
CORE BUSINESS DEFINITION – WORKING DEFINITION OF RESEARCH AND DEVELOPMENT RELATING TO KIWIFRUIT

INTRODUCTION AND CONTEXT

Purpose of this paper

1. This paper sets out KNZ's views as to its approach to its monitoring and enforcement functions under regulation 33(1)(b) of the Kiwifruit Export Regulations 1999 (**Regulations**) in respect of Zespri's research and development activities relating to kiwifruit within the definition of 'core business' in Regulation 2(ab)(iii).
2. KNZ has had regard to Zespri's views on the appropriate definition and principles of application for 'research and development relating to kiwifruit' (**R&D Activities**).
3. This paper is to be read in conjunction with the Discussion Paper relating to the Prior Notice and Non-Diversification Rules dated 17 November 2020 and may be amended or updated at any time at KNZ's discretion.

Interpretation

4. Zespri can conduct R&D Activities under (ab)(iii) of the definition of core business under the Regulations. However, the Regulations do not define R&D Activities and therefore the general principles of statutory interpretation will apply.
5. Regulations must be read as a whole and other factors, including the overall scheme and purpose of the Regulations should be taken into consideration as part of the interpretation.
6. Regulation 8 of Part 3 of the Regulations provides a purpose statement as follows:

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

 - (a) encouraging innovation in the kiwifruit industry while managing risks associated with the activities that are not 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

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- (d) promoting sustained downward pressure on ZGL's costs.
7. KNZ has had regard to the overall scheme and purpose of the Regulations in formulating its working definition of R & D.
 8. 'Core business' is a key concept in the mitigation measures in Part 3. A strong feature of the 2017 amendments was to expand the definition of core business to increase flexibility for Zespri to engage effectively in changing global markets, to maximise returns to producers. At the same time, the 2017 amendments were also intended to increase producer control over risks posed by Zespri's monopsony position, and the scope of the meaning of 'core business' is a key factor in achieving that objective.
 9. The identification of the specific activities listed in the definition of core business in (a) and (ab) reflect a careful delineation by the legislature of what activities can safely fall within that 'uncontrolled' framework¹.
 10. The existence of Reg 10A and the concept of 'supports core business' makes it clear that the test of what activities fall within the scope of core business is not wide.
 11. KNZ accordingly considers that the activities listed in the definition of core business should be read as confined to what they actually say they are, with careful attention to the boundary where an activity changes in nature so as to become a different activity.
 12. In considering a definition of R & D activity consideration needs to be given to:
 - 12.1 the boundary of when an activity is no longer an R&D Activity (the uncertainty has been resolved and/or steps are taken for the commercial production or use of the outcome);
 - 12.2 an activity undertaken to support core business (i.e to support R&D Activities) but are not themselves core business.

¹ Noting that some specific activities were expressly excluded from this definition because it was assessed that the level of risk they posed to 'captured kiwifruit growers' meant that they should remain subject to oversight

Defining Research and Development activities relating to kiwifruit

13. In developing the definition of R&D Activities, KNZ has considered a range of international and New Zealand definitions and principles used in identifying ‘research and development’ activities. In particular, KNZ has considered these definitions in light of the Regulations and R&D relating to kiwifruit and applied concepts (where appropriate) from:

- 13.1 OECD Frascati Manual 2015, the international framework for concepts and definitions for identifying R&D;
- 13.2 the definition of research and development activities in the Income Tax Act 2007 (including guidance papers issued in respect of eligible R&D for the R&D Tax Incentive);
- 13.3 ministerial directions to Callaghan Innovation (New Zealand’s innovation agency) and guidelines and principles published by Callaghan Innovation in defining R&D; and
- 13.4 the definition applied by Statistics New Zealand;

14. KNZ has also consulted with Zespri as noted above.

15. The below is a proposed working definition of R&D Activities:

“R&D Activities are activities relating to kiwifruit that;

- i) have a material purpose of investigating and resolving identified questions or uncertainties (not otherwise publicly available or deducible by a competent professional) relating to kiwifruit; and*
- ii) be undertaken with a primary view to create new knowledge and understanding which can be applied to create new or improve existing products, services, goods and/or processes before the start of commercial production or use; and*
- iii) be conducted using a planned systematic and methodical approach (which can be flexible); and*
- iv) lead to results or outcomes that will be reproducible and have the potential for transfer (to increase existing stock of knowledge).*

The ownership of intellectual property rights (including Plant Variety Rights), and/or commercial production or use of an outcome of an R&D Activity is not within the scope of R&D activities. Regulations 10A and 11 will apply to those activities.

General principles of application of the R&D definition

16. In assessing any activity against the above working definition, the following principles should be applied. R&D Activities:
 - 16.1 should aim to generate knowledge that is new to Zespri's business and the New Zealand kiwifruit industry;
 - 16.2 should aim to generate knowledge that is beneficial to Zespri's core business of the purchase of New Zealand grown kiwifruit for export, the marketing of New Zealand grown kiwifruit and market development for New Zealand grown kiwifruit;
 - 16.3 should be conducted within set timeframes, have an identifiable start and end (which may be subject to change) aligned to the timing of resolving the uncertainty, responding to the questions or obtaining an answer;
 - 16.4 should not be open ended in nature, or repeated multiple times in the same manner unless there are new learnings to be obtained from the repetition (e.g. multiple growing seasons present different environmental conditions);
 - 16.5 must be in relation to kiwifruit, but is not limited to research on fruit itself; and
 - 16.6 provided it meets the elements set out in the working definition and the above principles, may include end-to-end new cultivar development and pre-commercial trial activities conducted globally.
17. For the purposes of defining R&D Activities, 'commercial production or use' includes, but is not limited to:

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- 17.1 any commercial evaluation, including commercial trials, of existing kiwifruit or kiwifruit arising from a breeding project; and
- 17.2 any release, sale or supply of an outcome of an R&D Activity (including any kiwifruit plants and kiwifruit plant material able to be propagated and any material developed or arising from any breeding project relating to those plant materials) to commercial fruit growers or any third party for any purpose whatsoever.
18. While the above principles provide guidance, the application of the principles will be fact specific and likely to require analysis on a case-by-case basis.

Kiwifruit New Zealand

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