

Final decision of	the New Zealand Kiwifruit Board
In the matter of	a Discrimination complaint against Zespri
Under	the Kiwifruit Export Regulations 1999
Dated	26 July 2019

INTRODUCTION

- 1 This is the final decision of the Discrimination Complaint Committee on a complaint lodged by Southern Orchards Limited (**SOL**) against Zespri on 20 March 2019 and expanded upon in a detailed letter dated 12 April 2019.
- 2 SOL's complaint alleges that Zespri afforded preferential treatment in favour of other suppliers over two of the Complainant's KPINs by unreasonably delaying in issuing grower numbers to those KPINs.
- 3 The complaint is brought under the enforcement regime established by the Authorisation to Export Kiwifruit granted to Zespri Group Limited pursuant to the Kiwifruit Industry Restructuring Act 1999 and the Kiwifruit Export Regulations 1999.

INVESTIGATION PROCESS

- 4 The Board of Kiwifruit New Zealand (**KNZ**) met on 23 April 2019 and considered there were sufficient grounds to justify an investigation. The Board delegated to a committee all functions and powers necessary to undertake an investigation into this complaint. The Committee appointed Brian Dickey (Chair), Ian Greaves and Neville Harris to conduct the investigation.
- 5 The Committee issued a Notice of Investigation to the parties in accordance with cl 6.2.2 of the Export Authorisation on 8 May 2019 and set out a preliminary process for the investigation. The Committee aimed for its process to be consistent with the rules of natural justice and to allow the investigation to be conducted in a manner that is speedy, inexpensive and simple, as directed by cl 7.1(b) of the Export Authorisation.
- 6 The Committee's process was as follows:
 - Zespri to respond to SOL's complaint, including all information that Zespri considers relevant to the Committee's investigation, and any submissions by 24 May 2019.
 - SOL to provide any submissions and/or further information in reply to Zespri's response by 31 May 2019.
 - The Committee to issue its preliminary decision on whether Zespri has failed to comply with regulation 9 by 14 June 2019.

- SOL and Zespri to provide responses to any comments or conclusions in the preliminary decision by 21 June 2019.
 - The Committee to issue its final decision on whether Zespri has failed to comply with regulation 9 by 28 June 2019.
 - The Committee to invite the parties to make submissions on the orders appropriate in the circumstances, if any, only if there has been a failure to comply.
- 7 Zespri responded to SOL's complaint on 7 June 2019. This response was outside of the proposed timeframe by 14 days as agreed to by the Committee, and SOL was given an automatic extension to 14 June 2019. At SOL's request, a further extension to 28 June 2018 was provided on 13 June 2018. SOL's response was received on 28 June 2018.
- 8 Having received and considered all of the information provided by the Parties, the Committee released its preliminary decision on 8 July 2019 in accordance with cl 6.2.11 of the Export Authorisation. The Committee invited responses from both parties by 19 July 2019 and committed to issuing its final decision on 26 July 2019.
- 9 SOL responded to the preliminary decision on 19 July 2019 and Zespri responded on 22 July 2019. Those responses were incorporated into the final decision, which the Committee issues today, 26 July 2019.

THE NON-DISCRIMINATION RULE

- 10 This complaint alleges that Zespri has breached the non-discrimination rule, set out in regulations 9 and 10. These provide:

9 Duty not to discriminate unjustifiably

ZGL, and its directors and managers, must not unjustifiably discriminate among suppliers and potential suppliers in respect of –

- (a) a decision on whether to purchase kiwifruit; or
- (b) the terms of the purchase contract.

10 Justifiable discrimination

- (1) Discrimination (or the extent of the discrimination) is justifiable if it is on commercial grounds.

- (2) A commercial ground includes, but is not limited to, matters relating to product features, quality, quantity, timing, location, risk, or potential returns.

11 The non-discrimination rule is one of the mitigation measures set out in Part 3 of the Regulations. These are measures designed to mitigate the potential adverse effects of Zespri's statutory monopsony.¹ As regulation 8 explains:²

8 Purpose of Part

The purpose of this Part is to mitigate the potential costs and risks from the monopsony, by –

- (a) encouraging innovation in the kiwifruit industry while managing risks associated with activities that are not the core business; and
- (b) promoting efficient pricing signals to shareholders and suppliers; and
- (c) providing appropriate protections for producers and ZGL's shareholders and suppliers; and
- (d) promoting sustained downwards pressure on ZGL's costs.

12 KNZ has the function of monitoring and enforcing the non-discrimination rule under regulation 33(1)(b)(i), and is directed to do so in such a way as "to best achieve the purpose in regulation 8" (see regulation 33(2)).

13 It is important to note that KNZ's role in this context is limited to monitoring and enforcing the specific mitigation measures set out in the Regulations. KNZ is not empowered to inquire into whether Zespri's conduct in and of itself meets the objectives of regulation 8, nor to assess the general merits of Zespri's commercial decisions and judgements.

14 This limit on KNZ's role is further confirmed by regulation 6, which provides that the Export Authorisation set by KNZ must *not* provide for a range of matters relating to Zespri's business decisions, including:

- (b) a requirement that ZGL purchase any particular proportion of the kiwifruit crop:

¹ The regulations setting the mitigation measures were made under s 26 of the Kiwifruit Industry Restructuring Act 1999. Section 26(1)(g) refers specifically to "restricting discrimination among suppliers of kiwifruit for export to commercial grounds", which was recognised as a key protection for suppliers against Zespri's market power. See for example the speech of the Minister of Finance on introduction of the Kiwifruit Industry Restructuring Bill on 20 July 1999 and the select committee report, both discussed in *Turners & Growers Ltd v Zespri Group Ltd* (2010) 9 HRNZ 365 at [46] – [50].

² As amended from 1 August 2017 by the Kiwifruit Export Amendment Regulations 2017. Nothing in this decision turns on the amendments to this regulation.

- (c) the basis on which ZGL is to purchase and pay for kiwifruit (other than in connection with the non-discrimination rule) ...

THE COMPLAINT

- 15 SOL's complaint, set out most fully in its letter dated 12 April 2019, alleges that between 19 and 21 March 2019, Zespri unreasonably delayed in issuing grower numbers to two kiwifruit orchards, being KPIN 4240 and 3756 (**Affected KPINs**), thereby blocking them from being submitted for maturity clearance testing on 19 or 20 March 2019, and ultimately from earning a KiwiStart Premium of \$4.09 per tray (**KiwiStart Premium**).
- 16 A KiwiStart premium is an incentive paid by Zespri to suppliers who submit kiwifruit early in the season. The earlier the fruit is submitted, the higher the premium. For Gold3 and Organic Gold3 kiwifruit, the highest premium that could be achieved in 2019 was for fruit submitted in the week of 13 - 19 March. The premium for this fruit was \$4.09 per tray.
- 17 This delay is said to have arisen after SOL submitted Schedule 5 forms for the Affected KPINs that proposed minor amendments to the standard form contract. A Schedule 5 form is the document by which a supplier contracts to supply kiwifruit to Zespri during a particular season pursuant to the Supply Agreement (**Sch 5 Form**). The amendments made by SOL related to Zespri's permission to use information and enter orchards, as well as the timing of compliance with the Supply Agreement.
- 18 SOL says these same amendments had previously been made without issue in relation to other orchards. Most recently, on 13 March 2019, Zespri issued grower numbers to KPINs immediately after the receipt of amended Sch 5 forms. The provision of these grower numbers enabled the registered suppliers to successfully request maturity clearance tests and apply for the KiwiStart Rate.
- 19 SOL says that because of Zespri's delay in relation to the Affected KPINs, these KPINs had to be picked and packed later than they would have been otherwise. These orchards were submitted for maturity clearance the day Zespri released the 5th digit and cleared for harvest the next day and therefore processed under a later supply cap. They earned a premium of \$2.54 per tray.
- 20 SOL alleges that by procuring other suppliers' crops ahead of the Complainants, Zespri acted in a discriminatory manner. It further alleges that Zespri had no commercial reason for this behaviour and the discrimination was not justified.

ZESPRI'S SUBMISSION

- 21 Zespri's explanation in response is that it was assessing the suitability of the amendments and removals which SOL made to various clauses of the Sch 5 Form before issuing grower numbers. Zespri says that this delay was necessary in order to properly understand and decide whether to accept the changes made. It notes that SOL was seeking to contract with Zespri on different terms than suppliers who did not make changes to the Sch 5 form.
- 22 Zespri accepts that SOL had made the same changes to Sch 5 forms for previous KPINs (including on 13 March 2019), but says that due to an administrative oversight those changes were not identified and assessed by Zespri before grower numbers were issued.
- 23 Zespri acknowledges that grower numbers are often issued immediately or shortly after receipt of a Sch 5 form. However, where such forms have been amended (even slightly) and those amendments have been identified, Zespri says it is entitled to take time to understand and decide whether to accept or reject them.
- 24 Zespri submits that its delay in processing amended Sch 5 forms is not enough to constitute discrimination, and that its actions were justifiable in any event. It says that any changes by individual kiwifruit suppliers to the standard Supply Agreement or associated documents (such as the Sch 5 form) might affect matters relating to product features, quality, timing, location, risk, or potential returns.
- 25 Where there are changes, Zespri considers it justifiable to escalate the matter to suitably qualified persons for review and approval, and to allow up to 48 hours for that process to take place.
- 26 Zespri says further that the KiwiStart rate closed at midnight on 19 March 2019, and that it first received Sch 5 forms for the Affected KPINs less than 8 hours earlier, at 4.46pm that day. Zespri considers that it would not have been possible for SOL to receive grower numbers, obtain maturity clearances, and pick and pack kiwifruit for the affected KPINs before the midnight cut-off. Zespri suggests that SOL's reference to a midnight closure on 21 March 2019 appears to relate to the unrelated First-past-the-post volume supply cap (**FPP Supply Cap**).

SOL'S RESPONSE

- 27 SOL maintains its position in response to Zespri's submission. It says that Zespri has acknowledged discrimination in its response by accepting that there was

differential treatment between the Sch 5 forms received on 13 March 2019 and the forms received on 19 March 2019.

- 28 SOL says that the Sch 5 forms for the affected KPINs should have been processed on the morning of 20 March 2019 at the latest, and that this was promised by Zespri. SOL is sceptical that the approach taken by Zespri to approve the amended Sch 5 forms was legitimate. It says that the additional administrative treatment the Affected KPINs received was not the result of due process, but different personnel within Zespri applying different rules. It says that this is evidence of bias in handling the Sch 5 Forms.
- 29 In response to Zespri's contention that any differential treatment that occurred was justified, SOL says that the changes made had no material effect on whether or not a grower number could be issued for the Affected KPINs. It says that the only relevant section of the form is the supply option (A or B) and, in any case, the changes did not affect orchard access, or health and safety requirements. SOL considers that Zespri's argument fails on the evidence because prior to Sch 5 forms being received, and before knowing of any amendments, Zespri staff generally tell growers that grower numbers can be processed without delay.
- 30 SOL ultimately challenges the claim that amended Sch 5 forms should have any bearing on grower numbers. It notes that grower numbers are part of a continuum of requirements that need to be satisfied before a crop is procured. They are not the final stage, and there is no reason why grower numbers should be withheld pending the resolution of any contractual disputes.
- 31 In its response, SOL appears to accept that the rate it received for the Affected KPINs (\$2.54 per tray) was the same rate it would have received if the grower numbers had been issued immediately upon receipt of the Sch 5 Forms on 19 March 2019, and the fruit had been delivered on 20 or 21 March 2019.
- 32 However, SOL disputes that 19 March 2019 is in fact the date on which Zespri received the amended Sch 5 forms. It says that there is a possibility the registered supplier personally delivered the amended Sch 5 forms some days prior to the email of 19 March 2019, meaning that the grower numbers could well have been issued before that date. The Committee notes that no evidence was provided to support this claim and it has therefore been treated as an unsubstantiated assertion.

RESPONSES TO PRELIMINARY DECISION

- 33 In its response to the preliminary decision, SOL submitted that:

- (a) The processing of amended Sch 5 forms has taken longer than 48 hours in the past and the only reason that it didn't in this case was that SOL made a complaint to KNZ on 20 March 2019.
- (b) The wording of what is now paragraph [61] be amended to include the timing of SOL's complaint to KNZ.

34 The Committee has considered SOL's response in coming to its final view of the complaint. However, it does not consider there to be a proper basis for the conclusion that Zespri issued grower numbers only once provoked by KNZ. The past conduct of Zespri was not the subject of this complaint and there is no clear nexus between Zespri being informed of the complaint and Zespri issuing grower numbers. This conclusion notwithstanding, the Committee accepts that some changes to what is now paragraph [61] are warranted. These changes reflect the fact that SOL did complain on 20 March 2019, before grower numbers were issued. They do not affect the Committee's final decision.

35 Zespri had no substantive comments on the preliminary decision. It confirmed that an internal review of processes for reviewing amendments to Sch 5 forms would be completed in the last quarter of 2019. The Committee takes note of this conformation and considers it an appropriate response in the circumstances.

HAS ZESPRI BREACHED THE NON-DISCRIMINATION RULE?

36 Clause 6.2.1 of the Export Authorisation sets out the purpose of the investigation into a complaint as:

The purpose of an investigation conducted under this enforcement procedure is to determine whether ZGL has, on the balance of probabilities, failed to comply with any of the matters referred to in Regulation 33(1)(b)(i) – (iii).

37 Regulation 33(1)(b)(i)³ refers to the non-discrimination rule described in regulations 9 and 10. Breach of the non-discrimination rule requires two elements to be established:

- (a) First, that there has been discrimination between suppliers;
- (b) Second, that the discrimination is not justified as being on commercial grounds.

³ Both before and after the amendments under the Kiwifruit Export Amendment Regulations 2017.

38 The Committee has not applied any formal burden of proof on SOL as the complainant. Rather, the Committee sees its role under regulation 33 as itself inquiring into the issues raised by SOL's complaint, and reaching a view on whether Zespri has, on the balance of probabilities, breached the non-discrimination rule.

IS THERE DISCRIMINATION?

39 As noted in KNZ's decision on an earlier complaint under Regulation 9 determined on 16 June 2016,⁴ discrimination generally means to treat someone differently from someone else when those people are in comparable circumstances. It is also described as arising where there is a difference in treatment between two people or groups in comparable situations, that disadvantages one person or group compared with the other.⁵ Discrimination is generally seen as a broad and non-technical concept.⁶

40 SOL's complaint is that Zespri discriminated against the Affected KPINs by refusing to issue grower numbers immediately upon, or shortly after, receipt of Sch 5 Forms. SOL submits that other suppliers were issued with grower numbers immediately upon transmission of Sch 5 forms, but Zespri withheld grower numbers for these KPINs for almost 48 hours. It alleges that the closer scrutiny of these KPINs as opposed to those of other registered suppliers was discriminatory and unfairly prejudiced SOL's chance to receive the KiwiStart Premium for this fruit.

41 In response, Zespri argues that there was no discrimination under regulation 9. It says that SOL was seeking to contract with Zespri on different terms than suppliers who did not change or amend the Sch 5 forms, and that Zespri was entitled to a reasonable time to check that those amended terms were permissible. It says that the fact the changes to the Sch 5 form proved to be inconsequential is irrelevant. A slight delay in processing amended forms (of less than 24 hours beyond the typical processing timeframe and for the purposes of assessing a supplier's proposed change to the terms and conditions of supply) is not discrimination.

Did Zespri discriminate by treating the amended Sch 5 forms submitted for the affected KPINs differently from un-amended forms?

⁴ Grower Complaint, 16 June 2016, at [4.17] available at: <http://www.knz.co.nz/wordpress/wp-content/uploads/GROWER-COMPLAINT-in-full.pdf>

⁵ *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 at [55] and [136], reaffirmed for example in *B v Waitemata District Health Board* [2016] NZCA 184, [2016] 3 NZLR 569 at [84].

⁶ *Child Poverty Action Group Inc v Attorney-General* [2013] NZCA 402, [2013] 3 NZLR 729 at [48], [72] and [75]; *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 at [60]; [75] – [78] and [123] – [136].

- 42 The Committee accepts that the amended Sch 5 forms which SOL submitted on 19 March 2019 were treated differently from un-amended forms submitted by other suppliers. The nature of this differential treatment was a delay in the time it took a grower number to be issued to SOL.
- 43 This differential treatment arose because the other suppliers had fully accepted the terms and conditions of Sch 5, while SOL had proposed amendments. The Committee considers that this put SOL in different circumstances to other suppliers. It is irrelevant whether the amendments had a significant or negligible impact on the terms and conditions of the Supply Agreement, the effect is the same. By seeking to change the terms of its contractual arrangement with Zespri, SOL was no longer in comparable circumstances to other suppliers.
- 44 Where a supplier makes amendments to a Sch 5 form, the Committee considers that Zespri should be entitled to a reasonable period of time to consider and assess the impact of those changes, before issuing a grower number. Although the issuance of grower numbers is but one stage in the harvest process, it is a critical juncture at which Zespri ensures that its permissions are up-to-date.
- 45 If a supplier suggests changes to a Sch 5 form this may put that supplier in a preferential or disadvantaged position when compared with other suppliers. As a monopsony contracting with a myriad of suppliers under the same Supply Agreement, Zespri must proceed with utmost care whenever different terms are proposed, particular where those terms may put suppliers in different positions.
- 46 It is plain to the committee that the best time to consider such changes is at the time they are proposed and that Zespri may withhold grower numbers to avoid the risk that Zespri be taken automatically to have agreed to those changes. If Zespri did not have time to consider the impact of proposed amendments, it might inadvertently agree to terms which favour one registered supplier over others and breach the non-discrimination rule as a result.
- 47 The Committee considers that Zespri is not discriminating when it treats amended Sch 5 forms differently from un-amended forms because the circumstances are not comparable. That conclusion notwithstanding, Zespri must:
- (a) take a consistent approach to the treatment of all amended Sch 5 forms; and

- (b) take no more time than is reasonable to consider the impact of any proposed amendments and to decide whether or not to issue grower numbers.

Is there discrimination by inconsistent treatment of amended Sch 5 Forms?

- 48 The Committee is concerned by the fact that amended Sch 5 forms for the Affected KPINs may have been treated differently to other amended Sch 5 forms, such as those submitted by SOL on 13 March 2019 or submitted by other suppliers on other dates.
- 49 Zespri does not dispute that the Sch 5 forms sent on 13 March 2019 had been amended in the same way as the Sch 5 forms for the Affected KPINs, nor does it dispute that grower numbers were issued for those KPINs without hesitation. Zespri says it was an "administrative oversight", SOL says it was discrimination. SOL expected the same approach to be taken in respect of the Affected KPINs.
- 50 The Committee has sympathy for SOL's expectations. Zespri must be held to a high standard of consistency and its internal standards must be robust. Zespri should not be in the position where some amended contracts slip through undetected and others do not. If Zespri's policy is to require the Support Team to refer amended Sch 5 forms to suitably qualified persons for approval then that policy should be applied in a consistent manner. It should not be applied at the discretion of members of the Support Team.
- 51 If Zespri had withheld grower numbers for the Affected KPINs altogether, the Committee considers that there would be a strong case for discrimination. Given that the same amendments had not stopped Zespri from issuing grower numbers for the KPINs submitted on 13 March 2019, they should not have stopped Zespri from doing so in respect of the Affected KPINs. This is true regardless of whether the amendments were identified by Zespri or not. It is Zespri's responsibility to ensure that its processes are thorough, and it cannot use an error to shield discriminatory treatment.
- 52 But Zespri did issue grower numbers for the Affected KPINs. SOL's allegation is not that grower numbers were refused, but that they were delayed. The only potential discrimination arises therefore out of the time it took Zespri to issue grower numbers. On 13 March 2019, they were issued immediately. On 19 March 2019, they were issued after 45 hours.

53 This delay either arose because Zespri's internal processes were inadequate to identify changes to Sch 5 Forms or because staff within the Grower Support team were taking different approaches to amended Sch 5 forms. In either case, it is clear that Zespri erred in treating the amended Sch 5 forms submitted on 13 March 2019 differently to the Affected KPINs, but did this error result in discrimination against the Affected KPINs?

54 The Committee considers that the answer to this question turns on whether or not Zespri's delay in issuing grower numbers for the Affected KPINs was reasonable. In other words, did Zespri issue grower numbers for both sets of KPINs within a reasonable period of time?

Was Zespri's delay reasonable?

55 SOL says that Zespri delayed by almost 48 hours in considering the amended Sch 5 forms for the Affected KPINs, a delay which it says was unreasonable. SOL says that based on its experience, and that of other suppliers, it was led to believe that Sch 5 forms would be accepted almost immediately, with grower numbers issued by the end of the working day at the latest.

56 With regards to un-amended Sch 5 forms, Zespri does not dispute SOL's allegations. It says that its internal KPI for the Zespri Grower Support Services Team (**Support Team**) is to issue grower numbers within 24 hours of receipt of a Sch 5 form and generally on the same day as receipt. However, Zespri takes a different view of amended Sch 5 forms.

57 It says that the staff in the Support Team cannot be expected to meet the same deadlines for amended forms as they are not trained to interpret the effects of such amendments. It says that before grower numbers are issued, the Support Team should be referring amended Sch 5 forms to suitably qualified people within Zespri for approval and this takes time.

58 The Committee appreciates the rationale behind such a policy (if applied consistently). The best time to consider proposed amendments to a contract is at the time they are proposed. Taking affirmative action (such as issuing grower numbers) on the basis of an amended contract is risky as it may amount to tacit approval of the amended terms. The Committee would expect Zespri to ordinarily insist that amended Sch 5 forms are sighted and approved by suitably qualified persons before grower numbers are issued. This is the case even when they appear benign at first glance.

- 59 Of course, if the staff in the Support Team are trained to know that particular amendments are of no concern, they may be justified in issuing a grower number without secondary approval. Equally, if such staff are trained to respond to amended Sch 5 forms by advising that Zespri reserves its rights to dispute the amendments, immediate issuance could be justified. However, these are matters of internal Zespri policy and are beyond the scope of the Committee's inquiry. As a matter of general principle, staff in the Support Team can not be expected to consider, and in fact should not be responsible for considering, the impact that amended Sch 5 forms may have on the Supply Agreement.
- 60 The Support Team ought to refer amended Sch 5 forms to a suitably qualified person and withhold grower numbers until satisfied that the amendments made are acceptable, or a grower number can be issued in any case. This must be done within a reasonable period of time.
- 61 The Committee considers that a delay of 45 hours was reasonable in the circumstances. It makes this finding in light of the following facts:⁷
- (a) SOL submitted its Sch 5 forms at 4.48pm on 19 March 2019.
 - (b) At 4.53pm on 19 March 2019, a Zespri staff member responded by advising that the amendments would need to be run past their manager.
 - (c) At 5.07pm on 19 March 2019, a Zespri staff member advised SOL that the Sch 5 form would need to be seen by legal and that they should have an answer the next day.
 - (d) On 20 March 2019, in the morning, the Sch 5 forms were referred to Zespri legal for consideration.
 - (e) At 6.56pm that day, SOL followed up about the Sch 5 forms.
 - (e) On 21 March 2019, in the morning, Zespri was informed that SOL had lodged a complaint with KNZ about Zespri's delay in issuing grower numbers.
 - (f) At approximately 2pm that day, Zespri issued grower numbers to SOL.

⁷ Sol Complaint, Appendix 4.

- 62 Given the amended Sch 5 forms were submitted late in the afternoon on 19 March 2019, it was not reasonable for SOL to expect them to be processed that same day. SOL was promptly notified that the Sch 5 forms required approval from the legal team and the Committee considers that such approval would inevitably have taken one business day. As it happened, grower numbers were issued a day later than that, on 21 March 2019, presumably because it took more time for Zespri legal to consider and approve the changes than had been expected.
- 63 This delay is unfortunate, but not wholly unexpected. It amounts to a short delay between the earliest time approval could have been expected and the time it was in fact provided. Even if Zespri legal had considered this issue as a matter of urgency, there was always the possibility of a delay in considering the contract. The Committee struggles to see how such a delay amounts to unreasonableness.
- 64 The Committee is satisfied that it was reasonable for Zespri to take 45 hours to consider the impact of the proposed Sch 5 amendments. Efforts at prompt turnaround should be encouraged, but not be at the expense of adequate oversight.
- 65 The Committee does not consider that Zespri issued grower numbers only in response to the involvement of KNZ on 21 March 2019. There is no evidence to substantiate this allegation and it has not formed part of the Committee's reasoning.

IF THERE WAS DISCRIMINATION, WAS IT JUSTIFIED ON COMMERCIAL GROUNDS?

- 66 For completeness, the Committee provides the following assessment of whether differential treatment was justified on commercial grounds as provided by Regulation 10.

- 67 Regulation 10 provides:

10 Justifiable discrimination

- (1) Discrimination (or the extent of the discrimination) is justifiable if it is on commercial grounds.
- (2) A commercial ground includes, but is not limited to, matters relating to product features, quality, quantity, timing, location, risk, or potential returns.

- 68 In *Aotearoa Kiwifruit Export Limited v Southlink Ltd*, Winkelmann J stated that:⁸

⁸ *Aotearoa Kiwifruit Export Ltd v Southlink Ltd* HC Auckland CIV 2003-470-478, 3 February 2006 at [68]–[69].

Unjustifiable discrimination is discrimination that is not justifiable on commercial grounds... Given the purpose of the mitigation measures, and the provisions of Regulation 10, it would appear that justifiable discrimination is that which operates between a buyer and a seller in any given market, relating to commercial aspects affecting a particular purchase decision or its terms and conditions.

69 The Committee's role is to consider whether any difference in treatment between suppliers is made on commercial grounds. The Committee considered that the following areas of contention raised by this complaint warrant assessment in this respect:

69.1 Whether it is commercially justifiable to treat Sch 5 forms that have been amended differently from those that haven't.

69.2 Whether it is commercially justifiable to treat amended Sch 5 forms at one point in time differently from amended Sch 5 forms at another point in time.

Differing treatment of amended and un-amended Sch 5 forms

70 Zespri says that it examines amended Sch 5 forms more closely than un-amended Sch 5 forms, and that this takes time. It says that it does so in order to determine whether the amendments have any bearing on Zespri's supply arrangements and its commercial responsibilities, including its responsibility not to discriminate.

71 The Committee considers that there are real and legitimate commercial reasons to consider amended contracts more closely than standard form contracts. It is necessary to determine if the changes made have any effect on product features, quality, timing, location, risk, potential returns, or the purchase contract more generally. These are valid commercial grounds for Zespri to examine amended Sch 5 forms more closely and to take a reasonable time in doing so.

72 The Committee repeats its reasoning at paragraph [52] to [55] above and says that it is reasonable to require the Support Team to refer amended Sch 5 forms to a suitably qualified person, and to withhold a grower's numbers pending their response. Doing so avoids the risk that Zespri will be seen to have tacitly approved the amendments, or to have agreed to different terms for some growers than others.

73 The Support team can not be expected to consider the impact that amended Sch 5 forms may have on the Supply Agreement. If Zespri discriminated in taking more time to consider amended forms than un-amended forms, it was entitled to do so on commercial grounds (provided the total time taken was reasonable in the circumstances).

Differing treatment of amended Sch 5 forms at different times

- 74 Zespri treated the amended Sch 5 forms for the Affected KPINs differently to the amended Sch 5 forms submitted on 13 March 2019. It says that was a genuine error.
- 75 The Committee considers that there is no commercial justification for differential treatment between amended Sch 5 forms. Regardless of the date an amended Sch 5 form is submitted, it should be considered in the same way and responded to within a reasonable amount of time. Not all amendments will be alike and Zespri cannot be expected to approve or reject all amendments within the same period of time. However it can be expected to respond within a reasonable time and to take a consistent approach to the issuing of grower numbers.
- 76 As outlined above, Zespri issued growing numbers for both the Affected KPINs and the KPINs submitted on 13 March 2019 within a reasonable time and did not therefore discriminate. However, if there was discrimination, Zespri had no commercial justification for taking more time to consider some amended forms than others. The only justification is genuine error.
- 77 Where amendments are proposed to a Sch 5 form, Zespri must respond within a reasonable time and must not discriminate between suppliers by issuing some with grower numbers and yet refusing others. The same amendments to Sch 5 forms should be treated in the same way.

HAS SOL SUFFERED ANY LOSS?

- 78 Zespri says that in the event the Affected KPINs were discriminated against, SOL has not suffered any loss. Zespri says that it first received the Sch 5 Forms for the Affected KPINs at 4.46pm on 19 March 2019 and that the cut-off for the KiwiStart Premium was midnight that same day. Zespri says there was no way the Affected KPINs could have obtained maturity clearance, and been picked and packed in time, even if grower numbers were issued immediately.
- 79 SOL disputes this and says that the cut-off for the KiwiStart Premium was 21 March 2019. It says that it could have obtained maturity clearances and picked and packed the fruit by this date, provided that the grower number had been issued immediately. SOL says further that it is only by chance that it was able to secure the Protocol B pass and be eligible for the premium of \$2.54 per tray in any case.

80 Only once a complaint is upheld will the Committee quantify the complainant's loss. The date the KiwiStart Premium and Rate closed is immaterial to the question of whether Zespri has breached Regulation 9 or 10. However, for completeness, the Committee accepts that, based on the evidence before it, no economic loss has been suffered. It makes the following findings:

- (a) Zespri received the amended Sch 5 forms at 4.48pm on 19 March 2019. No evidence has been provided to substantiate the claim that they received the forms earlier.
- (b) 19 March 2019 was the day on which the KiwiStart Premium of \$4.09 per tray closed. Any fruit submitted after this date receives the lesser premium of \$2.54 per tray for the next week or a lower rate dependent on submit date.
- (c) It takes at least 18 hours to receive a Maturity Clearance upon receiving grower numbers. The Affected KPINS could not have been picked and packed by 19 March 2019 even if grower numbers had been issued the same day.
- (d) The premium that the Affected KPINS received (\$2.54 per tray) was the same premium they would have received if the grower numbers had been issued on 19 or 20 March 2019. SOL has suffered no loss.

RESULT AND COSTS

81 The Committee's final decision is to dismiss the complaint. The Committee considers that SOL was not discriminated against when it received grower numbers 45 hours after submitting amended Sch 5 Forms. Zespri is therefore not in breach of the non-discrimination rule in relation to the actions it took on 19 – 21 March 2019 in relation to the Affected KPINS.

82 The non-discrimination rule is intended to be a protective measure for suppliers, and as Winkelmann J recorded in the *Aotearoa* decision:⁹

[Regulation 9] protects a right that vitally affects the livelihood of those persons. ... The availability of proper procedures to enforce Zespri's duty and seek redress for any breach is therefore similarly likely to be of vital importance to suppliers.

⁹ *Aotearoa Kiwifruit Export Ltd v Southlink Ltd* CIV2003-470-478, HC Auckland, 3 February 2006 at [79]

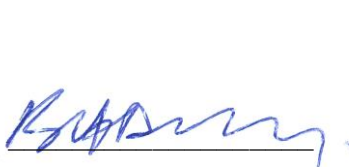
83 In light of this intention, and notwithstanding the conclusion reached, the Committee observes that Zespri made a material error in automatically approving some amended forms (i.e. the forms submitted on 13 March) and reviewing others during a 45-hour window (the Affected KPINs). Accordingly, the committee agrees that Zespri should internally review its procedures in relation to amended Sch 5 forms to ensure that:

- (a) consideration of Sch 5 forms is consistent;
- (b) there is a record of which amended Sch 5 forms have been approved, and by whom, and of when grower numbers are issued pending approval;
- (c) all Sch 5 forms are responded to within a reasonable period of time; and
- (d) no grower numbers are unreasonably withheld.

84 The Committee requests that, by 31 December 2019, Zespri advise the committee on the results of its review, and any consequential actions or decisions taken in relation to the future processing of Schedule 5 forms and the allocation of KPINs. The Committee understands that this review will occur in the last quarter of 2019 as part of Zespri's review of grower documentation for the upcoming season.

85 Costs should lie where they fall. It is important that suppliers are not disincentivised from bringing genuine complaints by the prospect of an award of costs against them in the event that their complaint is not upheld following an investigation. That proposition may well give way to other factors in other cases, for example if a complainant through its conduct unnecessarily increases the costs of the investigation. However, there is no such issue in the present case.

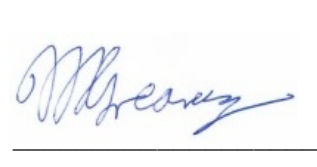
Dated 26 July 2019.



Brian Dickey



Neville Harris



Ian Greaves