

## **KIWIFRUIT EXPORT REGULATIONS 1999 (the “Regulations”)**

**Decision** of the Collaborative Marketing Appeal Committee of Kiwifruit New Zealand (“the Appeal Committee”) relating to the Application by Seeka Industries Limited (“Seeka”) for a collaborative marketing approval to export kiwifruit to China in collaboration with Zespri Group Limited (“ZGL” or “Zespri”).

**HEARING DATE:** 5 May 2014

**PRESENT: The Appeal Committee**

Sir Brian Elwood

Alister Hawkey

Ruth Lee

**In attendance:** Richard Procter, Kiwifruit New Zealand (“Chief Executive”)

### **1. Introduction**

- 1.1 In October 2014, Seeka applied to Kiwifruit New Zealand (KNZ) to export 60,000 tray equivalents Wilkins cultivar Green Class 1, all sizes, and 6,000 tray equivalents Green Class 2, all sizes, to distributor Dole for sale to retailers Lotus (Central East China) and RT Mart (Northern China).
- 1.2 KNZ delegated to the Collaborative Marketing Committee for SE Asia, India and China (the “Committee”) authority to consider and decide the application.
- 1.3 On 28 February 2014, the Committee comprising Messrs Ian Greaves and Hendrik Pieters approved an arrangement for the export of 60,000 trays of Wilkins Green Class 1 kiwifruit by Seeka under the SeekaFresh brand to its distributor Dole for sale to retailers Lotus (Central East China) and RT Mart (Northern China).

- 1.4 In approving the arrangement, the Committee:
- 1.4.1 Recommended that Seeka seek access to the Zespri freight arrangements for the 2014-15 season;
  - 1.4.2 Explained their reasons for requiring that the arrangement be part of the Zespri pool as follows:

“The effect of common pooling is that all growers share returns from the overall mix of higher and lower returning markets. Seeka have proposed that there be a separate pool for Wilkins, the result of which may be an advantage to one grower, or group of growers, rather than growers as a whole. For example, China is currently one of the higher OGR markets, is perceived to be supply short, and is expected to have the potential over time to become the highest returning market. To achieve this the industry has historically invested heavily in promotion, brand and systems, the effect of which manifests itself in a price premium for all NZ grown kiwifruit. This strongly incentivises proposals directed at the China market. On the cost side, common pooling also carries with it economies of scale benefits, including for freight.

On the basis of the information available, the Committee were not convinced that separate pooling for this arrangement will increase the overall wealth of NZ kiwifruit suppliers. This approval is on the basis that the Wilkins kiwifruit forms part of Zespri inventory, and is sold to Seeka at FOBS.”;
  - 1.4.3 Declined an increase in the number of retailer channels for this arrangement on the grounds that the reasons for this had not been provided, and the volume to be sold was similar to last season;
  - 1.4.4 Declined to approve the export of Class 2 kiwifruit under this arrangement as the Committee had no information before it as to why this fruit was required; and
  - 1.4.5 Declined to grant a three year approval because on the basis of the information provided, the Committee was not satisfied that there is an increase in the overall wealth of NZ kiwifruit suppliers from a longer term than one year.
- 1.5 Collaborative marketing arrangements generally are approved on the basis of the proposal submitted by the applicant but include specific and general conditions, the former of which are arrangement specific, the latter of which apply to all approved arrangements. Where supply of fruit is from the Zespri pools, the terms of trade are also specified.
- 1.6 The terms of trade, and specific conditions of approval identified by the Committee for this arrangement were as follows:

Terms of Trade:	Zespri standard terms of supply incorporating the conditions as set out in this approval.
Specific Conditions of approval that apply to this arrangement:	<ol style="list-style-type: none"> <li>1. Collaboration with Zespri country strategy. Close cooperation is required between Zespri and Seeka to act in the best interests of the NZ kiwifruit industry as a whole. Seeka and Zespri are to co-ordinate pricing and other operational details on an as needed basis, including to avoid substitution of other New Zealand grown kiwifruit. Failure to do so may result in cancellation of this arrangement.</li> <li>2. No wholesale market sales. Sales to nominated retailers, in geographical areas defined in agreement with Zespri in advance of first shipment. Sales to local staff are permitted for their own use, of no more than one tray per family per week. In the event that any of this fruit is resold, local staff sales are to be cancelled.</li> <li>3. Written acknowledgement from Dole China and the relevant retailer(s) committing to take the kiwifruit the subject of this arrangement in advance of shipment, and pay for it. The CIF price is to be set at not less than the Zespri New Zealand dollar equivalent of the target local currency CIF price at time of shipment.</li> <li>4. Clear definition of the cultivar as Wilkins in customs declarations and all promotional material.</li> <li>5. When and if requested by Zespri, the collaborative marketer is to provide a weekly summary of: <ol style="list-style-type: none"> <li>(i) volumes of trays imported into each market and volumes of trays sold,</li> <li>(ii) net proceeds of sale per tray (where the net proceeds of sale is defined as the nominated price at which kiwifruit is sold to the collaborative marketers customer, less any financial payments or financial incentives such as rebates and discounts, and any other equivalent adjustments to purchase price (collectively for these purposes referred to as "financial incentives")) where the benefit or any part thereof is directly or indirectly to the collaborative marketer's customer, and irrespective of how these financial incentives arise, and</li> <li>(iii) claims on the NZ kiwifruit industry due to fruit quality, including softs.</li> </ol> </li> <li>6. Kiwifruit delivered under this arrangement is to comply in all respects with the current Zespri quality system for Zespri Green Class 1 kiwifruit. The collaborative marketer is to be fully liable for quality (storage) defects of kiwifruit delivered into market under this arrangement, incurred up to point of sale,</li> </ol>

	<p>including the costs of disposal, repack, and the associated management costs.</p> <p>7. Financial results and forecasts based on export of kiwifruit under this approval including as to actual yields and shipment timing are to be provided to Zespri in Appendix A form prepared on a cumulative basis (refer application documentation as updated) , separately reconciled to the current payment, and be prepared in such a way that the result is consistent with the final results for this collaborative marketing arrangement. On request, Seeka is to provide verification of the results and underlying information to an auditor appointed by Zespri for this purpose, to enable reconciliation to the amount paid to the Zespri pools.</p>
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## **2. The Appeal**

2.1: The details of the appeal are set out in an email dated 23 April 2014 and can be summarised as follows:

- (a) The process undertaken by the Committee in setting the conditions attaching to the approval was unreasonable:
- (b) The conditions attaching to the approval breached Regulation 28 (2) (c) of the Regulations in that they are not “reasonable and necessary”.
- (c) The effect of having to pool the returns of the collaborative marketing programme and denying negotiations with Zespri for a “service level agreement” (“SLA”) is to deny the ability to earn potential income which would have been earned had the Wilkins grower been a Hayward grower in the Hayward pool. The Wilkins grower delivers a positive accretion income to the national pool yet receives a lower amount than if they had been treated as a Hayward grower and their fruit treated as Hayward.

2.2 By a further email dated 28 April 2014 Seeka sought to:

- (a) Emphasise its concern that the conditions attached to the approval breached Regulation 28 (2) (c); and
- (b) Identified the remedy requested as "to relieve the conditions and run this [the collaborative marketing programme] as a completely separate programme outside the pool [the Hayward pool operated by Zespri] ...

or alternatively to allow an SLA [service level agreement] that delivers the programme \$0.80 per tray premium ...".

### **3. How the Appeal Committee was to hear the appeal**

3.1 Although Seeka had earlier indicated it would appeal the Committee decision in order to address its concerns about conditions attaching to the Committee approval of its application for a collaborative marketing approval, KNZ initiated discussions at an administrative level to see if Seeka's concerns could be resolved. Apart from the decision of the Committee following it receiving further information as to the justification for Class 2 kiwifruit for promotional purposes, and the granting of that approval, those discussions did not result in any other relevant changes being made to the original approval. The email of 23 April 2014 was the first indication that Seeka did wish its appeal to proceed.

3.2 As the fruit picking season was underway timing had become critical to the implementation of the programme and the need to consider the appeal assumed urgency. KNZ ascertained the first date Appeal Committee members could come together to hear the appeal and advised Seeka. That date was not suitable to Seeka as its representative Michael Franks was to be overseas on business. KNZ offered Seeka three options to have the appeal considered as follows:

- "1        Seeka is represented at a hearing on 5 May 2014 by Company representatives excluding yourself [Michael Franks] because of your absence overseas.
- 2        Seeka submit to the Appeal Committee in writing and the Committee will consider the written material before it on the 5th May 2014.
- 3        The Appeal Committee will meet on 14th May at which time I understand you [Michael Franks] are able to attend personally."

Seeka chose option 2. The Appeal Committee met on 5 May 2014 to consider the appeal on the basis of the information then available to it. Neither Seeka nor Zespri appeared before the Appeal Committee. The Appeal Committee had before it the Seeka collaborative marketing application, the Committee determination and approval, copies of email correspondence from Seeka to KNZ including the notices of appeal referred to in para. 2.1 and 2.2 above and

to Seeka from KNZ and aide memoirs from the KNZ Chief Executive. The Appeal Committee also had a letter from Zespri dated 1 May 2014 in response to the notices of appeal, a copy of which was made available to Seeka to enable it to comment before the Appeal Committee met to consider the appeal. No further comment was received from Seeka.

#### **4. Preliminary matter**

- 4.1 Seeka noted in its email of 28 April 2014 a query about the potential conflict of Alister Hawkey as a member of the Appeal Committee through his being a Director of Nutritious Kiwifruit Company Limited and a Director of Trevelyan Pack and Coolstore Limited which were seen as "a potential competitor and a competitor of Seeka" respectively. This query was not supported with any evidence or explained by way of elaboration.

Alister Hawkey was elected as a Director of KNZ by kiwifruit producers in accordance with Regulation 37 of the Regulations and Mr Hawkey advised the Appeal Committee that the two companies concerned are not involved in the collaborative marketing of kiwifruit into China which was the matter before the Appeal Committee. The Appeal Committee is accordingly of the view that Seeka has not established that Mr Hawkey has a conflict of interest which would require him to stand down as a member of the Appeal Committee.

- 4.2 Mr Hawkey continued as a member of the Appeal Committee.

#### **5. Consideration of the Appeal**

- 5.1 From the notices of appeal the Appeal Committee identified what appeared to be the main issues of concern to Seeka. These are as set out in paragraphs 2.1 and 2.2 above. The Appeal Committee was assisted in this endeavour by a consideration of the remedy sought by Seeka, namely that it "relieve the conditions and run this [the approved programme] as a completely separate programme outside the pool (as with First Fresh) or alternatively to allow an SLA [Service Level Agreement] that delivers the programme \$0.80 per tray SLA premium...".

- 5.2 The process undertaken in setting the conditions attaching to an approval

It is clear that the Committee adopted the usual KNZ process of attaching conditions either of a general nature or relating to some aspects specific to the particular approval under consideration. The imposition of conditions follows the decision to support an application. KNZ may in approving an application impose any reasonable and necessary conditions: see Regulation 28 (2) (b). The approval is completed when the conditions to be attached to it are identified by the Committee considering the application to be reasonable and necessary to underpin it. This is not a process involving the Committee and the applicant agreeing to the conditions attaching to the approval although in the process of hearing the applicant the possibility of conditions clarifying or supporting what is being proposed may be explored. Seeka were concerned that the conditions attaching to the approval had not been agreed by it. The Appeal Committee is satisfied that the Committee correctly applied the usual approach to the imposition of conditions and it was not obliged to obtain Seeka's agreement to the conditions. The only requirement on the Committee in setting conditions is that they be reasonable and necessary.

5.3 In seeking a remedy, Seeka has sought either to:

5.3.1 "relieve the conditions and run this [the approved programme] as a completely separate programme outside the pool (as with First Fresh)...", or

5.3.2 "...alternatively to allow an SLA that delivers the programme \$0.80 per tray SLA premium...".

5.4 The effect of having to pool the returns

The Committee considered the question of pooling, and commented specifically on it in its approval of the arrangement as recorded in paragraphs 1.4.2 above. Seeka did not present reasons in its notices of appeal as to why it did not agree with the position of the Committee, other than asserting the result was in combination with "subsequent denial of allowing any negotiation with Zespri for a "Service Level Agreement"" being financially detrimental to the Wilkins grower. On this issue, Zespri submitted in its letter dated 1 May 2014 as follows:

" KNZ appears to have decided in respect of the Seeka proposal that common pooling is a reasonable and necessary condition, with a view to preserving the intent of the Regulations that collaborative marketing would benefit the industry as a whole, and to avoid setting a precedent for collaborative marketers to "cherry-pick" markets while leaving lower-returning

opportunities to be borne by the Zespri inventory. Zespri submits that it was reasonable for KNZ to take this position.”

....

“Where a variety is largely considered to be within type of a mainstream Zespri product and is proposed to be sold in the same markets and sales windows as Zespri inventory, Zespri believes that pooling is appropriate to mitigate against opportunistic exploitation of premium markets and/or exceptional market conditions as exist in the 2014 season.”

The Appeal Committee is of the view that the pooling arrangement is a consequence of the application of the Zespri Terms of Trade to the supply of fruit by Zespri from its inventory to the approved arrangement. Seeka has not explained how this consequence is neither reasonable or necessary given the Committees explanation or the Zespri submission. The Appeal Committee considers the consequence of the application of the Zespri Terms of Trade, common pooling, to be reasonable and necessary. Common pooling did not result from any other specific condition attaching to the approval.

5.5 In respect to the Seeka suggestion for a separate pool for the Wilkins fruit, Zespri commented in its letter of 1 May 2014 that:

“ Zespri accepts and agrees with the principle that separate pooling may be justified for collaborative marketing programmes where the kiwifruit at issue represents a genuine opportunity to earn incremental shelf space in its own right – such as in the case of First Fresh where the variety generally occupies a different sales window from the Zespri inventory.”

Such is not the case with Wilkins fruit in the Zespri inventory which has been treated in the same manner as Hayward fruit for some years and as part of the Green Class 1 pool.

5.6 The alternative remedy proposed by Seeka was to allow Seeka to negotiate an SLA that delivers the programme \$0.80 per tray SLA premium.

5.7 Seeka provided a spreadsheet setting out how the amount of \$0.80 cents per tray was calculated. In summary the amount was the Seeka calculation of the lost differential benefit to it (after deduction of relevant costs) of the time payments that would have been paid to it from the Zespri Class 1 pool if the Wilkins kiwifruit delivered under the arrangement under appeal had been delivered in the same ratio per week as Seeka delivered Hayward to Zespri in the 2013-14 season. In the 2013-14 season, Seeka advised that Hayward supplied by them to Zespri was delivered in weeks 13 to 47. Seeka wished to apply the net lost differential benefit calculated by them based on the 2013-14



season to the 2014-15 season when the same circumstances may simply not apply.

- 5.8 In explanation as to why this payment should apply to the 2014-15 season, Seeka advised as follows:

“This China Wilkins program is required to load out 100% of the fruit in a compressed time frame – after the Kiwistart period, and before significant time payments are made from the pool. The [Wilkins] fruit typically loads out in weeks 21 to 25”.

Time payments are designed to compensate Registered Suppliers for the costs and risks of late delivery. Under the Supply Agreement for the 2013-14 season, time payments are applied to kiwifruit delivered from week 25 on, at an increasing rate with each week.

- 5.9 In its return of the Wilkins results for the 2013-14 season, Seeka advised delivery occurred in weeks 22 to 27, and time payments were paid from the pool for the Seeka Wilkins arrangement accordingly, amounting to on average \$0.26 per tray or \$0.17 net after costs. These time payments were calculated in a manner consistent with that for all other kiwifruit submitted to the Zespri Green Class 1 pool.

- 5.10 The Appeal Committee gave particular consideration to the Seeka submission that for the 2014-2015 season it was required “...to load out 100% of the fruit in a compressed time frame...after the Kiwistart period...” and found no such requirement on it in the approval document. Instead, by the terms of its application it was Seeka which proposed “The Wilkins Seeka Dole program is an early program”, “There is no effect on the market from this small early program”, and “Wilkins is an early program”. More specifically, the projected load out timing for the arrangement was proposed by Seeka in its application (Appendix A) for weeks 22 to 30. It appears that rather than the load out timing being a “requirement” imposed by the Committee, the load out timing was an integral part of Seeka’s own application for approval.

- 5.11 In its notices of appeal Seeka advised “The program delivers positive accretive income to the national pool, yet the grower receives a lower amount than they would have received should they have been treated as a Hayward grower and had their fruit treated as Hayward.” On the contrary, the Appeal Committee found nothing to suggest that the payment from the pool to Seeka for this arrangement was any different than what it would have been if the payment was

for Hayward. The Zespri pool does not have one set of payment rules for Hayward fruit and another for Wilkins fruit.

- 5.12 The terms and conditions for supply of kiwifruit to Zespri are set out in the Supply Agreement, of which SLAs form part. Negotiation of an SLA is a matter between Registered Suppliers and Zespri, and KNZ is not involved in the negotiation of either the Supply Agreement or the associated SLAs. The only constraint imposed is by virtue of the regulatory requirement for Zespri to enter into a contract with the collaborative marketing approval holder consistent with the collaborative marketing approval (see Regulation 29).

Seeka is a Registered Supplier. In its notices of appeal, Seeka have expressed the view that it had been denied the opportunity to negotiate an SLA for the supply of Wilkins kiwifruit to Zespri for the arrangement the subject of this appeal. The Appeal Committee notes it is for Seeka and Zespri to decide whether such an SLA should be considered, not a matter for KNZ involvement. However, if such an SLA had been agreed by Seeka and Zespri, the Appeal Committee notes that it would have been a significant departure from the current payment system adopted by the industry for fruit delivered after week 20, and if negotiated with Seeka alone, would appear to carry with it significant risk of discrimination as between suppliers.

6. Were the conditions attaching to the approval reasonable and necessary

Measured against the factual background identified earlier in this determination, the general and specific conditions included as part of the approval were both reasonable and necessary. Seeka did not explain how the conditions were neither reasonable or necessary other than to make a general allegation that the conditions “may have the effect of breaching [section 28 (2) (c)]of the Regulations”. The Appeal Committee proceeded to consider the Seeka appeal on the basis of the provisions of Regulation 28 (2) (b), not Regulation 28 (2) (c) which appeared to have no application in the circumstances.

It is clear that Seeka would have liked other consequences to have followed from the approval including the conditions imposed. In so far as the conditions have actually created the outcomes which are of concern to Seeka, some of those concerns are of Seeka’s own making or a misunderstanding of KNZ’s powers. The Appeal Committee is of the view that all the conditions in the

approval are reasonable and necessary to ensure the integrity of the approved arrangement in achieving the purpose for which collaborative marketing is identified in the Regulations, namely “ of increasing the overall wealth of New Zealand kiwifruit suppliers.

## **7. Outcome of the Appeal**

The appeal is not upheld.

This Determination confirms the decision of the Appeal Committee conveyed to Seeka on 5 May 2014 in view of the tight time constraints and as a matter of courtesy to ensure that Seeka was inconvenienced to the least extent possible as a result of its appeal.

For and on behalf of the Kiwifruit New Zealand Appeal Committee



Sir Brian Elwood

**Chairman**

**Dated: 13 May 2014**