IN THE HIGH COURT OF NEW ZEALAND
TAURANGA REGISTRY

CIV 2016-470-36
[2016] NZHC 864

UNDER	the Judicature Amendment Act 1972
IN THE MATTER	of three decisions of Kiwifruit New Zealand declining applications for collaborative marketing arrangements under the Kiwifruit Export Regulations 1999
BETWEEN	SPLICE FRUIT LTD First Plaintiff
	SEEKA FRUIT INDUSTRIES LTD Second Plaintiffs
AND	THE NEW ZEALAND KIWIFRUIT BOARD First Defendant
	ZESPRI GROUP LTD Second Defendant

Hearing:	26 April 2016
Counsel:	G Brittain for Plaintiffs V Casey for First Defendant L A O'Gorman and B N White for Second Defendant
Judgment:	3 May 2016

JUDGMENT OF HEATH J

This judgment was delivered by me on 3 May 2016 at 2.00pm pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

CONTENTS

The kiwifruit industry

[1] In 1999, the Government of the day decided to restructure the kiwifruit industry. It proposed a new regulatory framework for the export of kiwifruit from New Zealand. One of the aims was to separate out the functions undertaken by the old New Zealand Kiwifruit Marketing Board (the old Board), so that:

(a) Its commercial business was assumed by a limited liability company to be established for that purpose, Zespri Group Ltd (Zespri). Zespri was to be subject to generic laws governing the governance and management of all companies. Its shares were to be issued to producers, and tradable among them.

(b) Regulatory functions were to be transferred to a newly established New Zealand Kiwifruit Board (the Board). Those functions were

> designed to monitor and enforce various provisions designed to minimise the risk that Zespri would abuse its privileged position in the market, and to safeguard the overall economic interests of all kiwifruit suppliers.

[2] These policy changes were given effect by the Kiwifruit Industry Restructuring Act 1999 (the Act), and the Kiwifruit Export Regulations 1999.[1] As a result of a deliberate policy decision, and consistent with the views of a majority of industry participants, a monopsony[2] was created in favour of Zespri, so that it is the sole entity that is entitled to export kiwifruit to anywhere other than Australia.[3] A number of mechanisms were put in place to minimise the possibility of abuse of Zespri's market power,[4] and to ensure that increasing the overall wealth of kiwifruit suppliers remained the primary objective.[5]

[3] This proceeding involves the concept of "collaborative marketing". While not specifically defined in the Act or the Regulations, this regime enables third parties to seek approval from the Board to undertake a co-operative export venture, in association with Zespri. The Board, as the independent regulator, is empowered to approve collaborative marketing proposals. The decision to use this policy tool to encourage growth of the overall wealth of kiwifruit suppliers was deliberate; an export licensing regime was expressly rejected.

The applications

[4] Splice Fruit Ltd (Splice) and Seeka Kiwifruit Industries Ltd (Seeka) apply for judicial review of three discrete decisions made by the Board on applications for collaborative marketing approvals; one by Splice and two by Seeka. All three decisions were made on 22 December 2015, for reasons given in writing on 21 January 2016.[6] All three proposals were rejected.

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1 A discussion of the legislative scheme appears at paras [20]–[26] below.
2 A market condition in which a single buyer dominates or controls trade in a commodity or service; as opposed to a "monopoly", in which the sale of a commodity or the supply of a service is dominated by a particular vendor or service provider.
3 Kiwifruit Export Regulations 1999, reg 3(1), set out at para [27] below.
4 Ibid, Part 3.
5 For example, through the collaborative marketing regime set out in part 4 of the Regulations.
6 The decisions are discussed at paras [58]–[62] below.

[5] The applications for collaborative marketing approval relate to the 2016 export year. That is due to begin in earnest in about two to three weeks time. That commercial imperative means that a prompt determination of the present application is required.

[6] An expedited hearing was directed following a telephone conference held on 7 April 2016. That was done to enable the applications for judicial review to be determined (in the event that either or both plaintiffs were successful) in sufficient time for any rehearing by the Board to take place before the export season begins. Any delay would render a successful outcome for Splice and Seeka no more than a pyrrhic victory. At the conclusion of the substantive hearing, on 26 April 2016, it became apparent that the latest date on which judgment could be given, to achieve those ends was 3 May 2016.

[7] The issues are not straight-forward. I would have preferred more time to reflect on them, but nature waits for no-one. Because of the time constraints under which I have prepared this judgment, I have elected not to discuss the competing contentions at any length. I shall address the applications based on my own analysis of the central provisions of the Act and Regulations. In doing so, I intend no disrespect to counsel. I have considered all of their submissions, and thank counsel for their quality.

Background

[8] Splice and Seeka each carry on business from Te Puke as exporters and marketers of kiwifruit. Each made applications to the Board[7] to approve proposed collaborative marketing arrangements, under Part 4 of the Regulations. In summary, they were:

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[7] Under powers of delegation conferred by cls 10 and 11 of Schedule 2 to the Kiwifruit Export Regulations 1999, the Board delegated each decision-making function to a committee comprising two members of the Board. Clauses 10 and 11 are set out at para [26] below. Splice's application in respect of an export to Austria was considered by the Kiwifruit New Zealand Collaborative Marketing Committee for Europe/MEIOSA/Pacific Islands, and the two applications by Seeka were considered by the Kiwifruit New Zealand Collaborative marketing Committee for America/China/Hong Kong.

(a) An application by Splice for approval of a collaborative marketing arrangement involving the export of 180,000 trays of green organic Class 1 kiwifruit to Austria.

(b) An application by Seeka for approval of a collaborative marketing arrangement involving the export of 400,000 trays of green Class 1 kiwifruit to Hainan Island, in China.

(c) An application by Seeka for approval of a collaborative marketing arrangement involving the export of 120,000 trays of green Class 1 kiwifruit to Xinjiang province, in China.

[9] None of the applications were supported by Zespri. Each was refused.

The issues

[10] The primary issue is whether the Board[8] erred in law in the way in which it determined the applications. Three errors are alleged:

(a) First, the Board is said to have wrongly put an onus on Splice and Seeka to establish that an approval should be given, as opposed to conducting an independent assessment of whether the proposals met the regulatory aim of increasing the overall wealth of kiwifruit suppliers.[9] (The "onus" point).

(b) Second, the Board's decision is said to be flawed because it regarded "collaboration" as a mandatory factor to be taken into account in determining the application. It is contended that Zespri's willingness or otherwise to collaborate with any particular applicant is irrelevant in circumstances where the Board is deciding whether they should be compelled to do so, in the overall economic interests of kiwifruit suppliers. (The "collaboration" point).

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8 Unless the context otherwise requires, I refer to "the Board" rather that the particular committee that determined the relevant application: see fn 7 above.

9 Kiwifruit Export Regulations 1999, reg 24, set out at para [30] below.

(c) Third, the Board is said to have failed to take into account mandatory factors relevant to its decision.[10] The factors in issue are set out in reg 8, which sets out the purposes of what are called "mitigation measures". (The "mandatory considerations" point).

[11] A second challenge is based on breach of a "legitimate expectation" that Splice and Seeka each assert to have the right to use an "appeal" process, if the initial decision of the relevant committee was adverse to them. This "right" of "appeal" was set out in the Information Document, on the basis of which the applications were made.[11] Before the applications were determined, the Board unilaterally removed the "appeal" process, on the basis of advice received from a Queen's Counsel to the effect that the provision of such a process was beyond the powers of the Board.

[12] The timing of that decision must be considered against this background:

(a) Applications had to be made by 30 October 2015.

(b) The Board met with Splice's representative on 25 November 2015.

(c) The Board's decision to dispense with the "appeal" process was conveyed to Splice and Seeka on 1 December 2015.[12]

(d) The meeting with Seeka's representatives took place on 3 December 2015.

(e) The Board's decisions were made on 22 December 2015.

[13] A final group of challenges assert that the Board acted unreasonably in rejecting the applications. This point requires a consideration of the decisions given in respect of the discrete applications for collaborative marketing. While

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10 Primarily deriving from reg 8 of the Kiwifruit Export Regulations 1999, set out at para [29] below.

11 The "appeal" provision was contained in Clause (E) of the Information Document, set out at para [91] below.

12 Queen's Counsel's written opinion is dated 23 November 2015, based on instructions conveyed on 10 November 2015.

acknowledging that the applications for judicial review were unlikely to turn on these arguments, Mr Brittain, for Splice and Seeka, invited me to deal briefly with each.

[14] Ms O'Gorman, for Zespri, opposes the applications. She submits that the processes undertaken by the Board, and the reasons that it gave for the three decisions, disclose no error of law. Nor, she contends, are there any other administrative law grounds on which the applications for judicial review could succeed.

[15] Ms Casey, for the Board, appeared to assist the Court, but also advanced argument in respect of the "legitimate expectation" issue. That was done because the "appeal" right had been removed by the Board on Senior Counsel's advice. Notwithstanding the usual rule that a decision-maker will abide the decision of the Court, I agreed to hear from Ms Casey on that basis.[13]

Judicial review principles

[16] Judicial review is different from an appeal.[14] Generally, the Court is limited to ensuring that procedural fairness has been observed and that the decision-maker has exercised its powers lawfully, both in respect of its jurisdiction and its reliance on applicable law. If any errors of that type have been made, judicial review will generally run to require reconsideration of the decision in issue.

[17] In the context of the present case, judicial review is sought based on alleged errors of law and a breach of the respective applicants' legitimate expectation of the availability of an "appeal" process. They are conventional grounds for judicial review.

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13 *Attorney-General v Maori Land Court* [1999] 1 NZLR 689 (CA). My approach is consistent with the Court of Appeal's view that the restriction is based on the need for the decision-maker to remain aloof from argument on the issues it determined: at 695–696. The "appeal" point does not fall into that category.

14 For example, see *Waitakere City Council v Lovelock* [1997] 2 NZLR 385 (CA) at 397, applying *Chief Constable of the North Wales Police v Evans* [1982] 3 All ER 141 (HL) at 155 and *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd* [1994] 2 NZLR 385 (PC) at 389, applying *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 (CA) at 228–230 and 391.

[18] The final ground, based on the alleged unreasonableness of each decision, can, in some circumstances, provide greater difficulty. It is important for the Court not to assume substantive decision-making roles that the legislator has deliberately vested in a specialised tribunal.

[19] The intensity of review is not in issue; the application will turn on whether the decision reached by the specialist tribunal was within the range of reasonable decisions open to it.[15] If it were, the decisions will not be challengeable on the grounds that they are unreasonable.

The legislative scheme

(a) The restructuring process

[20] The Act provided for the conversion of the old Board into a company and identified a means by which the industry would be restructured.[16] After a restructuring plan had been prepared by the old Board, the responsible Minister of the Crown was required to decide whether to approve restructuring in that form.[17] The Minister was to confirm its terms after a producer referendum on the proposed restructuring plan was held.[18] On the day on which restructuring took effect (1 April 2000[19]), the old Board was deemed to metamorphose into the company known as Zespri.[20]

[21] Section 26 of the Act authorised the Governor General to make Orders in Council, on the recommendation of the Minister, to deal with specific issues. They included establishment of the new Board, regulation of the export of kiwifruit, provision of mitigation measures and collaborative marketing. Section 26(1)(e), (f),

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15 I recognise that various methodologies have now been mooted, developed or applied to provide a consistent basis for determining applications based on the "unreasonable" decision ground. For example, see Joseph, *Constitutional and Administrative Law in New Zealand* (4th ed Thomson Reuters, 2014) at para 22.8.4. I do not need to consider the wider issues in the context of this case.

16 Kiwifruit Industry Restructuring Act 1999, Long Title.

17 Ibid, ss 9 and 10.

18 Ibids, s 13 and 18.

19 Ibid, s 2(1), definition of "restructuring day".

20 Ibid, s 20.

(q) and (t) are relevant to the topics of mitigation measures and collaborative marketing:

> **26 Regulations**
>
> (1) The Governor-General may from time to time, by Order in Council made on the recommendation of the Minister, make regulations—
>
> …
>
> *Regulation of export of kiwifruit*
>
> …
>
> (e) providing for the new Board to require Zespri Group to export kiwifruit in collaboration with other persons approved by the Board:
>
> (f) providing for the terms and conditions or other requirements that may or may not be part of the authorisation, permit, or collaborative marketing approval:
>
> *Mitigation measures*
>
> (g) restricting discrimination among suppliers of kiwifruit for export to commercial grounds:
>
> (h) restricting certain diversification of business:
>
> (i) imposing requirements in respect of the corporate form and governance of the company and the tradeability of its shares, including any rules about maximum shareholding:
>
> …
>
> *Information Disclosure*
>
> …
>
> (q) requiring collaborative marketers and the new Board to disclose information relating to kiwifruit exported under any collaborative marketing arrangement:
>
> …
>
> *General*
>
> (t) providing for the exclusion of Crown liability in relation to export authorisations, permits, and collaborative marketing approvals and the operation of Zespri Group and collaborative marketers:
>
> ….

[22] The Regulations were promulgated under s 26(1) of the Act. Like any statutory or regulatory instrument, the Regulations fall to be construed by reference to their text, informed by purpose.[21] The policy underpinning the restructuring of the kiwifruit industry is something I take into account, in that regard.

(b) The Board

[23] The Board is established under the Regulations.[22] The Regulations set out (among other things) the functions of the Board,[23] its membership,[24] the way in which producer representatives are elected,[25] and its powers.[26] Schedule 2 to the Act sets out additional provisions relating to the Board that are designed to deal with operational matters, such as a member's term of office,[27] meetings of the Board,[28] delegation of functions[29] and the means by which contracts must be entered into.[30] For present purposes, the Board's functions, membership and powers of delegation assume particular importance.

[24] The functions of the Board are set out in reg 33:

> **33 Functions**
>
> (1) *The functions of the Board* are—
>
> (a) to authorise the export of kiwifruit at FOBS, and to set the terms of the authorisation in accordance with Parts 1 and 2:
>
> (b) *to monitor and enforce*—
>
> (i) the non-discrimination rule, the non-diversification rule, the information disclosure requirements, and *the collaborative marketing requirements*; and
>
> (ii) the requirement that the point of acquisition of title to kiwifruit purchased for export be in accordance with regulation 5(c); and (iii) any other terms and conditions of the authorisation:

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21 Interpretation Act 1999, s 5(1). See further, paras [35]–[38] below.
22 Kiwifruit Export Regulations 1999, reg 32.
23 Ibid, reg 33.
24 Ibid, reg 36.
25 Ibid, reg 37.
26 Ibid, reg 38.
27 Ibid, Schedule 2 cl 1.
28 Ibid, cl 5.
29 Ibid, cls 10 and 11.
30 Ibid, cl 12.

(c) *to determine collaborative marketing applications in accordance with Part 4*.

(2) The Board must carry out its function under subclause (1)(b) to best achieve the purpose in regulation 8.

(Emphasis added)

[25] Membership of the Board is prescribed by reg 36:

36 Membership

The Board consists of 5 members of which—

(a) 3 members are to be elected by producers in accordance with regulation 37:

(b) 1 member is to be appointed by New Zealand Kiwifruit Growers Incorporated or its successor:

(c) 1 member is to be appointed by the other members, who is fully independent of the kiwifruit industry and who is to act as the chairperson of the Board.

[26] The Board's powers of delegation are set out in regs 10 and 11 of Schedule 2:

10 Committees

(1) The Board may from time to time, by resolution, appoint, alter, discharge, continue, or reconstitute any committee to advise the Board on any matters relating to the Board's functions and powers that are referred to that committee by the Board.

(2) Any person may be appointed to be a member of a committee, whether or not that person is a member of the Board.

(3) Subject to these regulations, and to any direction given by the Board, every committee may regulate its own procedure.

11 Delegation of functions and powers

(1) The Board may from time to time, either generally or specifically, delegate any of the Board's functions and powers to any of its committees, members, or employees.

(2) However, the Board must not delegate the power of delegation conferred by subclause (1).

(3) Every delegation must be in writing.

(4) Any delegation may be made to—

(a) a specified person; or

(b) a person belonging to a specified class of persons; or

(c) the holder for the time being of a specified office or appointment; or

(d) the holder for the time being of an office or appointment of a specified class

(5) The committee or person to whom any such delegation is made may exercise or perform the delegated functions or powers in the same manner and with the same effect as if they had been conferred directly by these regulations and not by delegation.

(6) Subclause (5) is subject to any general or special directions given or conditions imposed by the Board.

(7) Every committee or person purporting to act pursuant to any delegation under this clause is presumed, in the absence of proof to the contrary, to be acting in accordance with the terms of the delegation.

(8) Every delegation under this clause is revocable at will, but the revocation does not take effect until it is communicated to the delegate.

(9) A delegation continues in force according to its terms until it is revoked, notwithstanding any change in the membership of the Board or of any committee.

(10) No delegation under this clause prevents the performance or exercise of any function or power by the Board.

(c) The regulatory framework

[27] The nature of the monopsony granted in favour of Zespri is best understood by reference to both regs 3 and 4:

3 Export ban

(1) No person may export kiwifruit otherwise than for consumption in Australia except as authorised or approved by the Board in accordance with these regulations.

(2) Every person commits an offence, and is liable on conviction to a fine not exceeding $50,000, who knowingly and without lawful excuse contravenes subclause (1).

4 Board must authorise [Zespri] to export kiwifruit

(1) The Board must authorise [Zespri] to export kiwifruit.

(2) The terms and conditions of the authorisation must be in accordance with regulations 5 to 7 and must be in writing.

[28] Part 3 of the Regulations identifies "mitigation measures" that are intended to minimise the risk of abuse of the monopsony by Zespri.[31] Four specific rules were designed for that purpose: Zespri was not to discriminate unjustifiably among suppliers and potential suppliers;[32] not to diversify its operations beyond its core business activities;[33] and obliged to make specified information disclosure to promote transparency, for the benefit of both its shareholders and suppliers.

[29] The distinction between shareholders and suppliers is important. The reference to "suppliers" identifies an industry interest, as opposed to one that best suits the shareholders (for the time being) of Zespri. The term "supplier" is defined in reg 2 as "a person from whom [Zespri] acquires the property in kiwifruit grown in New Zealand". Both interests are the object of particular mitigation measures, the purposes of which are set out in reg 8:

> **8 Purpose of Part**
>
> 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 requiring that providers of capital agree to the ways in which their capital is used outside the core business; and
>
> (b) promoting efficient pricing signals to shareholders and suppliers; and
>
> (c) providing appropriate protections for [Zespri's] shareholders and suppliers; and
>
> (d) promoting sustained downward pressure on [Zespri's] costs.

[30] Part 4 of the Regulations deals with collaborative marketing proposals.[34] The Part 4 regime is aimed at ensuring that the Board retains its focus on the need to increase the wealth of all New Zealand kiwifruit suppliers. Regulation 24 states:

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31 Based on s 26(1)(g)–(i) of the Kiwifruit Restructuring Act 1999, set out at para [21] above.

32 Kiwifruit Export Regulations 1999, reg 9. Regulation 10 permits discrimination if justified on commercial grounds.

33 Ibid, reg 11.

34 Although not relevant to this case, a specific provision dealing with disclosure of collaborative marketing information is contained in reg 15 of the Kiwifruit Export Regulations 1999.

24 Purpose of Part

> The purpose of this Part is to enable the Board to require [Zespri] to enter into collaborative marketing arrangements for the purpose of increasing the overall wealth of New Zealand kiwifruit suppliers.

[31] A "collaborative marketing arrangement" is one by which an entity may export New Zealand grown kiwifruit in collaboration with Zespri.[35] The Board is required to approve any proposed arrangement.[36] Any person may apply to the Board for such an approval.[37] In determining an application for a collaborative marketing approval, the Board, subject to any particular requirements of Part 4, is entitled to "regulate its own procedure in a way that is consistent with the rules of natural justice".[38] The Board is invested with all powers necessary to carry out its functions.[39]

[32] No later than one month after the commencement of each kiwifruit season, the Board may direct Zespri "to make a certain volume of kiwifruit available for collaborative marketing arrangements in that current season".[40] That volume may be set either by reference to a percentage of volume or an amount by volume based on the New Zealand-grown kiwifruit that Zespri has (in the previous season) or will (in the current season) purchase.[41]

[33] The term "collaborative marketing approval"[42] applies once the Board has approved a proposal under reg 28. That regulation provides:

28 Board decision

> (1) As soon as practicable after receiving an application, the Board must consider it and decide whether to approve a collaborative marketing arrangement.
>
> (2) *The Board—*
>
> > (a) *may before deciding whether to approve the application indicate to the applicant possible changes to the application*

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35 Ibid, reg 2, definition of "collaborative marketing arrangement".
36 Ibid, reg 24.
37 Ibid, reg 27.
38 Ibid, reg 31.
39 Ibid, reg 38. The functions of the Board are set out in reg 33, set out at para [24] below.
40 Ibid, reg 26(1).
41 Ibid, reg 26.
42 Ibid, reg 2, definition of "collaborative marketing approval".

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;* and

(c) must, after deciding an application—

(i) as soon as practicable, give written notice to the applicant of its decision, including the reasons for its decision in any case where it declines the application; and

(ii) if the application has been approved, issue the collaborative marketing approval to the applicant.

….

(Emphasis added)

[34] In the absence of any impediment to its legal competence to do so, Zespri is at liberty to enter into any contract or arrangement with another entity for the purchase and marketing of kiwifruit.[43] On the other hand, if the Board approves a collaborative marketing arrangement, Zespri is obliged to enter into a contract with the approval holder, on terms determined by the Board.[44]

Interpretation principles

[35] The twin pillars of statutory interpretation in New Zealand are the text of the particular provision under consideration and the purpose for which it was enacted. That approach is mandated by s 5(1) of the Interpretation Act 1999:[45]

5 Ascertaining meaning of legislation

(1) The meaning of an enactment must be ascertained from its text and in the light of its purpose.

…

[36] That approach was discussed by the Supreme Court in *Commerce Commission v Fonterra Co-operative Group Ltd*.[46] Delivering the judgment of the Court, Tipping J said:

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43 Ibid, reg 30.
44 Ibid, reg 29.
45 The term "enactment" is defined to include both Acts of Parliament and regulations: Interpretation Act 1999, s 29, definition of "enactment".

> [22] It is necessary to bear in mind that s 5 of the Interpretation Act 1999 makes text and purpose the key drivers of statutory interpretation. The meaning of an enactment must be ascertained from its text and in the light of its purpose. Even if the meaning of the text may appear plain in isolation of purpose, that meaning should always be cross-checked against purpose in order to observe the dual requirements of s 5. *In determining purpose the Court must obviously have regard to both the immediate and the general legislative context. Of relevance too may be the social, commercial or other objective of the enactment*.
>
> (Emphasis added; footnote omitted)

[37] While the Court is entitled to have regard to any articulation of purpose contained in external documents, such as Parliamentary history, and other written sources explaining the public policy reasons for enactment,[47] some caution is required when considering views expressed in parliamentary debates. Care must be taken not to put undue weight on an individual speech by a Minister that might not wholly (or fairly) capture Parliament's intentions.[48]

[38] There is no challenge to the validity of any of the relevant Regulations promulgated under s 26(1) of the Act.[49] Nor is there any challenge to the delegation processes adopted by the Board. So, the starting point for analysis must be those provisions within the Regulations that deal specifically with collaborative marketing arrangements. They must be interpreted against the background of the public policy decisions that preceded restructuring[50] and relevant provisions of both the Act and the Regulations that illuminate their purpose.

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46 *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 (SC).

47 In the specific context of an interpretation of the Kiwifruit Export Regulations 1999, see *Turners & Growers Ltd v Zespri Group Ltd (No 2)* (2010) 9 HRNZ 365 (HC) at para [28].

48 Ibid, at para [31].

49 They were held to be *intra vires* the Act and otherwise valid in *Turners & Growers Ltd v Zespri Group Ltd (No 2)* (2010) 9 HRNZ 365 (HC).

50 See paras [1] and [2] above.

Analysis

(a) Collaborative marketing arrangements

(i) Questions of process

[39] On receipt of an application for approval of a collaborative marketing arrangement, the Board must "consider . . . and decide whether" to approve it.[51] Before determining the application, the Board may "indicate to the applicant possible changes to the application which, if included, would improve the prospects of the application being approved".[52] An application may be approved subject to "reasonable and necessary conditions".[53]

[40] Subject only to the availability of kiwifruit under any allocation made by the Board under reg 26,[54] the Board may adopt whatever procedure it thinks fit to consider and determine the application, provided that procedure "is consistent with the rules of natural justice".[55] The need to comply with the principles of natural justice is consistent with s 27(1) of the New Zealand Bill of Rights Act 1990[56] which states:

> **27 Right to justice**
>
> (1) Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.
>
> …

[41] To comply with the rules of natural justice, the Board must hear from both the applicant and Zespri. There is no right to an oral hearing, or indeed to one with any degree of formality. What is required is to ensure that both an applicant and Zespri are provided with all relevant information to which the Board may have regard when making its decision, and for each to be afforded a fair opportunity to be heard on all relevant issues.

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51 Kiwifruit Export Regulations 1999, reg 28(1), set out at para [33] above.
52 Ibid, reg 28(1)(a).
53 Ibid, reg 28(2)(b).
54 See para [21] above.
55 Kiwifruit Export Regulations 1999, reg 31.
56 The word "rules" in reg 31 and "principles" in s 27(1) are used interchangeably.

[42] As a matter of good practice, the Board does hold a meeting at which the parties are heard on any issues arising from the application. The constitution of the committee of the Board delegated to determine the application[57] may include at least one person with an industry interest.[58] I am satisfied that the Regulations evidence an intention to modify the general rule that a person should not be a judge in his or her own cause.[59] As a result, no complaint can be made on grounds of apparent bias, on the part of any particular member of the decision-making committee.[60]

(ii) What is the test for approval?

[43] It is necessary to analyse, and to some degree unpack, the deceptively simple expression of the purpose of the collaborative marketing regime set out in reg 24 of the Regulations.[61]

[44] Subject to sufficient kiwifruit being allocated,[62] the Board is empowered to *require* Zespri to enter into any collaborative marketing arrangement, if that proposed arrangement has "the purpose of increasing the overall wealth of New Zealand kiwifruit suppliers".

[45] While reg 24 refers only to "suppliers", reg 8(b) and (c), in explaining the purpose of the mitigation measures, refers to both "shareholders and suppliers".[63] The distinction recognises that economic outcomes that are in the best interests of Zespri's shareholders may not necessarily be in the best interests of the collective group of New Zealand kiwifruit industry suppliers.

[46] The purpose of the collaborative marketing regime is different to that underlying the various rules comprising the mitigation measures. While the

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57 As to powers to delegate, see para [26] above.

58 See para [25] above. Only one member, the chairperson, is independent of the industry.

59 *Jeffs v New Zealand Dairy Production Marketing Board* [1967] NZLR 1057 (PC), applied, in the context of the kiwifruit industry, in *NZI Financial Corporation Ltd v New Zealand Kiwifruit Authority* [1986] 1 NZLR 159 (HC).

60 Compare with principles generally applicable to those carrying out judicial functions, discussed in *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd* [2009] NZSC 72, [2010] 1 NZLR 35 (SC) and *Saxmere Co Ltd v Wool Board Disestablishment C Ltd (No 2)* [2009] NZSC 122, [2010] 1 NZLR 76 (SC).

61 Set out at para [30] above.

62 Kiwifruit Export Regulations 1999, reg 26. See also para [21] above.

63 Regulation 8 is set out at para [29] above.

mitigation measures are designed to minimise the potential for abuse of Zespri's monopsony, the collaborative marketing regime is intended to focus the Board's attention on the goal of increasing the overall wealth of New Zealand kiwifruit suppliers, as opposed to Zespri's shareholders. While both objectives have a common aim, the distinction is important to an administrative law analysis of the Board's powers to approve a collaborative marketing arrangement.

[47] The usual meaning of "collaboration" is to "unite labour" or "co-operation".[64] The fact that the Board's decision compels Zespri to collaborate does not have any particular bearing on the outcome. No element of competition is involved. Competition is the antithesis of collaboration. Applications for approval of collaborative marketing arrangements are likely to be made only if Zespri is unwilling to enter into an arrangement with the particular applicant, has received no adequate information before the application is made to form a judgment whether to enter into a consensual arrangement, or where it believes that it is legally incompetent to enter into such an arrangement without the Board's express authority. That proposition is evident from Zespri's ability to enter into consensual arrangements with third parties for the purchase and marketing of kiwifruit.[65]

[48] Industry practice can be discerned from the form that the Board provides to potential applicants. In my view, that practice conforms to my analysis of the purpose provision of Part 4. The applicant must supply to the Board a full description of:

(a) The proposed arrangement;

(b) Any collaboration previously undertaken with Zespri;

(c) The extent of collaboration to be undertaken with Zespri as part of the proposed collaborative marketing arrangement;

(d) How the proposed arrangement will increase the overall wealth of kiwifruit suppliers;

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64 Oxford English Dictionary (on line edition).
65 Kiwifruit Export Regulations 1999, reg 30.

(e) The advantages that the applicant and any partners to its proposal bring to the arrangement and how those advantages, both individually and collectively, add to the increased wealth of New Zealand kiwifruit suppliers;

(f) The risks to the overall wealth of kiwifruit suppliers from the arrangement, and how the applicant intends to mitigate those risks;

(g) The risks carried by the applicant and its partners (respectively) in respect of the proposed arrangements.

[49] By submitting an application, the applicant consents to release of all information supplied in or with it to Zespri "for all purposes associated with collaborative marketing". That makes it plain that Zespri will have an opportunity to consider the information provided and to prepare a response before the Board considers whether to grant approval. The applicant also consents to "the release of information to third parties and agents acting on behalf of [the Board] for the purpose of credit checks carried out on the applicant, its principals and agents, in market assessments and any other purpose related to" the application. That is consistent with the Board's ability to undertake an independent inquiry.

[50] In addition, detailed information is required in respect of the applicant's marketing strategy. In summary, the applicant is required to provide a full business case for approval of the arrangement.

(iii) Relevance of the reg 8 factors

[51] The next issue is whether the reg 8[66] factors, directed specifically at mitigation measures included in Part 3, are mandatory considerations to be taken into account by the Board when deciding whether or not to approve a Part 4 application for a collaborative marketing arrangement.

[52] In determining the relevance of the reg 8 factors, it is important to understand the different functions that Parts 3 and 4 of the Regulations serve. While both are

[66] Set out at para [29] above.

concerned with the general objective of protecting suppliers, they are aimed at meeting distinct public policy considerations.

[53] Section 26(1) of the Act expressly identifies the need for regulations which, in general terms, protect suppliers who are not shareholders of Zespri from abuse of market power, flowing from the monopsony it holds. On the other hand, the collaborative marketing regime is aimed at ensuring that the Board conducts an inquiry into whether Zespri should be compelled to enter into any arrangement by reference to whether the purpose of the proposed arrangement increases the wealth of the general body of suppliers.

[54] In my view, the question is whether all or any of the purposes of the mitigation measures must be considered by the Board as part of an inquiry into the likely increase in wealth of suppliers. In the vast majority of cases, what is good for the shareholders of Zespri will be good for suppliers generally. The Board's function is to identify cases where greater wealth may be produced by Zespri collaborating with a third party.

[55] As a matter of law, a distinction is drawn between mandatory factors that a decision-maker must take into account, and permissive factors that may be considered. Mr Brittain and Ms O'Gorman offered competing views on where the line should be drawn between the two. Mr Brittain submitted that, either expressly or by necessary implication, the factors set out in reg 8 ought to be taken into account. On the other hand, Ms O'Gorman contended that while it was permissible, in an appropriate case, for the Board to consider one or more of the reg 8 criteria, no reviewable error occurs if it did not. She submitted that a specialist body such as the Board is entitled to determine for itself what factors are relevant and irrelevant; and, it is not for the Court to second-guess its judgment.

[56] The leading New Zealand judgment on this issue is that of Cooke J, in *CREEDNZ Inc v Governor-General*.[67] In that case, judicial review was sought of a Ministerial decision to apply the National Development Act 1979, so that an Order in Council could be made to allow an aluminium smelter and associated works to be

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[67] *CREEDNZ v Governor-General* [1981] 1 NZLR 172 (CA).

undertaken at Aramoana. The effect of such a regulation would be to bypass normal statutory consent procedures. Cooke J said:[68]

> A point about the legal principle invoked by the plaintiffs should be underlined. It is a familiar principle, commonly accompanied by citation of a passage in the judgment of Lord Greene MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, 228; [1947] 2 All ER 680, 682: "If, in the statute conferring the discretion, there is to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion it must have regard to those matters". More recently in *Secretary of State for Education and Science v Tameside Borough Council* [1977] AC 1014, 1065; [1976] 3 All ER 665, 695, Lord Diplock put it as regards the statutory powers of a Minister that ". . . it is for a court of law to determine whether it has been established that in reaching his decision . . . he had directed himself properly in law and had in consequence taken into consideration the matters which upon the true construction of the Act he ought to have considered . . ."
>
> *What has to be emphasised is that it is only when the statute expressly or impliedly identifies considerations required to be taken into account by the authority as a matter of legal obligation that the Court holds a decision invalid on the ground now invoked. It is not enough that a consideration is one that may properly be taken into account, nor even that it is one which many people, including the Court itself, would have taken into account if they had to make the decision*. And when the tests are whether a work is likely to be in the national interest and is essential for one or more of the purposes specified in s 3(3), it is not easy to assert of a particular consideration that the Ministers were legally bound to have regard to it.
>
> *Questions of degree can arise here and it would be dangerous to dogmatise. But it is safe to say that the more general and the more obviously important the consideration, the readier the Court must be to hold that Parliament must have meant it to be taken into account.* Further, in relation to a decision as important as that provided for by s 3(3) I would not be content to accept that it is necessarily enough if a Minister's department has taken a consideration into account in arriving at its advice to the Minister. For some purposes, particularly in judging what is fair procedure in allowing representations by affected parties, it must be right to give weight to the idea authoritatively expressed by Lord Diplock in *Bushell v Secretary of State for the Environment* [1980] 2 All ER 608, 613; [1980] 3 WLR 22, 28: "The collective knowledge, technical as well as factual, of the civil servants in the department and their collective expertise are to be treated as the minister's own knowledge, his own expertise". ...
>
> (Emphasis added)

[57] There is nothing in Part 4 that expressly requires the Board to take into account one or more of the purposes identified in reg 8 as a mandatory factor, when

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[68] Ibid, at 182–183. Richardson and McMullin JJ did not disagree with Cooke J's analysis of this issue. See, in particular, 186 and 202 (Richardson J) and 211 (McMullin J).

determining whether to approve a collaborative marketing arrangement. Thus, the question reduces to whether a need to take account of one or more of those purposes arises by necessary implication. I consider that question later.[69]

(b) Did the Board err in law?

(i) The Board's decisions

[58] There are three decisions in issue:

(a) Splice's application was heard and determined by a committee of two members of the Board known as "The Kiwifruit New Zealand Collaborative Marketing Committee for Europe/MEIOSA/Pacific Islands" (the Europe Committee).

(b) The two applications by Seeka were heard and determined by two members of the Board designated as "The Kiwifruit New Zealand Collaborative Marketing Committee for America/China/Hong Kong" (the China Committee).

[59] Both committees were established under cl 11 of Schedule 2 to the Regulations.[70] A meeting was held with representatives of Splice and Zespri on 25 November 2015 to deal with Splice's application. Both applications made by Seeka were considered at meetings held on 3 December 2015, at which representatives of both Seeka and Zespri were in attendance.

[60] Each decision uses (what I term) a template format designed to set out legal principles that each committee was required to consider in determining the applications. There can be no objection to use of such a template, provided it directs the attention of committee members to all relevant legal principles they must consider. The problem with using a template is that if it were to contain an error of law, the lay members considering it may not apply the correct test. Conversely, if

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69 See paras [86]–[90] below.
70 Set out at para [26] above.

something were inadvertently omitted, a mandatory relevant factor might not be taken into account.

[61] The "template" portions of all three decisions state:

> **Regulatory context and general principles**
>
> 5. The collaborative marketing regime is provided for under Part 4 of the Regulations. In order to obtain approval for a collative marketing arrangement *an Applicant must satisfy the Board* or a Committee to whom the Board's powers under Regulation 28 have been delegated *that the proposed arrangement will*:
>
> (a) *increase the overall wealth of the New Zealand Kiwifruit suppliers; and*
>
> (b) *be done in collaboration with [Zespri]*.
>
> 6. Generally, in considering an application for approval, the Board takes a broadly based approach to the collective short and long term interests of New Zealand kiwifruit suppliers rather than to the individual interests of particular suppliers or groups of suppliers.
>
> 7. The Board is cognizant of the export regime prescribed by the Regulations and the operation of the [Zespri] market strategy in implementing that export regime.
>
> **Increasing the overall wealth of New Zealand kiwifruit suppliers**
>
> 8. *While the Board adopts a broad approach to what might facilitate or achieve an increase in the overall wealth of New Zealand kiwifruit suppliers, it also needs to be mindful of the risks that may affect that wealth adversely.*
>
> 9. There may be opportunities afforded by short-term fluctuations in supply and demand but in the Board's view these must be considered against the longer term objective of increasing the overall wealth of New Zealand kiwifruit suppliers.
>
> 10. Each application for approval of a collaborative marketing arrangement is considered on its merits on a case by case basis and ultimately is assessed by the Board relative to the purpose of the collaborative marketing regime established by the Regulations of "increasing the overall wealth of New Zealand kiwifruit suppliers". *For the Board to approve an application there must be sufficient evidence to satisfy it that the wealth of New Zealand kiwifruit suppliers will be increased by the proposed collaborative arrangement.*
>
> **Collaboration**
>
> 11. A collaborative marketing arrangement is defined in the Regulations as meaning an arrangement by which a person may export New

> Zealand grown kiwifruit in collaboration with [Zespri]. *Applications need to demonstrate that the wealth of New Zealand kiwifruit suppliers will be increased by the proposed arrangement to be carried out in collaboration with [Zespri]*.

(Emphasis added)

[62] Although it is fair to say that each committee goes on to address issues relevant to the particular application with which it was dealing, the conclusions of both the Europe and China Committees for declining each application were expressed in almost identical terms.

(a) On Splice's application, the Europe Committee said:

> 15. Having considered the application and all the material put before it, including the submissions referred to earlier, the Committee concluded it was not satisfied the Applicant's programme had the potential to increase the overall wealth of New Zealand kiwifruit suppliers. Nor, in the Committee's view, did it demonstrate any sufficient degree of collaboration with [Zespri] to meet the requirements of the Regulations.

(b) On Seeka's application in respect of Hainan Island, the China Committee said:

> 16. Having considered the application and all the material put before it, the Committee concluded it was not satisfied the Applicant's programme had the potential to increase the overall wealth of New Zealand kiwifruit suppliers. Nor, in the Committee's view, did it demonstrate any sufficient degree of collaboration with [Zespri] to meet the requirements of the Regulations.

(c) On Seeka's application in respect of Xinjiang, the China Committee said:

> 16. Having considered the application and all the material put before it, the Committee concluded it was not satisfied the Applicant's programme had the potential to increase the overall wealth of New Zealand kiwifruit suppliers. Nor, in the Committee's view, did it demonstrate any sufficient degree of collaboration with [Zespri] to meet the requirements of the Regulations.

(ii) The "onus" point

[63] An application for approval of a collaborative marketing arrangement does not involve an adversary contest between an applicant and Zespri. The Board is undertaking an independent inquiry (in order to enhance the interests of suppliers), to determine whether the proposal has the purpose of increasing "the overall wealth of New Zealand kiwifruit suppliers". The need for independent appraisal can be seen from the Board's ability to make suggestions to an applicant about possible changes which would improve the prospects of approval.[71] It is also underlined by the Board's ability to approve a proposal subject to "any reasonable and necessary conditions".[72] In these circumstances, I conclude that there is no onus on an applicant to satisfy the Board that a proposed collaborative marketing arrangement should be approved.

[64] Although it lacks any statutory or regulatory foundation, parts of the Information Document reinforce those points. In the particular Information Document on which Splice and Seeka relied to make their applications, the Board set out its approach to the assessment of particular applications:[73]

> **(G) Assessment of Applications**
>
> 1. On receipt, all applications will be considered for completeness. Applications that are not complete will be returned to the applicant either for the provision of further information or to be resubmitted as a new application. It is in the applicant's interest to submit an application early.
>
> 2. *[The Board], as its option, may:*
>
> *1. obtain in market assessments and other evaluations of the arrangements proposed in collaborative marketing applications. This could involve the use of third parties, consultants and trade specialists and may involve your customer/client, distributors and other partners and representatives being contacted direct to establish capability.*
>
> *2. if necessary visit the facilities, customer/client, distributors and other partners, representatives and agents and the markets that form part of an application is approved and/or*

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71 Ibid, reg 28(2)(a).

72 Ibid, reg 28(2)(b).

73 In a footnote to the first sentence of cl (G)1. The Board said "Meeting with Zespri to notify them of the applicant's intentions is not effective collaboration. It is in the applicant's interest to ensure that any collaboration issues (either in the formulation of the application, or as anticipated in its actual operation) are fully canvassed and documented.

hold meetings of the Collaborative Marketing committee, the applicant and Zespri in market. This may delay a decision on the application.

3. require written evidence of the rights and obligations of the respective parties involved in the proposed arrangement, and that those parties understand and will accept the conditions of approval, and comply with them.

4. require the Applicant to provide confirmation to [the Board] or such other organization as [the Board] may elect, that the Applicant has obtained information as to the legal requirements (including Customs) of the country of destination, and will comply with those requirements in a manner consistent with the laws of New Zealand and the country of destination.

5. impose any reasonable and necessary conditions. Failure to satisfy the requirements of any condition can result in an approval being cancelled or revoked.

3. Additional costs resulting from in market assessments and evaluations, or visits to market or otherwise will be charged to applicants as a Supplementary fee.

(Emphasis added)

[65] Because Zespri is not engaging in an adversary contest with an applicant, the Board's inquiry will focus, at least initially, on information supplied by the applicant, and later by Zespri. In making its determination, it is also entitled to make its own inquiries, and may indicate to an applicant how it might improve its chances of receiving approval.[74] The ability to impose reasonable and necessary considerations itself suggests that the Board's inquiries may reveal information on which it is prepared to give conditional approval, rather than the form of approval sought by the applicant.

[66] In substance, the Board is conducting an inquiry into the economics of a particular proposal. The membership structure of the Board, which includes three members elected by producers and one appointed on behalf of growers[75] provides industry expertise on the part of the Board, or a delegated committee, to form a judgment on that question.

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74 Generally, see regs 24 and 28(2)(a) and (b).

75 Kiwifruit Export Regulations 1999, reg 36, set out at para [25] above.

[67] There are a number of statements in the decisions under review that suggest the Board may have placed an illegitimate onus on Splice and Seeka to demonstrate or satisfy the Board that its approval should be granted. However, some leeway must be given to a decision-making body made up of lay persons who are being asked, primarily, to form an economic judgment on the nature of the proposal. I need to take care not to regard the words used in too technical a sense. The overall approach to the decision-making task assumes greater significance on an inquiry of this type.

[68] I make some preliminary observations, referable to all three decisions:

(a) Each committee's approach to the concept of increasing the overall wealth of New Zealand kiwifruit suppliers took into account "opportunities afforded by short-term fluctuations in supply and demand … [and] the longer term objective of increasing the overall wealth of New Zealand kiwifruit suppliers".[76] That was an appropriate consideration.

(b) Each committee required evidence that the wealth of suppliers would be increased by the proposed collaborative arrangement.[77] Each application was considered on a case by case basis against the goal of increasing the overall wealth of relevant suppliers. On the basis that the "evidence" included information provided by the applicant, Zespri and the independent inquiries of the Board, that too was an appropriate consideration.

[69] The Europe Committee analysed the returns gained in the previous season from a collaborative programme by which, jointly, Zespri and Splice had supplied kiwifruit to an Austrian supermarket chain, Billa. Accepting that in previous years, the programme "appeared" to have made "a substantial margin over and above the Zespri benchmark return", the committee was satisfied that, in those years, the overall wealth of New Zealand suppliers had been increased. However, it was not

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[76] See para 9 of each decision, set out at para [61] above.
[77] See para 10 of each decision, set out at para [61] above.

satisfied, on the information available to it, that an increased projection for the 2016 season could be achieved, other than by Billa paying a premium over that which it would otherwise pay to Zespri. Such a premium might have been achievable through Billa's ability to use a house brand for the kiwifruit supplied, but the committee considered such an approach was contrary to the strategy of using the Zespri brand, "to create brand value and premium returns to New Zealand suppliers".

[70] Ultimately, the committee formed the view that the proposal [was] not "entirely consistent, collaborative & synergistic with Zespri marketing strategy" as [had] claimed". Further, it was concerned that supply of kiwifruit to Billa for use as a house brand was "in fact holding back the development of the [Zespri] brand, and subsequent returns to growers, in the important European markets".

[71] Seeka proposed to export 400,000 trays of green Class 1 kiwifruit to China Commercial Group, an entity based on Hainan Island. Seeka proposed that it would provide packing machine and lease coolstore capacity from China Commercial Group, with that entity marketing all fruit in retail operations in which they had a shareholding or commercial relationship. It proposed that the programme operate outside drawdown provisions in a standard supply agreement.

[72] When considering Seeka's proposal to collaborate with Zespri to export to Hainan Island, the China Committee considered that the "programme was overly ambitious and required a large volume of sales … to make it economic to lease coolstores and set-up an in-market retail packing operation". Given "the small size of the Hainan market and its limited capacity to handle [such] volumes" the committee had concerns that the product would "leak" into mainland China and create "confusion and disruption" in a very large market. It was concerned that this could lead to lower prices and returns from China, and decrease the overall wealth of New Zealand suppliers.

[73] The China Committee was also concerned that a proposal to operate "outside the drawdown provisions of schedule 2 of the [relevant] Supply Agreement" would be "detrimental to the goal of increasing overall wealth of suppliers" and "would only be beneficial" to Seeka.

[74] Seeka also sought approval to enter into a collaborative marketing arrangement to export fruit to Xinjiang province in China. Xinjiang is a landlocked area situated in the north-west region of China, bordering (primarily) Kazakhstan, Mongolia and Kyrgyzstan. It has a population of over 20 million people. Seeka's proposal was to export 120,000 trays of green Class 1 kiwifruit to Shanghai Unidev Imp & Exp Co Ltd, as importer of record, for sale by Zhong Xincheng Trading Co Ltd, under the "SeekaFresh" brand. Seeka requested that the programme operate outside the standard drawdown provisions. It contended that the value inherent in the proposal was the introduction of a distribution channel that would not otherwise be realised, to an area that was yet to be exploited by Zespri.

[75] Zespri told the China Committee that it had, in fact, developed "a clear distribution channel and strategy", and expressed concerns that an approval would lead "to a substitution risk for Zespri branded programmes" in Xinjiang province. Zespri also had concerns about the prevention of leakage of the fruit to other regions in which Zespri had established operations.

[76] The China Committee gave three reasons for rejecting the proposal, based on the criterion of increasing the overall wealth of suppliers:

(a) There was a real risk of "leakage" of the fruit into other regions of China. The committee observed that transporting fruit to Xinjiang required a truck journey of four days to reach Urumqi, the largest city in the region and the inland port to which the fruit would be sent. While Seeka agreed there was a need for special steps to be put in place to ensure the fruit was delivered to the correct destination, the committee was not satisfied that Seeka and Zespri could put arrangements into place to avoid the prospect of "leakage".

(b) The committee accepted Zespri's advice that it had developed a marketing strategy for the region, with support for the Zespri brand. It was satisfied that Zespri's operations provided a "significant opportunity for enhancing returns and increasing overall wealth of New Zealand suppliers". On balance, the committee considered that

Seeka's proposed programme had the capacity to disrupt Zespri's attempts to grow the market in this region and might create a parallel supply of New Zealand kiwifruit that could be detrimental to the aim of increasing sales and maximising returns in China generally, and Xinjiang in particular.

(c) The operation of the programme outside the standard drawdown provisions would be detrimental to the aim of the collaborative marketing scheme.

[77] All three applications were considered by committees, the Europe and China Committees respectively, whose members had particular expertise in the markets in question. Before making their decisions, each committee heard presentations from both the applicant and Zespri.

[78] A fair reading of the three decisions indicates that, although there are parts that might suggest an onus had been placed on an applicant, a proper independent inquiry was made into the information available to each committee. The committee members made their own assessment of the economic concerns. There is no suggestion that they relied on relevant information that neither the applicants nor Zespri had an opportunity to counter. While it would have been better for the committees to have avoided the use of language that suggested that there was any onus on the applicant, I am satisfied that the Board did not err in its approach to this question. This aspect of the application for judicial review fails.

(iii) The "collaboration" point

[79] The second error alleged is that each committee held that "an Applicant must satisfy the Board or a Committee to whom the Board's powers … have been delegated that the proposed arrangement will":

… (b) be done in collaboration with [Zespri].[78]

[78] See para [61] above.

[80] When giving its actual decision, each committee stated that the respective applicant had not demonstrated "any sufficient degree of collaboration with [Zespri] to meet the requirements of the Regulations".[79]

[81] The reasons given by each committee for reaching that view were:

(a) On Splice's application, the Europe Committee said:

> 20. With regard to collaboration, the Committee found no evidence of the Applicant's claim of "comprehensive consultation with Zespri" and the proposal is not "entirely consistent, collaborative & synergistic with Zespri marketing strategy" as the Applicant claimed. The applicant's written application made strong statements about collaboration "in-market & in NZ" but this was not supported by any evidence and it was the Committee's view that the relationship between the Applicant and [Zespri] had broken down to the extent that any future collaboration was unlikely to be successful.

(b) On Seeka's application in respect of Hainan Island, the China Committee said:

> 20. In relation to the requirement for collaboration, *the* Committee found insufficient evidence of the Applicant's genuine intent to collaborate with [Zespri] in the sense implicit in an approval granted under Regulation 28. The Committee felt that if the Applicant genuinely considered that there are substantial benefits for the New Zealand kiwifruit suppliers by operating cool storage and packing lines in-market, then it would have expected the Applicant to have tested the feasibility of that proposal with [Zespri]. The Applicant did not engage with [Zespri] with any meaningful information about that matter. This proposal, if it were to succeed would require a close and genuine collaboration with [Zespri] to test the concept.

(c) On Seeka's application in respect of Xinjiang, the China Committee said:

> 20. In relation to the requirement for collaboration, the Committee found insufficient evidence of the Applicant's genuine willingness to collaborate with [Zespri] in the sense implicit in an approval granted under regulation 28. The Committee felt that given the special sensitivities around the

[79] See the extracts from each decision, set out at para [62](a)–[62](c) above.

> China market, the Applicant should understand the need to work very closely with [Zespri] to minimise risks and achieve the stated objectives of the programme. Whilst the Applicant stated they are able to work with [Zespri], the Committee was not satisfied, based on the Applicant's submissions, of their ability to collaborate with [Zespri] to a sufficient degree to deliver this programme.

[82] There is a lack of clarity in the respective decisions as to the nature of the "collaboration" that each committee was taking into account as a factor that could determine the application in a manner adverse to the applicant. The various statements made in the decisions indicate a number of different concerns:

(a) Was the proposed arrangement one that would be "done in collaboration with" Zespri?[80]

(b) Did the proposal involve a "sufficient degree of collaboration" with Zespri?[81]

(c) Did the applicant fail to consult adequately with Zespri before making its application?[82]

(d) Was there a genuine willingness on the part of the applicant to collaborate with Zespri?[83]

(e) Had the relationship between the relevant applicant and Zespri broken down to such a degree that they could not work together collaboratively on the proposed project?[84]

[83] In a variation on the same themes, the Information Document stated that: "Meeting with Zespri to notify them of the applicant's intentions is not effective collaboration".[85]

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80 See para 5(b) of the "template" part of the decisions, set out at para [61] above.
81 See para 15 of each decision, set out at para [62] above.
82 See para 20 of the Europe Committee's decision, set out at para [81](a) above.
83 See para 20 of both decisions of the China Committee, set out at para [81](b) and (c) above.
84 See para 20 of the Europe Committee's decision, and para 20 of the China Committee's decision on the Xinjiang application, set out at para [81](a) and (c) above.
85 See fn 75 above.

[84] There are inherent difficulties in treating any of the factors identified as being a basis to refuse outright an application for a collaborative marketing approval. I say that because:

(a) The purpose of the collaborative marketing regime is to allow the Board to compel Zespri to enter into an arrangement if it were satisfied that the purpose is to increase the wealth of New Zealand kiwifruit suppliers. Collaboration is the *outcome* of the Board's decision, not a factor to be taken into account in determining whether approval should be given.

(b) If a proposal did not involve any collaboration, then it would not be a collaborative marketing arrangement of the type envisaged by the Regulations. An applicant cannot export, other than to Australia, in its own right. To export, it needs to work in conjunction with the holder of the monopsony, Zespri. If the application were not to allow for any collaboration with Zespri it could not be considered by the Board.

(c) The absence of pre-application consultation between the applicant and Zespri cannot be relevant to an assessment of the quality of the proposed project and whether it has the purpose of increasing the overall wealth of suppliers. An applicant's failure to consult may cause difficulties to it if the Board took the view that there was inadequate time for Zespri to respond adequately or for the Board to make its own inquiries. Obviously, the better the quality of the information that the Board receives, the more likely it is that its decision will be right. It is in the interests of all applicants to discuss proposals with Zespri in advance to ensure that potential problems are identified at an early stage. That should ensure that appropriate risk management processes can be put in place to overcome them.

(d) If the Board considered that there had been a breakdown in relations between the applicant and Zespri to such a degree that it may be difficult for them to work together, it would need to find a way for the

> proposal to be implemented, if it were such that a significant economic benefit to suppliers would be gained from it. The relevance of the parties' inability to work together goes to the risk of whether it may not succeed for that reason. The higher the risk that the project might be jeopardised for that reason, the more likely it is that expected benefits might be compromised.

[85] In my view, the various ways in which the "collaboration" factors were considered by each committee were irrelevant to their decisions.

(iv) The "mandatory considerations" point

[86] Identification of relevant mandatory factors, in the context of a test established by statute or regulation, falls to be determined by reference to interpretation of the purpose provision, in light of the overall regulatory scheme.[86] For example, while the desirability of encouraging innovation, one of the purposes behind the mitigation measures,[87] may be to an important consideration in any given case, the question is whether the regulatory framework requires all or any of the factors set out in reg 8 to be considered on all applications for collaborative marketing arrangements.

[87] Greater latitude tends to be given to specialist bodies to determine those factors that they regard as relevant to a particular case.[88] Having said that, a decision-maker *must* take into account any factors that are expressed as mandatory, or should be regarded as mandatory by necessary implication.

[88] In this case, it is clear that there is no express requirement for the decision-maker to take into account the factors relating to purpose found in reg 8. That moves the question to whether, as a necessary implication, such factors should be regarded as mandatory considerations.

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86 *CREEDNZ v Governor-General* [1981] 1 NZLR 172 (CA) at 182–183 set out at para [56] above.

87 Kiwifruit Export Regulations 1999, reg 8(a) set out at para [29] above.

88 For example, see *Air New Zealand Ltd v Wellington International Airport Ltd* [2009] NZAR 138 (HC) at para [39].

[89] I do not consider that all or any of the factors in reg 8 will necessarily be relevant to a collaborative marketing arrangement. As I have already indicated, in my view there is a need to separate different policy goals identified in the regulations. Regulation 8 sets out the purposes behind the mitigation measures, which are designed to minimise the risk that Zespri will abuse its monopsony. On the other hand, reg 24 is concerned with the need for the Board to ensure, by comparing what can be achieved through collaborative action between an applicant and Zespri, on the one hand, and by Zespri alone, on the other, that suppliers receive the best return for their product.

[90] While, as counsel for Zespri accepted, individual factors set out in reg 8 may be relevant to a particular application, they are not to be regarded as mandatory factors requiring consideration on every application for a collaborative marketing arrangement. That being so, the Board did not err in failing to take account of all factors set out in reg 8. It was open to the Board to consider such (if any) of those factors that it considered relevant in the context of the particular application.

(c) Legitimate expectation

(i) Legal principles

[91] Reliance on the principle of "legitimate expectation" derives from an "appeal" provision contained in the Information Document. Clause (E) provided:

> **(E)** ***Appeal Provision***
>
> 1. Applicants are entitled to appeal the final decision of the relevant Collaborative Marketing Committee, to [Kiwifruit New Zealand's] Appeal Committee as follows:
>
> - Within 14 calendar days from the date they are sent the Collaborative Marketing Committee's reasons for declining their application, or
>
> - Within 14 calendar days from the date they are sent the Collaborative Marketing Committee's decision.
>
> 2. The Appeal Committee consists of those members of the [Kiwifruit New Zealand] Board not involved with the consideration of the relevant collaborative marketing application and is chaired by the Board Chairman. Any decision that is appealed or any decision

> affected by an appeal will not become a final decision until after the appeal is determined.

[92] In *Comptroller of Customs v Terminals (NZ) Ltd*,[89] the Court of Appeal, in a judgment given by Randerson J, explained the nature of the concept:

> [121] The concept of legitimate expectation may be viewed as an aspect of the administrative law principle that requires governments and public authorities to act fairly and reasonably. The general principle was formulated by the Privy Council in *Attorney-General of Hong Kong v Ng Yuen Shiu* [[1983] 2 All ER 346 (PC) at 351]:
>
> > … when a public authority has promised to follow a certain procedure, it is in the interests of good administration that it should act fairly and should implement its promise, so long as it does not interfere with its statutory duty.
>
> [122] *This general principle was affirmed by the Privy Council more recently in New Zealand Maori Council v Attorney-General [[1994] 1 NZLR 513 (PC) at 525] but with the qualification that a successful challenge to an assurance of this type would depend in part on whether there was any "satisfactory reason" for the Crown not to comply with it*.
>
> [123] Establishing a legitimate expectation in administrative law is not dependent on the existence of a legal right to the benefit or relief sought. The expectation might be engendered by promises that a particular authority will act in a certain way or by the adoption of a settled practice or policy which the claimant can reasonably expect to continue. A promise of the kind alleged may be express or implied.
>
> [124] *Legitimate expectation is to be distinguished from a mere hope that a cause of action will be pursued or a particular outcome gained. To amount to a legitimate expectation, it must, in the circumstances (including the nature of the decision-making power and of the affected interest) be reasonable for the affected person to rely on the expectation.*
>
> [125] Where legitimate expectation is raised, the inquiry generally has three steps. The first is to establish the nature of the commitment made by the public authority whether by a promise or settled practice or policy. This is a question of fact to be determined by reference to all the surrounding circumstances. A promise or practice that is ambiguous in nature is unlikely to be treated as giving rise to a legitimate expectation in administrative law terms.
>
> [126] *The second is to determine whether the plaintiff's reliance on the promise or practice in question is legitimate.* This involves an inquiry as to whether any such reliance was reasonable in the context in which it was given.

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[89] *Comptroller of Customs v Terminals (NZ) Ltd* [2014] 2 NZLR 137 (CA). Although this judgment was not reported until 2014, it was decided on 18 December 2012.

> [127] The third, and often most difficult part of the inquiry, is to decide what remedy, if any, should be provided if a legitimate expectation is established.
>
> (Emphasis added)

[93] Both Splice and Seeka can point to an explicit assurance of the existence of an "appeal" process. In Seeka's case, that was reinforced by the way in which it had been applied to earlier applications that it had made. Further, both were entitled to expect consistency of approach by which the Board determined applications of this type.

[94] The usual approach will be to hold public authorities to promises, provided what they offer is lawful. It is unnecessary to go so far as to say that an applicant would not have embarked upon the process unless what was promised had been given.[90] In this case, both Splice and Seeka made their applications on the faith of what was said in the Information Document, and an existing (and consistent) practice involving an "appeal" process of which those involved in the industry were well aware.

(ii) Factual inquiry

[95] The question of reliance is a matter of evidence. Mr Luxton, is the sole director and shareholder of Splice. Mr Michael Franks, is the Chief Executive Officer of Seeka. Each gives evidence about the relevance of the "appeal" right. In the absence of cross-examination, I accept their evidence on this topic.

[96] Mr Luxton deposes:

> 15. I was aware that the Information Document advised that an appeal process would be available, and that gave me some comfort, considering that Zespri did not support the programme, and being conscious of the close links between Zespri and [the Board]. For example, they share the same building, and all members of [the Board] have connections to the industry and Zespri.
>
> 16. [The Board] refers applications for collaborative marketing approvals to committees. The committee had heard Splice's application was made up of Ian Greaves and Heindrik Pieters. A

[90] Joseph, *Constitutional and Administrative Law in New Zealand* (4th ed Thomson Reuters, 2014) at para 25.2.4(1)(c).

> hearing date was allocated for Splice's application for 25 November 2015.

[97] Mr Franks, on behalf of Seeka, is more specific as to reliance on the "appeal" process. Relevantly, he deposed:

> 13. The appeals process is also important to Seeka because Seeka is concerned that members of [the Board] committees often have conflicts of interests. For example, the applications in respect of Hainan Island and Xinjiang province were heard by Hendrik Pieters and Andrew Fenton. Hendrik Pieters is the deputy chairman of Eastpack Limited, Seeka's largest kiwifruit post-harvest competitor. Andrew Fenton is a director of Market Gardeners Limited and La Mana in Australia, both direct competitors of Seeka. In the past, the appeals process afforded Seeka an opportunity for a cost efficient review by alternative members of Kiwifruit New Zealand.

[98] Ms Casey supplied me with copies of two "appeal" decisions, both involving Seeka. The first related to a decision of the China Committee of 14 February 2013 that had declined an application to export a particular variety of kiwifruit to China. Seeka asserted that there had been an error in the process adopted by the China Committee which resulted in important information not being considered, and which would have had a material bearing on the outcome.

[99] Although not available to the China Committee, the "Notice of Appeal" set out the information on which Seeka relied. The appeal hearing was scheduled for 21 February 2013 before the then chairperson of the Board, and another member. A decision was given before that meeting, because it was favourable to Seeka. The Appeal Committee said:

> **2. Seeka Appeal**
>
> …
>
> 2.2 The Appeal Committee is of the view that in the circumstances of this Application, in particular the short time frame between the decision and the further information being available from the Applicant, there is time to consider the additional information before the kiwifruit harvest season commences. Whether or not that information is of relevance to the eventual outcome of the Application will be for the China Committee to determine.
>
> **3. Outcome of the Appeal**
>
> …

> 3.2 The Appeal is upheld to the extent that the Appeal Committee recommends that the China Committee re-convene its meeting with Seeka to consider the further information referred to in the Notice of Appeal and make such modifications to its decision of 31 January 2013 as it deems appropriate. Zespri representatives should be invited to attend that re-convened meeting.

[100] The second concerned a decision of the China Committee to decline an application to export two varieties of kiwifruit to Northern and Central East China. The decision rejecting the application had been made on 28 February 2014, but the 'appeal" was not heard until 5 May 2014. Again, the chairperson of the Board presided, on this occasion with two other members. In a more detailed decision, the Appeal Committee considered the grounds of the appeal, which went to the question whether conditions attached were "reasonable and necessary". By agreement, submissions were made in writing and the Appeal Committee determined the appeal on the papers.

[101] The Appeal Committee decided that the appeal was "not upheld". The discussion of relevant factors and the reasoning of the Appeal Committee was more extensive than the 2013 appeal and the decisions of the Europe and China Committees with which I am concerned. It is clear from both decisions that there was a full re-consideration of the points raised by Seeka.

[102] In this particular case, I consider that, notwithstanding the lack of evidence that each party would not have embarked upon the process if the "appeal" right had not been present, each had a legitimate expectation that a two stage process would be involved. That expectation was reasonable. It was a practice well known in the industry. Having regard to the compelling reasons given by Mr Franks for the existence of the process[91] the Board should be held to its promise, provided the "appeal" right was lawful.

(iii) Was the "appeal" process lawful?

[103] In *New Zealand Maori Council v Attorney-General*,[92] the Privy Council qualified the right to a remedy for breach of any legitimate expectation in holding

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91 See para [97] above.

92 *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 (PC) at 525.

that no remedy was available if there were "a satisfactory reason" for the breach. That could include re-consideration at a time prior to an application for review being heard by a Court.

[104] On 10 November 2015, the Board sought advice from Senior Counsel on whether "it is appropriate and lawful for an Appeal Committee to be established to hear Appeals after a Collaborative Marketing Committee has made a decision" on a collaborative marketing proposal. Senior Counsel responded on 23 November 2015, with written advice. He concluded that:

> **Conclusion:**
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> 14. … the appeal procedure created by the Board for dealing with applications for collaborative marketing approval made pursuant to Regulation 27 is outside the jurisdiction of the Board and is accordingly unlawful and invalid. Specifically regulation 31 which enables the Board to regulate its own procedure does not confer on the Board any lawful right to constitute and implement such a procedure, nor is the procedure otherwise lawfully conferred by any other provisions of the Act or Regulations.

[105] In reaching that conclusion, reliance was placed on what Senior Counsel termed "a fundamental principle of law that no rights of appeal exist in relation to any statutory or regulatory regime unless they are specifically conferred by applicable legislation".[93] Further, he opined that a right of appeal could not be created as an incident of the Board's jurisdiction because "the Board has no inherent jurisdiction and any implied powers it may have arising from the powers specifically conferred on it or by reason of Regulation 38, only apply in relation to the exercise of the jurisdiction specifically conferred by the Act or Regulations". Senior Counsel concluded:

> It follows that within the scheme of the Regulations and the specific requirements contained in Regulations 28(2)(c) and Regulation 29, a decision once made under Regulation 28 and communicated and implemented as required, completes the function of the Board and in relation to any application so decided, and communicated and implemented as required, the Board thereafter is *functus officio* (without further jurisdiction). If the Board is *functus* at that point, logically it cannot then at the same time legitimately have a right to embark upon an appeal procedure for which there is no express jurisdiction. In that way and for those reasons the

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[93] In reliance on *Attorney-General v Sillem* (1864) 10 HLC 704 (HL), as recently applied in *Hawke v Accident Compensation Corporation* [2015] NZAR 897 (CA).

> Board's function under Regulation 28, and that Regulation's requirements, allied with other relevant Regulations, complement and support the conclusion separately reached that neither Regulations 31 or 38, or both jointly, lawfully confer any power on the Board to provide the appellate procedure that has been adopted and implemented by the Board up to this time.

[106] As the lawfulness of the decision to create an "appeal" process is a question of law, it is for me to determine it. I have referred to portions of Senior Counsel's opinion to identify the issues that I must address. I have considered his views on the basis that his reasoning was adopted by Ms Casey, as part of her submissions for the Board.

[107] Throughout this judgment I have referred to the "appeal" process with the use of quotation marks. I have done that deliberately. There are many types of appeal that arise when decisions of tribunals or courts are in issue. Without being exhaustive, some may involve a complete rehearing of a proceeding, with or without discretion to allow further evidence to be introduced; some may involve a power to remit to the original decision-maker for reconsideration; some may be limited to questions of law; others may be limited to determining whether the procedure was fair. Clause (E) of the Information Document does not specify what type of "appeal" was contemplated.[94]

[108] With respect, I consider that the Queen's Counsel from whom the Board sought advice focussed inappropriately on the question whether the Board could set up an appellate procedure akin to that which might otherwise have been included in the Act or Regulations. In my view, a fair reading of cl (E) does not suggest that anything more than a review of the earlier decision was required. I consider it was open to the Board to regulate its own procedure by incorporating a review process of that type; whether the label "appeal" or "review" is used is beside the point.

[109] The two "appeal" decisions to which I have referred[95] suggest that the Board was prepared to receive further information and to ask a committee to reconsider, if necessary. Based on its own experiences, Seeka was entitled to believe that a process of that type would be followed if it made application, though unlike Splice,

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94 Clause (E) is set out at para [91] above.

95 See paras [98]–[101] above.

it was advised that the appeal process had been withdrawn before its meeting with the Board and Zespri took place.[96] I have no doubt that the "appeal" procedures adopted by the Board, and the way in which they functioned, were well known to industry participants who might have applied for a collaborative marketing arrangement to be approved.

[110] I asked Ms Casey what the position would be if new and important information came to hand after the committee had given its decision. She suggested that there was no impediment to a second application being made. Whether or not as a matter of law, that suggestion is correct, there is certainly a practical impediment arising from the fact that an application was required to be made by 30 October 2015 and decisions had to be made in sufficient time for proposals to be implemented during the forthcoming export season. Also, on Senior Counsel's advice, an issue would arise as to whether the Board was *functus officio.*

[111] What was contemplated was an opportunity for a disappointed applicant to have its application reconsidered by a committee that included the independent member of the Board. Beyond that, cl (E) of the Information Document does not go. The Regulations give the Board all necessary powers to enable it to carry out its functions,[97] to delegate certain functions to committees,[98] to regulate its own procedures,[99] and to do so in a manner that allowed it to "perform its functions in a manner that is as efficient and cost-effective as possible".[100] The establishment of a process of review (however termed) was far more cost effective and efficient than leaving a disappointed applicant to seek judicial review in this Court.

[112] Part 4 of the Regulations do not place any constraints on the way in which the Board wishes to undertake its functions when inquiring into a collaborative marketing arrangement. I do not accept the view that the Board's decision to delegate determination of a particular collaborative marketing proposal to a committee appointed for the purpose in any way restricts the Board from putting an

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96 See para [11] above.
97 Kiwifruit Export Regulations 1999, reg 38.
98 Ibid, Schedule 2 cls 10 and 11.
99 Ibid, reg 31.
100 Ibid, reg 34.

additional mechanism in place to provide a timely, cost-effective and efficient reconsideration of a decision, in order to avoid the possibility of error. In the context a collaborative marketing arrangement, error could have a material adverse effect on the economic interests of the general body of suppliers. Further, there is no suggestion in the Regulations that a decision of the committee will render the Board *functus officio*, either if valid grounds to review are advanced or additional evidence comes to light which could materially affect the decision.

[113] I add that I do not criticise the Board for removing the appeal process in the way it did. Properly, it was relying on advice from a senior Queen's Counsel. I have formed a different view on the law.

(d) Were the decisions "unreasonable"?

[114] I propose to deal with each of the decisions briefly, in explaining why I do not consider they are challengeable on grounds of unreasonableness. I do so, partly, on the invitation of Mr Brittain who accepted that it was unlikely the application for judicial review could succeed under this head, if unsuccessful on all others. Given the orders I intend to make, these comments are restricted to decisions based on the evidence available to the committees at that time. If additional information were put before the Board on review, my comments would not be determinative of the nature of the decision to be given.

[115] I recognise the expertise of each committee in analysing the economic issues in connection with the kiwifruit industry. The Court must be wary about intruding into areas involving assessment of the merits, particularly in such a specialised field.[101] My comments are intended to be read by reference to that underlying approach.

[116] The Europe Committee's decision on Splice's application turned on its assessment of whether the proposal would increase the overall wealth of kiwifruit suppliers. The Board was aware of previous collaborative efforts between Zespri

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[101] *Diagnostic Medlab Ltd v Auckland District Health Board* [2007] 2 NZLR 832 (HC) at para [328]. See also *Stevenson v New Zealand Apple & Pear Marketing Board* HC Wellington CP 63/87, 6 November 1987 at 16 (Tipping J).

and Splice. But, it determined whether the "overall wealth" test had been applied by reference to "short-term fluctuations in supply and demand [against] … the longer term objective of increasing the overall wealth of New Zealand kiwifruit suppliers". The Europe Committee analysed the information it had before it and was conscious of the potential for the proposal to impact adversely on the "ZESPRI" brand and premium returns to New Zealand suppliers that could be received through it. The use of a house brand under the name of "Ja! Naturlich" told against Splice on that point. That was a reasonable decision open to the committee.

[117] Seeka's application in respect of the Hainan Island proposal was the subject of a review of economic evidence by the China Committee, and its own assessment of problems that might arise with the ability of the intended market to deal with the volumes of kiwifruit Seeka intended to supply. Concerns were expressed about "leakage" of the product into the mainland China market and the disruption that could cause to Zespri's strategy. Having regard to those factors, and Seeka's request for the programme to operate outside standard drawdown provisions, the committee considered that the overall wealth of suppliers would not be increased by approval of the application. The committee was entitled to reach that conclusion.

[118] So far as Seeka's application in respect of Xinjiang province was concerned, the expertise of the members of the China Committee takes on greater significance. Not only were they concerned with an analysis of the economic issues but also considered problems involved in getting the kiwifruit to the relevant destination port, Urumqi, and the likelihood of "leakage" if the proposal were to go ahead. The committee was also of opinion that there was a risk that overall wealth of suppliers could be adversely affected by the proposal given Zespri's current market strategy; in particular the China Committee was concerned about the possibility of a parallel supply of New Zealand kiwifruit developing in a manner detrimental to the goals of increasing sales and maximising returns in China. The committee was also concerned about the request for the programme to be operated outside standard drawdown provisions. The committee's decision was reasonable, in the circumstances.

Relief

[119] Although judicial relief is a discretionary remedy,[102] when a reviewable error has occurred good reason must exist not to provide a remedy. In *Phipps v Royal Australasian College of Surgeons*,[103] Lord Nicholls, delivering the advice of the Privy Council, said:

> [27] … The overriding general principle is the need to achieve a fair result in the particular circumstances. But, in general, Courts should be slow to conclude that evidence such as that given by the reviewers in the present Court proceedings is a sufficient reason for withholding relief. When a decision is flawed by serious procedural irregularity, the person prejudiced is normally entitled to have the matter considered afresh. Justice requires that the decision should be set aside and reconsidered unless, in the particular case, there is a good reason why that should not be so. ….

[120] It is also trite that the most appropriate remedy should be granted. In *Hunt v A*, the Court of Appeal observed that New Zealand had "squarely adopted a regime of remedial flexibility: if there is a breach of an obligation, whatever remedy is most appropriate will be employed".[104]

[121] In light of my finding on the legitimate expectation point, a rehearing by the Board (or a nominated committee) is necessary. I was told that it would not be possible to constitute an Appeal Committee of the type contemplated in cl (E) of the Information Document because the chairperson will be overseas at the time the decision must be made. Both applicants were content to agree, in the unusual circumstances of this case, that a reconsideration by nominated members of the Board would meet the need for a remedy if they were successful on this point. The order that I will make will require reconsideration in light of the interpretation of the Regulations set out in this judgment.

Result

[122] Each application for judicial review is granted:

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102 For example, see *Bulk Gas Users Group v Attorney-General* [1983] NZLR 129 (CA) at 136.
103 *Phipps v Royal Australasian College of Surgeons* [2000] 2 NZLR 513 (PC) at para [27].
104 *Hunt v A* [2008] 1 NZLR 368 (CA) at para [92].

(a) All three applications are remitted for reconsideration by a committee established for that purpose by the Board, in accordance with the interpretation of the Regulations set out in this judgment.

(b) I make a declaration that the "appeal" process to which cl (E) of the Information Document refers is lawful, and provides a power for the Board to review any decision reached by a collaborative marketing committee.

[123] Costs are reserved. The Registrar shall allocate a telephone conference before me at 9am on the first available date after 13 June 2016. Memoranda shall be filed no less than three working days before the conference setting out the parties' positions on costs. If not agreed, I shall make directions as to the exchange of submissions and whether any hearing will be oral or on the papers.

[124] I do not believe that any information contained in this judgment is of a confidential nature which should not be published. The judgment will be released publicly no earlier than 9am on Friday 6 May 2016. If counsel have any concerns about the form in which the judgment is to be published they shall file memoranda before that time for my consideration. If that were to occur the judgment would not be published until such time as I determine the issues raised.

[125] I thank counsel for their assistance.

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P R Heath J

Delivered at 2.00pm on 3 May 2016

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