenditure. Zespri is the leading internationally recognised brand for kiwifruit. The marketing advantage is that New Zealand grown kiwifruit is available in global markets in good quantities and of consistent quality. Consequently New Zealand kiwifruit sold through the Zespri system sells at premium prices. Generally supply and demand for New Zealand kiwifruit is in balance and an increasing crop volume has been sold in

the face of increased world wide production of kiwifruit often marketed at lower prices than that obtained by Zespri.

- 4.4 The volume of New Zealand kiwifruit marketed through Zespri reached approximately 100 million trays during the 2008-2009 season. The Zespri strategy is to maintain tight control over the in market distribution channel, as much as possible giving distributors the benefit of exclusive access to New Zealand kiwifruit. In turn Zespri requires a commitment to New Zealand kiwifruit, in the form of for example dedicated staff, cool store capacity and where possible the handling of only New Zealand kiwifruit. In addition, Zespri also develop relationships with the major retail chains, assisting to build customer demand with in store and other promotions. In combination there is a demand push and a demand pull which helps build price premiums. If there are alternative supply channels of the same sourced fruit, this balance can be undermined particularly in the very competitive market between the same and different fruits. The major retail chains in particular focus on Class 1 fruit and know that significant volumes of New Zealand kiwifruit are available from a single source of consistent quality and size and backed by a controlled and monitored supply chain and in market service and promotional expenditure.
- 4.5 Although New Zealand grown kiwifruit is the subject of a single desk marketing regime through the export authorisation granted to Zespri for export other than for consumption in Australia, Zespri “must enter into a contract with the collaborative marketing approval holder consistent with the collaborative marketing approval.” issued by the Board (see Regulation 29)
- 4.6 Thus although the Board must authorise Zespri to export kiwifruit it can issue collaborative marketing approvals under Part 4 of the Regulations.
- 4.7 The Board therefore has the capacity to issue collaborative marketing approvals as defined by the Regulations and Zespri is required to enter into a contract with the approval holder. Zespri’s consent or agreement to a collaborative marketing approval is not a requirement of the Regulations or of the Board when considering an application for a collaborative marketing approval.
- 4.8 Generally what is an essential pre-requisite to the Board issuing a collaborative marketing approval is an applicant’s ability to satisfy the Board that the collaborative marketing arrangements being proposed will achieve the

purpose set out in Regulation 24 “of increasing the overall wealth of New Zealand kiwifruit suppliers.” This requires the Board to take:

1. a broadly based approach to the collective short and long term interests of New Zealand kiwifruit suppliers rather than to the specific interests of individual suppliers or groups of suppliers,
2. recognition of the single desk export regime prescribed by the Regulations,
3. cognizance of the operation of the Zespri market strategy in implementing that single desk export regime, and
4. account of the extent to which the proposed arrangement is or can be one that is “in collaboration with ZGL”.

4.9 The Board must finally come to the view that increasing the overall wealth of New Zealand kiwifruit suppliers will (or will likely) result from its approval of a particular collaborative marketing arrangement.

4.10 The Board responsibility in this regard is not an easy one. There can be and sometimes is a differing perspective of what will increase the overall wealth of New Zealand kiwifruit suppliers. The Board is a body with extensive experience of the New Zealand kiwifruit industry and the differing views within that industry and has noted the widely held support for the single desk regime upon which the industry is currently based. Recognition of that single desk structure and what it has achieved for New Zealand kiwifruit suppliers is a factor that properly must be carefully weighed by the Board when considering a collaborative marketing application, as an undermining of that marketing structure may have negative consequences for overall supplier wealth.

4.11 The Boards approach has been to encourage would be collaborative marketers to engage with Zespri from an early stage in the development of collaborative marketing arrangements. This is because any collaborative marketing arrangement approved by the Board entails the export of New Zealand grown kiwifruit “ in collaboration with Zespri.” The Board interprets the collaboration required as meaning to work with Zespri on an arrangement for the export of New Zealand grown kiwifruit with the purpose of increasing the overall wealth of New Zealand kiwifruit suppliers.

4.12 There have been occasions when the Board has approved collaborative marketing applications contrary to Zespri’s wishes because the applicant has

demonstrated to the Board's satisfaction that the overall wealth of NZ kiwifruit suppliers will be increased, The Board is constantly on guard to ensure that Zespri considers properly and with an open mind the collaborative marketing proposals which are put to it. The Board has adequate powers to require Zespri to enter into collaborative marketing arrangements which it approves. See Regulation 29. The Board may also indicate possible changes to an application which would improve the prospects of the application being approved: see Regulation 28 (2) (a); and impose any reasonable and necessary conditions: see Regulation 28 (2) (b).

- 4.13 The Board does not consider an undertaking or intention to collaborate with Zespri after a collaborative marketing approval has been issued to be the collaboration required by the Regulations. The arrangements for collaboration need to be identified preferably before the proposal is considered by the Board because unless clearly identified there could be risks to the purpose of increasing the overall wealth of kiwifruit suppliers. The more complete is the level of collaboration the more likely it is that the proposal if approved would increase the overall wealth of New Zealand kiwifruit suppliers by removing uncertainties or concerns that what is proposed may for example result in the substitution of Zespri branded fruit by other fruit without an increase in the overall wealth of New Zealand kiwifruit suppliers.