



## **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 Southern Produce Limited (“SPL”) to export kiwifruit to North America in collaboration with Zespri Group Limited (“ZGL” or “Zespri”).

**HEARING DATE:** 17 March 2014

### **PRESENT: Kiwifruit New Zealand (Appeal Committee)**

Sir Brian Elwood

Ruth Lee

Ian Greaves

### **Southern Produce Limited**

Tony Ponder

Kim Webb

### **Zespri Group Limited**

Katherine Evans

Murray Linnell

**In attendance:** Richard Procter

## **1. Introduction**

- 1.1 In October 2013, SPL applied to Kiwifruit New Zealand (KNZ) to export 154,000 tray equivalents Hayward Green Class 1, sizes 22, 25, 27, 30, 33, 36, 39, and 42, and 23,000 tray equivalents Green Organic Class 1, sizes 22, 25, 27, 30, 33, 36, 39, and 42, to distributor A J Trucco Ltd for supply to independent produce stores and small/medium retail chains on the East Coast of North America.
- 1.2 KNZ delegated to its America, Indian Ocean and Philippines Collaborative Marketing Committee (the Committee) authority to consider and decide the application.
- 1.3 The Committee by way of an indicative decision approved the application for 77,000 trays Green Class 1. The Committee declined the application for 23,000 tray equivalents Green Organic Class 1, but offered to re-hear the application for organics if it transpired that the figures available to it at the Collaborative Marketing meeting were incorrect. No request had been received for a re-hearing.
- 1.4 By email dated 16 January 2014, SPL appealed the Committee's indicative decision.
- 1.5 The Appeal Committee heard the appeal on the 17 March 2014.
- 1.6 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 SPL.

## **2. SPL Appeal**

- 2.1 The details of the SPL Appeal are set out in the email dated 16 January 2014, referred to in paragraph 1.4 above. In essence the appeal centred around the following matters:

- That the comparative data presented to the Committee was inaccurate in context or at least incomplete and lacked fairness in terms of comparison, such that the decisions were based on incorrect assumptions;
- That conclusions reached by KNZ failed to recognise ten years consistent performance of the applicant;
- That the decision failed to acknowledge adjustments in the target pricing made by Zespri; and
- That the conclusion to reduce the volume of Class 1 green kiwifruit could not have been reasonable given that Southern Produce had not received 2014 pricing from Zespri.

### **3. The Committee Decision**

3.1 The Committee approved the application for export of Hayward Green Class 1 kiwifruit, but at a reduced volume of 77,000 trays, declined the application for 23,000 tray equivalents Green Organic Class 1, but offered to re-hear the application for organics if it transpired that the figures available to it at the Collaborative Marketing meeting were incorrect.

3.2 In summary, the reasons were:

- 77,000 trays of Hayward Green was a volume considered by the Committee as more consistent with an outlook for a constrained green kiwifruit supply in 2014, and the level of orchard gate returns from the North American market.
- The figures available at the time of hearing of the application would indicate that the SPL organic experience with the current season suffered due to freight, agent's commission, and time costs on a comparable basis with Zespri, and therefore did not increase the overall wealth of New Zealand kiwifruit suppliers. However, the Committee also understood SPL were investigating the relative performance of their organic arrangement and offered should it eventuate that the figures on which their conclusion was based were incorrect, they would welcome the opportunity to reconsider this

aspect of the application. At the time of the hearing on 17 March 2014 SPL had not re-approached the Committee to take up its offer to reconsider.

#### **4 Events subsequent to the Appeal**

- 4.1 As part of the appeal appeared to relate to the factual matter of the comparative data presented for organics to the Committee, by email dated 5 February 2014, Richard Procter advised SPL of the data on which the Committee decision was based, including for comparison the Zespri advised North American pricing and returns.
- 4.2 SPL did not respond to that email.

#### **5 The Appeal Committee's Consideration of the Appeal**

- 5.1 From the papers available to the Appeal Committee, it was clear the Committee was not satisfied as to how the applied for volume not approved would increase the overall wealth of New Zealand kiwifruit suppliers:
- in the case of Green Class 1 given overall supply constraints and superior returns available elsewhere, and
  - in the case of organics, based on the returns achieved last season by SPL in North America.
- 5.2 At the meeting of the Appeal Committee on 17 March 2014 Tony Ponder spoke and presented a written paper. Given what subsequently emerged during the hearing it is not necessary at this stage to analyse or discuss the thrust of the written or verbal submissions save to note:
- (a) an explanation was given to SPL as to the reason why the green volume approved had been reduced from the previous year's allocation; and
  - (b) it became obvious that there had been a communication issue which resulted in SPL not taking up the offer of the Committee to reconsider if SPL had more correct/additional information available for the Committees consideration.
- 5.3 In the circumstances it appeared to be sensible for the Appeal Committee to adjourn the hearing to enable SPL and Zespri to confer and check the

available information with a view to SPL pursuing the Committees offer. It could be that a substantial measure of agreement would emerge around the correct information the Committee should consider before it reached a final decision. This course of action was endorsed by SPL and Zespri.

- 5.4 The Appeal Committee therefore adjourned the hearing sine die for one week for further discussions and to allow the Collaborative Marketing Committee to reconsider this new information, following which the hearing to be resumed if necessary at the request of SPL.

For and on behalf of the Kiwifruit New Zealand Appeal Committee



Sir Brian Elwood

**Chairman**

**Dated: 27 March 2014**



## **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.