
**IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY**

**I TE KOTI MATUA O AOTEAROA
TE WHANGANUI-Ā-TARA ROHE**

CIV-2014-485-11493

BETWEEN	STRATHBOSS KIWIFRUIT LIMITED First Plaintiff
AND	SEEKA KIWIFRUIT INDUSTRIES LIMITED Second Plaintiff
AND	THE ATTORNEY-GENERAL Defendant

SYNOPSIS OF OPENING SUBMISSIONS FOR THE DEFENDANT
September 2017

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OVERVIEW

1. Central government biosecurity management responsibilities relate to the widest concepts of “the public interest”: human health; the environment; international relations and trading arrangements; and national economic performance.
2. The essence of the defendant’s case is that the management of biosecurity risks is a statutory responsibility undertaken by the Minister and Ministry in the broad interests of New Zealand as a whole.
3. Subject to very narrow exceptions inapplicable here, this responsibility does not give rise to private law claims for damages such as those advanced by the plaintiffs.
4. The relevant legal context includes:
 - 4.1 the Biosecurity Act 1993;
 - 4.2 the World Trade Organisation (**WTO**) agreement on the Application of Sanitary and Phytosanitary Measures (**SPS Agreement**);
 - 4.3 the Appropriation Acts which fund biosecurity management and include Parliamentary oversight;
 - 4.4 the Public Finance Act 1989 which provides for Ministerial involvement in Ministry priorities and enhances Parliamentary oversight;
 - 4.5 judicial review of particular decisions involving statutory powers; and
 - 4.6 in extraordinary circumstances (and not pleaded here), the tort of misfeasance in public office.
5. However, the 1993 Act provides no support for the inclusion of the tort of breach of statutory duty in the relevant legal context (again not pleaded here), nor the tort of negligence.

6. While the plaintiffs plead their two causes of action invoking the tort of negligence, the defendant says that these claims are misconceived in law and unsupported on the evidence. Contrary to the thrust of much of the plaintiffs' case, the Court is not undertaking a hindsight-based commission of inquiry into biosecurity management (including its resourcing and rules) for the years 2006-2010.
7. The plaintiffs' negligence claims are primarily based on allegations that the Crown is liable in law because it (a) owes and (b) is in breach of a common law duty of care to protect a primary production industry from commercial loss as a result of a biosecurity incursion.
8. The Crown says:
 - 8.1 No such common law duty of care exists. New Zealand's appellate courts have rejected a common law duty of care in respect of public authorities acting as regulators in the public interest.¹
 - 8.2 In any event, there was no breach of any such duty.
 - 8.3 If there was a breach, any such breach cannot be proved to have caused kiwifruit orchards to have become infected with Psa-3.
 - 8.4 Even if such a duty was held to exist and have been breached, the statutory immunity in s 163 of the Biosecurity Act 1993 applies.
9. These opening submissions address:
 - 9.1 Key points about the statutory and international framework;
 - 9.2 New Zealand's biosecurity system;
 - 9.3 The kiwifruit industry in New Zealand;
 - 9.4 The role of science in the proceeding;
 - 9.5 The pleadings;

¹ *Takaro Properties Ltd v Rowling* [1987] 2 NZLR 700 (PC); *Fleming v Securities Commission* [1995] 2 NZLR 514 (CA); *Attorney-General v Carter* [2003] 2 NZLR 160 (CA); *North Shore City Council v Attorney-General* [2012] NZSC 49, [2012] 3 NZLR 341 (*The Grange*). A duty of care in respect of biosecurity protection was rejected in *D Pride & Partners v Institute for Animal Health* [2009] EWHC 685 (QB).

- 9.6 The scope of the claimed duty;
 - 9.7 The defendant's position on duty, breach and causation;
 - 9.8 The statutory immunity;
 - 9.9 The factual narrative; and
 - 9.10 An outline of the witnesses to be called for the defendant.
10. The appendices include the following information:
- 10.1 **Appendix A** – Diagram of Part 3 Biosecurity Act 1993;
 - 10.2 **Appendix B** – Core chronology; and
 - 10.3 **Appendix C** – Glossary.
11. In these submissions:
- 11.1 The relevant pathogenic bacterium is referred to by its current scientific name **Psa3**, rather than Psa-V (the “V” having originally stood for “virulent”).
 - 11.2 All references to the Biosecurity Act 1993 are to that legislation as it was on 7 July 2010 (the relevant reprint prior to the incursion).
 - 11.3 “MAF” is used to refer to both the Ministry of Agriculture and Forestry, and the Ministry for Primary Industries (the name of the Ministry changed in 2012).

THE STATUTORY AND INTERNATIONAL FRAMEWORK

12. The plaintiffs' claims relate to the acts or omissions of MAF as a statutory authority. Accordingly, it is both appropriate and necessary to consider the purposes of the relevant legislative environment including the nature of MAF's functions and responsibilities.²

The Biosecurity Act 1993

13. The Biosecurity Act 1993 provides the statutory framework. The long title refers to "the exclusion, eradication, and effective management of pests and unwanted organisms". The definition of "risk goods" emphasises concern with the effect of organisms on "natural and physical resources or human health in New Zealand": s 2(1). And the range of topics addressed in Parts 2-7 of the Act, including border measures and post-incursion responses, illustrates the very broad scope of the Act.
14. Part 3 of the Act is particularly important. Its purpose is to: "provide for the effective management of risks associated with the importation of risk goods."³ Part 3 sets out the process for importing risk goods. A diagram which shows the process is included at **Appendix A** of these submissions.
15. The Supreme Court has previously considered Part 3 of the Biosecurity Act, in the context of a judicial review of a decision by MAF to allow the import of fresh pork meat into New Zealand. The judicial review was unsuccessful. The majority of the Supreme Court agreed that Part 3 does not require the elimination of all risk for imports. The majority judgment quoted from a decision of the majority of the Federal Court of Australia on equivalent Australian legislation:⁴

The legislation does not suggest that quarantine decisions are to be made on an assumption that every scientific fact is known about every conceivable disease or pest that might be introduced into Australia, or that such decisions are to be delayed until all such facts are discovered and accepted. On the contrary, quarantine decisions have to be made in the existing state of knowledge. Imponderables have to be weighed and

² *Fleming v Securities Commission* [1995] 2 NZLR 514 (CA) p 518; *Attorney-General v Carter* at [33]-[37], [43].

³ Biosecurity Act 1993, s 16. All references in these opening submissions are to the Biosecurity Act 1993 as at 7 July 2010 (the most relevant reprint of the legislation for the purposes of the proceeding).

⁴ *NZ Pork Industry Board v Director-General of the Ministry for Primary Industries* [2013] NZSC 154, [2014] 1 NZLR 477 at [111] per Arnold J for McGrath, William Young and Glazebrook JJ; citing *Director of Animal and Plant Quarantine v Australian Pork Ltd* [2005] FCAFC 206, (2005) 224 ALR 103. The majority comprised Heerey and Lander JJ; Branson J dissented.

value judgments made. No specific criteria are laid down, other than the condition to be established must limit the degree of quarantine risk to one which is “acceptably low” – which necessarily assumes that there will be some risk.

16. The approach taken in the Biosecurity Act can be contrasted with the approach in the Hazardous Substances and New Organisms Act 1996 (**HSNO Act**), which expressly requires all persons exercising functions, powers and duties under that legislation to take a precautionary approach:

7 Precautionary approach

All persons exercising functions, powers, and duties under this Act including, but not limited to, functions, powers, and duties under sections 28A, 29, 32, 38, 45, and 48, shall take into account the need for caution in managing adverse effects where there is scientific and technical uncertainty about those effects.

17. Similarly, the Fisheries Act 1996 (which governs the use and sustainability of fisheries resources) explicitly requires a cautious approach:

10 Information principles

All persons exercising or performing functions, duties, or powers under this Act, in relation to the utilisation of fisheries resources or ensuring sustainability, shall take into account the following information principles:

- (a) decisions should be based on the best available information:
- (b) decision makers should consider any uncertainty in the information available in any case:
- (c) *decision makers should be cautious when information is uncertain, unreliable, or inadequate:* (emphasis added)
- (d) the absence of, or any uncertainty in, any information should not be used as a reason for postponing or failing to take any measure to achieve the purpose of this Act.

18. The plaintiffs are evidently advocating a precautionary approach to the 1993 Act. That was conspicuously not provided for by Parliament for the purposes of New Zealand’s biosecurity system (in the context where Parliament was making such specific provision in the HSNO Act and the Fisheries Act). Instead, the New Zealand approach reflects New Zealand’s acceptable level of risk, as determined by New Zealand in line with New Zealand’s international obligations under the SPS Agreement (explained further below) and mindful of our trading dependency.

The SPS Agreement

19. The SPS Agreement forms part of the wider WTO international trade enhancing arrangements. This provides international obligations which New Zealand has agreed to meet.⁵ New Zealand's international obligations are specifically referred to in Part 3 of the Biosecurity Act. Under the SPS agreement, importantly, governments:
 - 19.1 retain the right to determine their appropriate level of risk to human, animal and plant life and health;⁶ but
 - 19.2 must be able to demonstrate that the least trade-restrictive measure to achieve a government's appropriate level of protection has been chosen;⁷ and
 - 19.3 must be able to justify any restrictive measure on the basis of science.⁸
20. The purpose of the requirements under the SPS Agreement is to stop restrictive measures imposed on imports being used as protective barriers to trade.⁹ These principles also underpin aspects of New Zealand's bilateral trade agreements (for example New Zealand's trade agreements with China, Australia, Singapore and Thailand).¹⁰ This is the international framework that must be taken into account by MAF officials when they are making decisions which could be considered to be restrictive measures.

The Public Finance Act and Appropriation Act

21. The Biosecurity Act and New Zealand's international obligations explicitly require MAF officials to balance the benefits of trade with biosecurity risk. That process, and the allocation and prioritisation of resources in that framework, are subject to Parliamentary oversight.

⁵ CB v17 p 13783; CB v44 p 37043; CB v41 p 34481; CB v13 p 10282; CB v04 p 02930; CB v09 p 07023; CB v41 p 34503; CB v41 p 34517; CB v41 p 34529; CB v44 p 37025. See also the 2009 MAF publication 'Balance in Trade'.

⁶ Brief of Evidence of Gretchen Stanton at [34].

⁷ SPS Agreement, Art. 2.2, 5.6; CB v44 p 37043; Brief of Evidence of Gretchen Stanton at [38].

⁸ SPS Agreement, Art. 2.2; CB v44 p 37043.

⁹ Brief of Evidence of Stephen Butcher at [13]; Brief of Evidence of Gretchen Stanton at [14].

¹⁰ Brief of Evidence of Murray Sherwin at [37] and [63].

22. The Public Finance Act 1989 requires the Crown to seek Parliamentary authority for expenses incurred¹¹ and Parliamentary authority for any public money spent.¹² The authority and appropriations are linked in the Public Finance Act to the review by Parliament of the particular Department's intentions on the funds, and the performance of the Department in obtaining the particular outcomes desired by the Government.¹³ The process can be seen in the following steps in the Parliamentary financial cycle¹⁴ for the 2009/10 year, for MAF's biosecurity activities:

22.1 MAF's Statement of Intent was presented to the House in May 2009, pursuant to s 39 of the Public Finance Act. The document set out the Government's goals, priorities and the measures and indicators that would be used to assess MAF's performance. The Minister of Agriculture, Biosecurity and Forestry provided a statement of responsibility (that he was satisfied the information in the Statement of Intent was in accordance with ss 38, 40 and 41 of the Public Finance Act and was consistent with the policies and performance expectations of the Government). The Director-General confirmed that the information in the Statement of Intent was consistent with the proposed appropriations set out in the estimates for 2009/10.¹⁵

22.2 The Estimates of Appropriations for 2009/10, including for Vote Biosecurity were presented to the House on 28 May 2009. The total appropriation across all Votes was \$74.2 billion.¹⁶ Vote Biosecurity was appropriated \$185.6m.¹⁷

22.3 The information supporting the Estimates was also presented. For Vote Biosecurity, this included standards of performance agreed with the Minister for MAF's various activities.¹⁸

¹¹ Public Finance Act 1989 (as at 7 July 2010), s 4.

¹² Public Finance Act 1989 (as at 7 July 2010), s 5.

¹³ D McGee *Parliamentary Practice in New Zealand* (4th ed), 2017 Clerk of the House of Representatives at 512.

¹⁴ Parliament's financial cycle (chart), New Zealand House of Representatives.

¹⁵ Statement of Intent, 2009-2012. CB v18 p 14957.

¹⁶ Summary Table of Total Appropriations for Each Vote, 2009/10.

¹⁷ Vote Biosecurity estimates of appropriations 2009/10. CB v17 p 14071.

¹⁸ Performance Information for Appropriations, Vote Biosecurity 2009/10. CB v17 p 14074.

- 22.4 The Estimates were reviewed by the relevant Select Committees. For example, the estimates for Vote Biosecurity were reviewed by the Primary Industries Committee. The Minister gave evidence before the Committee.¹⁹
- 22.5 The Estimates were given final approval in the Appropriation (2009/10 Estimates) Act, enacted in September 2009.
- 22.6 MAF presented its Annual Report to the House pursuant to s 44 of the Public Finance Act after the end of the Government financial year for 2009/10. The Annual Report included a review of performance on the outcomes agreed with Government, audited statements, service performance under Vote Biosecurity (including in respect of specific targets and priorities agreed with Ministers), and the financial statements for the 2009/10 year.²⁰
- 22.7 The Annual Report was reviewed by the Primary Production Committee in November and December 2010.²¹
23. The process illustrates several important factors implicit in the statutory framework, including that:
- 23.1 MAF, like all government departments, was operating in an environment of limited public resources. Ministers decided how much funding each “Vote” would receive. This was, and is, a political process.
- 23.2 MAF was required to allocate the resources appropriated in Vote Biosecurity to the various activities MAF carried out to guard against biosecurity risk. Those allocation decisions are also political; the particular outcomes, priorities and targets were agreed with the Minister.

¹⁹ Report of the Primary Production Committee, 2009/10 - Estimates for Votes Agriculture and Forestry, and Biosecurity.

²⁰ Ministry of Agriculture and Forestry Annual Report, 2009/10. CB v17 p 13805.

²¹ Report of the Primary Production Committee 2009/10 Financial Review of the Ministry of Agriculture and Forestry.

- 23.3 The Minister and MAF were accountable to Parliament. They had to be able to justify what the moneys appropriated for Vote Biosecurity achieved.
24. The statutory framework requires Ministers and senior officials to manage the interrelationships (including some tensions) between New Zealand's multilateral and bilateral international obligations, New Zealand's financial interests as a trading nation, the threats posed to New Zealand by biosecurity risks, and the scope and arrangement of the public resources to be allocated.
25. Parliament approves the resources, knowing the Government's intended allocation of those resources to the Government's priorities. In the case of biosecurity, a system which aims to mitigate risk at the pre-border, border and post-border stages (as explained further below), is the system adopted. Parliament has endorsed risk management (rather than a zero risk system) through the Biosecurity Act. The system, and use of resources within it, is subject to Parliament's scrutiny.

NEW ZEALAND'S BIOSECURITY SYSTEM

26. Enactment of the Biosecurity Act in 1993 was the first time Parliament had attempted to bring together all biosecurity legislation in one place.²² The Act replaced commodity-specific legislation.²³ The legislation was informed by the then-draft SPS Agreement.²⁴

New Zealand must balance trade and biosecurity interests

27. Self-evidently, New Zealand is dependent on trade for its prosperity. It has long been an advocate for trade liberalisation and a rules-based, multilateral, WTO system.²⁵
28. The Uruguay Round of WTO trade negotiations concluded in 1994. Importantly, WTO members:
- 28.1 Agreed new rules for liberalising trade in agricultural products (including banning quotas, lowering tariffs, and reducing trade-distorting subsidies); and
 - 28.2 Established the SPS Agreement, which established the rules for taking measures to protect the life or health of people, animals and plants, while at the same time facilitating trade. New Zealand, with Australia, took an active role in the negotiation of the SPS Agreement. It came into force for all signatories on 1 January 1995.
29. Since the establishment of the SPS Agreement, New Zealand has developed a reputation for taking a strategic and principled approach, including consistently following the principles and rules set out in the SPS Agreement. The rules-based system is important for New Zealand, as without it New Zealand has insufficient economic muscle to otherwise resolve trade disputes.²⁶ The rules-

²² Brief of Evidence of Murray Sherwin at [10].

²³ On enactment of the Biosecurity Act 1993, the Animals Act 1967, the Plants Act 1970, the Poultry Act 1968, the Noxious Plants Act 1978, the Agricultural Pests Destruction Act 1967, the Apiaries Act 1969, and that portion of the Dog Control and Hydatids Act 1982 were to be repealed, with a transition period of three years (Hansard, 8 Dec 1992, 13090, Hon John Faloon).

²⁴ Brief of Evidence of Murray Sherwin at [11].

²⁵ Brief of Evidence of Murray Sherwin at [54]; Brief of Evidence of Stephen Butcher at [26].

²⁶ Brief of Evidence of Stephen Butcher at [216].

based system is broadly reciprocal; whatever rules and conditions New Zealand imposes must also be workable in terms of what New Zealand can export.²⁷

The end-to-end biosecurity function is consolidated in MAF

30. In 1997 the Biosecurity Council was formed. Its purpose was to coordinate biosecurity effort, which was split across MAF, the Ministry of Health, the Department of Conservation and the Ministry of Fisheries.²⁸
31. The Biosecurity Council produced a report in 2003 called the “Biosecurity Strategy”.²⁹ The need for a strategy arose out of a concern that New Zealand was facing growing and more complex risks, the system was coming under pressure from increased trade flows, there was increased sensitivity to the nature of the risks, and a concern that the balance was not right as between economic risks and environmental risks.³⁰
32. In particular, the biosecurity system was struggling with increased pressures on the border (trade volumes had increased in the recent past by 76% and international passengers by 93%); there was a heightened public expectation about protection of New Zealand’s natural heritage; changing climatic conditions meant the ranges for certain pests were extending; and there was a backlog of unfinished Import Health Standards (explained further below).³¹
33. The Biosecurity Strategy recommended that MAF take the leadership role for the “whole biosecurity system, on behalf of all New Zealanders”.³² The strategy was endorsed by Cabinet and in 2004 Biosecurity New Zealand was established as a business unit within MAF.³³ Biosecurity New Zealand was charged with bringing together all of the government’s biosecurity responsibilities and taking the lead role for biosecurity for all government agencies.³⁴

²⁷ Brief of Evidence of Murray Sherwin at [58]-[60]. Brief of Evidence of Stephen Butcher at [26].

²⁸ Brief of Evidence of Murray Sherwin at [14].

²⁹ CB v04 p 02722.

³⁰ Brief of Evidence of Murray Sherwin at [34].

³¹ Brief of Evidence of Murray Sherwin at [41].

³² CB v04 p 02722 at 02756.

³³ Brief of Evidence of Murray Sherwin at [43] & [39].

³⁴ Brief of Evidence of Murray Sherwin at [47].

MAF's approach to managing risk

34. MAF knew that it could never keep every pest and pathogen out of New Zealand. There were also limited resources. A zero-risk approach was unobtainable. Instead, MAF focused on significant risks and trying to mitigate them, and then having an effective system set up to ensure MAF could respond when incursions occurred.³⁵
35. The system set up within Biosecurity New Zealand, which was in place during the relevant period for this proceeding (2006-2010), reflects this approach to risk. It was a system of trying to “manage” risk at three stages: pre-border, border and post-border.

Prioritisation and allocation of resource to risk

36. Prioritisation of pre-border risk assessment and management activities involves a range of policy considerations. The process primarily involves prioritising the creation and amendment of delegated legislation which will allow the import of “risk goods” into New Zealand (Import Health Standards, discussed further below).
37. In the relevant period, this prioritisation was conducted by an independent panel comprising representatives from MAF, the Ministry of Foreign Affairs and Trade (**MFAT**) and the Biosecurity Ministerial Advisory Council (**BMAC**).³⁶ Prioritisation was conducted against the Integrated Risk Management Framework, which included a number of criteria involving Ministerial priorities, net benefits of trade (including cultural and social benefits), the cost and complexity of a particular Import Health Standard, technical feasibility, and “acceptability” to various stakeholders.³⁷
38. Additionally, the management of risk at the pre-border and border stage included relying on declarations and certifications by trading partners as to the nature of goods being imported,³⁸ and on declarations made by importers.³⁹ The trade system is reliant on a high level of trust in governmental declarations

³⁵ Brief of Evidence of Barry O'Neil at [51]-[55]. Brief of Evidence of Stephen Butcher at [30], [58], [77].

³⁶ Brief of Evidence of Stephen Butcher at [96].

³⁷ CB v09 p 07052. CB v06 p 04636.

³⁸ Brief of Evidence of Barry O'Neil at [56]-[57].

³⁹ Brief of Evidence of Steve Gilbert at [61].

and certifications.⁴⁰ In respect of importers' declarations, there were (and are) significant penalties for incorrect declarations (including the commercial disincentive of having declarant status removed). MAF actively prosecutes importers who make false declarations. MAF also uses intelligence profiling to target particular importers.⁴¹

39. MAF verified such declarations and certifications through audits (for example sending officials to audit overseas facilities processing high risk imports; the regular random selection of sea containers for full internal and external inspection; and the regular random selection of fresh produce imports for a reconciliation compliance check).⁴²
40. MAF conducted 24 hour "Target Evaluation" for all imports arriving in New Zealand that triggered MAF's involvement as a result of their Customs tariff code. The import documentation is assessed at the Auckland Biosecurity Centre, and a decision is made as to what to do with a particular consignment based on the information provided.⁴³
41. The above are all examples of the allocation of limited public funds to manage risk, in light of the volume of goods and persons crossing New Zealand's border. The approach is one that requires MAF officials at all levels of the organisation to use their discretion and judgement.
42. The system is not set up to require a physical reconciliation or inspection of every item crossing New Zealand's border. As MAF's Director of Border Clearance will say, that kind of approach would result in New Zealand ceasing to be a trading nation.⁴⁴

Border settings are complex

43. In addition to the need to make the best use of the resource available in the biosecurity system, there are three other important factors that must be taken into account.

⁴⁰ Brief of Evidence of Barry O'Neil at [57]. Brief of Evidence of Stephen Butcher at [28].

⁴¹ Brief of Evidence of Steve Gilbert at [61]-[71]; [21]; [44]; [54]; [79].

⁴² Brief of Evidence of Steve Gilbert at [61]-[71]; Brief of Evidence of Barry O'Neil at [57].

⁴³ Brief of Evidence of Fiona Willmot at [11]; [63]; [94].

⁴⁴ Brief of Evidence of Steve Gilbert at [76].

44. First, New Zealand's obligations under the SPS Agreement extend to activity at the border. Annexure C and Article 8 of the SPS Agreement require signatory countries to ensure that sanitary or phytosanitary procedures (animal or plant health procedures) are undertaken and completed without undue delay.⁴⁵
45. Second, MAF officials making decisions about requirements to be met at the border and the availability of resource (e.g. quarantine facilities), must consider whether the system will encourage individuals to operate illegally. The more stringent the conditions for import, or if a particular process is too slow, the more likely it is that people will try and smuggle material into New Zealand.⁴⁶ Smuggling of live plant or animal material is generally done by people involved in the industry (growers, producers or enthusiasts).⁴⁷ By way of example, between 2000 and 2011 there were 46 seizures of kiwifruit *plant material* (not including actual kiwifruit or seeds) in the passenger and cargo pathways.⁴⁸
46. Third, New Zealand's primary industries need ongoing access to genetic material in order to remain competitive.⁴⁹
47. These considerations mean that determining what may come over the border and how, and what resources will be allocated to particular commodities, is a complex decision making process. The risk management/benefit equation is not simple. This is in addition to the need to consider trade access and prioritisation of resources for Import Health Standards.

Priorities for MAF in the late 2000s

48. At the end of 2008, as a result of the Global Financial Crisis, it was made clear to public sector Chief Executives that there should be no expectation of additional funding for the foreseeable future.⁵⁰

⁴⁵ Brief of Evidence of Murray Sherwin at [105]-[106].

⁴⁶ Brief of Evidence of Barry O'Neil at [79]-[84]. Brief of Evidence of Stephen Butcher at [118] & [225]. KTWI.400.008.0282. CB v40 p 33302.

⁴⁷ Brief of Evidence of Steve Gilbert at [78].

⁴⁸ Brief of Evidence of Steve Gilbert at [94].

⁴⁹ Brief of Evidence of Barry O'Neil at [83]. CB v40 p 33302.

⁵⁰ Brief of Evidence of Murray Sherwin at [82].

49. The 2008 Briefing to the Incoming Minister records:⁵¹

Recognising that zero risk is unattainable, and that we do not have unlimited resources to spend on biosecurity, the biosecurity system is based on the concept of risk management rather than risk prevention. Risks are managed down as effectively and cost-efficiently as possible, but some residual risk will always be present while goods and people are moving in and out of New Zealand.

The demand for biosecurity services has been increasing, and difficult priority decisions are required. We must strike the right balance between pushing risk offshore, managing risk at the border, and maintaining capability to respond post-border when the need arises. At times there are conflicting interests amongst stakeholders, or the primary drivers for some stakeholders are not well aligned to those of the biosecurity system. In these situations MAF makes decisions based on what will produce the best outcome for New Zealand overall, by applying an integrated decision-making framework that incorporates the full range of economic, environmental, social and cultural values.

50. The 2009 Statement of Intent for MAF was presented to the House of Representatives in April 2009. The three outcomes MAF was working to achieve were:⁵²

50.1 Economy: Sustainable economic growth and prosperity for New Zealanders.

50.2 People: Healthy New Zealanders and a vibrant rural community.

50.3 Environment: Maintained and enhanced economic, social and cultural benefits for New Zealanders from the natural environment.

51. The Ministerial foreword included the following:⁵³

MAF is reviewing its biosecurity border operations. I would like to see lower costs for industry and government, while maintaining our world-class biosecurity standards.

52. The scope of activity and outputs for MAF can be seen in the diagram on pages 12 and 13 of the Statement of Intent.⁵⁴

⁵¹ CB v16 p 13081 at 13100. A Briefing to the Incoming Minister is prepared as a matter of course by all government departments after a general election (or if there is a shuffle of Cabinet Portfolio responsibilities).

⁵² CB v18 p 14957 at 14964.

⁵³ CB v18 p 14957 at 14961.

⁵⁴ CB v18 p14957 at 14970.

53. MAF was charged with serving the public interest across multiple fronts. One of MAF's key activities was the creation and maintenance of documents called "Import Health Standards".

Import Health Standards

54. Import Health Standards (**IHS**) are pieces of delegated legislation promulgated under s 22 of the Biosecurity Act. They set the requirements that any risk good must meet before it can be imported into New Zealand and given biosecurity clearance. "Risk goods" are defined under the Biosecurity Act 1993, and include plants and plant products, fresh fruit and nursery stock (e.g. budwood).⁵⁵
55. There are currently 339 IHSs. They range in length from five to over 300 pages.⁵⁶ Examples of the types of commodities covered by IHSs are: bovine meat and meat products for consumption from the European Union, sawn wood from all countries, garlic from the People's Republic of China, ballast water from all countries, bananas from Australia, cut flowers and foliage, wood packaging material from all countries, zebra semen from the USA, and vehicles, machinery and tyres.⁵⁷
56. Under s 22 of the Biosecurity Act, a Chief Technical Officer (a statutory position within MAF) must recommend the creation of an IHS having regard to a number of factors, including New Zealand's international obligations.
57. The development and amendment of IHSs is a complex issue for MAF. There is a high demand for IHSs (an IHS must be in place before a risk good can be imported). Because they are fundamental to trade access, creation and review of IHSs is a highly political issue, as discussed above. Industry and trading partners seek many more IHSs than MAF is able to provide. The sophisticated skills required to complete an IHS are scarce and expensive.⁵⁸
58. One of the IHSs in place is for nursery stock (broadly, plant material for growing). The Nursery Stock IHS is one of the key documents in this case.⁵⁹

⁵⁵ Biosecurity Act 1993, section 2(1)

⁵⁶ CB v18 p 14599.

⁵⁷ CB v42 p 35104.

⁵⁸ Brief of Evidence of Stephen Butcher at [93].

⁵⁹ CB v18 p 14599.

THE KIWIFRUIT INDUSTRY IN NEW ZEALAND

59. The kiwifruit industry is an important industry in New Zealand. It is characterised by self-determination, resilience and optimism; and by a higher degree of organisation than other primary industries.
60. The kiwifruit industry comprises the full range of those involved. These include: the contractors providing inputs, and their employees; other providers of inputs, and their employees; pack house and cool store operators, and their employees; transport providers, and their employees; and of course the growers, and their employees.
61. There are approximately 2,500 kiwifruit growers in New Zealand, and approximately 3,207 orchards registered with Zespri.⁶⁰ There are kiwifruit growing regions in the Bay of Plenty, Waikato, Franklin, Auckland, Whangarei, Kerikeri, the Far North, Poverty Bay, Hawkes Bay, Whanganui, Horowhenua, and in Nelson and Motueka in the South Island.⁶¹
62. There is a wide variety of ownership structures. Orchards are owned by partnerships, trusts and companies. Orchards are often under some kind of arrangement, for example a lease, licence or management contract.
63. Many inputs are required for the operation of the kiwifruit industry. The following services are typically contracted out: pruning, fertilising, bud and flower thinning, girdling, male pruning, fruit thinning, canopy management, harvesting, beekeeping, spraying, orchard management, artificial pollination, weather station electrical services, irrigation services, post ramming, and the creation of artificial shelters and structures (in addition to contracting for machinery and chemical supplies).
64. The industry's organisational structure includes:
 - 64.1 Zespri International Limited (**Zespri**). This is a company owned by current and former New Zealand kiwifruit growers, which provides a "single point of entry" (**SPE**) for the export of New Zealand grown kiwifruit. Essentially, Zespri provides a global marketing and supply

⁶⁰ Brief of Evidence of Lain Jager at [35].

⁶¹ DSB-60737 at 60755.

platform for New Zealand kiwifruit. The SPE is governed by the Kiwifruit Export Regulations 1999. The Zespri Board is made up of five growers and three independently appointed directors. It represents and advocates for its shareholders in industry matters.

- 64.2 New Zealand Kiwifruit Growers Incorporated (**NZKGI**). This is a grower-formed body established in 1993. It represents and advocates for growers in industry matters.
- 64.3 Registered suppliers, who sign a supply agreement with Zespri. A registered supplier is comprised of one or more supply entities. A supply entity is comprised of a group of growers supplying a post-harvest operator (**PHO**). The supply entity is a separate entity to the PHO, in order that grower funds are protected from the commercial operation of the PHO. Registered suppliers represent and advocate for suppliers and PHOs in industry matters.
- 65. Representatives of these groups negotiate a supply agreement every year. The supply agreement is finalised by the Industry Advisory Council (**IAC**), comprising representatives of all three interests. Once the IAC recommends the supply agreement is adopted, it is agreed to by Zespri and the registered suppliers.
- 66. Other matters for the industry are also determined by the IAC. For example, the IAC played a key role in the response to Psa, including agreeing a \$50m response package with the Government.
- 67. Under the Kiwifruit Export Regulations, Zespri is the main exporter of the New Zealand kiwifruit crop, albeit there is a process by which other marketers can seek approval from Kiwifruit New Zealand (the regulator) to export internationally.⁶² Almost all (approximately 97%) of kiwifruit growers in New Zealand supply Zespri. They are represented in the industry by Zespri (as grower shareholders), or through the registered suppliers, or both.
- 68. A kiwifruit orchard that supplies Zespri is assigned a unique “KPIN” number (Kiwifruit PIN). This is used to track the source of fruit and return payments

⁶² In the past year, approximately 3m trays of kiwifruit, of 120m trays, were exported by these other marketers.

to the appropriate grower. All of the grower plaintiffs in this proceeding are claiming in respect of orchards with KPINs. Accordingly, they are all represented through the industry structure described above.

69. The plaintiffs do not constitute nor represent the kiwifruit industry. Rather the first plaintiffs are a relatively small proportion of the growers; and the second plaintiff, Seeka, is but one of a number of post-harvest operators.

SCIENTIFIC KNOWLEDGE

70. Scientific knowledge features in at least four ways in this proceeding:
 - 70.1 The state of scientific knowledge at the time a review of pollen transmitted pests and pathogens was conducted by MAF;
 - 70.2 The scientific knowledge available at the time Dr Sathyapala, Susan Cooper and others considered the request by Kiwi Pollen (NZ) Ltd to import kiwifruit pollen;
 - 70.3 The scientific knowledge about the expected length of time from infection with Psa3 and when symptoms would be seen on a kiwifruit orchard; and
 - 70.4 The evolution of scientific knowledge about Psa.
71. In order to assist the Court in considering the evidence regarding scientific knowledge, the defendant is calling an expert witness (Professor Richard Newcomb of the University of Auckland).
72. Professor Newcomb has been asked to address:
 - 72.1 The nature of scientific knowledge, and how different opinions are reconciled;
 - 72.2 The scientific research process; and
 - 72.3 Definitions or explanations for particular scientific terms.
73. Professor Newcomb's brief of evidence includes the following, which inform consideration of the evidence heard prior to Professor Newcomb being called:⁶³
 - 73.1 The scientific method is a process through which a researcher can test an idea of how the world is (hypothesis), through to when the idea could be regarded as new scientific knowledge.⁶⁴ A hypothesis

⁶³ Professor Newcomb is in Europe for much of the trial but will return to give evidence after the geneticist witnesses.

⁶⁴ Brief of Evidence of Richard Newcomb at [12].

becomes knowledge when the weight of evidence and inability to falsify become evident through repeated experiments.⁶⁵

- 73.2 Scientists are quite comfortable working with uncertainty, in the space between what is considered known and the unknown.⁶⁶

- 73.3 In the scientific method overall, uncertainty is generally dealt with using a weight of evidence approach.⁶⁷ As more and more peer-reviewed, published experiments favour one hypothesis over another, so too does consensus in the field move.⁶⁸

- 73.1 The most common method that scientists use to describe where the field is up to is the production of a review of the literature to date.⁶⁹ Such a review can be limited by the extent to which older material is reasonably available for review.⁷⁰

- 73.2 While we can go back and read the literature of the past it can be difficult to recall the entire context of what was known generally at that time.⁷¹

- 73.3 There is rarely any great fanfare when scientific consensus is reached and often we only realise that knowledge has been developed through consensus with hindsight.⁷² Scientists working on the natural environment have more variables to contend with that are beyond their control so may need to replicate experiments over more years to reach consensus.⁷³

⁶⁵ Brief of Evidence of Richard Newcomb at [15].

⁶⁶ Brief of Evidence of Richard Newcomb at [22].

⁶⁷ Brief of Evidence of Richard Newcomb at [22].

⁶⁸ Brief of Evidence of Richard Newcomb at [22].

⁶⁹ Brief of Evidence of Richard Newcomb at [23].

⁷⁰ Brief of Evidence of Richard Newcomb at [25].

⁷¹ Brief of Evidence of Richard Newcomb at [33].

⁷² Brief of Evidence of Richard Newcomb at [28].

⁷³ Brief of Evidence of Richard Newcomb at [28].

- 73.1 Hindsight bias is the tendency to see the past more clearly with the benefit of hindsight (“I knew it all along”). In science the effect of hindsight bias is to blur the steps in innovation that occur over time the further in the past they have occurred.⁷⁴
74. Accordingly, in an area of rapidly evolving scientific knowledge, such as Psa, there is a need for consciousness of hindsight bias in considering assertions about the state and clarity of scientific knowledge as at some past dates.

⁷⁴ Brief of Evidence of Richard Newcomb at [32].

THE PLEADINGS

75. These opening submissions are accompanied by a comparative pleadings document, including a table of contents which indicates the major headings of the amended statement of claim (**ASOC**).
76. One factor of the ASOC is the range of matters on which the plaintiffs seek to found their claims. No fewer than 11 decisions, between 2006-2010, are impugned:
- 76.1 No Pest Risk Assessment was commenced, and the Nursery Stock IHS was not amended, before pollen import permits were issued (from early 2007);⁷⁵
 - 76.2 No consultation occurred about the importation of pollen;⁷⁶
 - 76.3 MAF should not have relied on the Card report in permitting pollen imports;⁷⁷
 - 76.4 The initial import permit conditions for pollen were inadequate (April 2007);⁷⁸
 - 76.5 The amended import permit conditions for pollen were inadequate (November 2008);⁷⁹
 - 76.6 There was no specific risk assessment before each pollen permit was issued;⁸⁰
 - 76.7 MAF should have reviewed the Nursery Stock IHS and other border controls, or the underlying risk assessment, when MAF became aware of the Italian Psa outbreak in 2009;⁸¹
 - 76.8 MAF should have properly assessed pollen as a pathway for Psa;⁸²

⁷⁵ ASOC [124](a)(ii), (iii) & (xiii) and [50]-[79].

⁷⁶ ASOC [124](a)(vii), (xiv).

⁷⁷ ASOC [124](a) (viii), (ix).

⁷⁸ ASOC [124](a) (xii), (xiii).

⁷⁹ ASOC [124](a)(vi).

⁸⁰ ASOC [124](a) (v).

⁸¹ ASOC [14](B), [80]-[105].

⁸² ASOC [124](a)(x).

- 76.9 MAF should have liaised with Plant & Food Research Limited, a Crown Research Institute, (**Plant & Food**) regarding pollen, Psa and imports (mid-2010);⁸³
- 76.10 Inadequate MAF response to Plant & Food advice regarding Psa and pollen (September 2010);⁸⁴ and
- 76.11 Specifically, MAF should have physically inspected the June 2009 consignment of kiwifruit pollen and not granted it clearance.⁸⁵

⁸³ ASOC [99] [124](a)(xiv).

⁸⁴ ASOC [94]-[95], [102]-[104], [124](a) (xi), [124](b) (v), (vi).

⁸⁵ ASOC [128](a), [109]-[115].

THE SCOPE OF THE ALLEGED DUTY OF CARE

77. Cutting across the statutory framework, the plaintiffs are asking the Court to impose a common law duty of care on the Crown which would extend to, at least, all participants in all primary industries in New Zealand.
78. The pleaded duty is for officers, agents or employees of MAF to exercise reasonable care and skill when undertaking their functions and responsibilities in relation to biosecurity in New Zealand, including under the Biosecurity Act 1993.⁸⁶ It is important to bear in mind the full scope of the duty. It would necessarily apply in all cases of goods coming over the border. The burden of the duty must be assessed in that light, not just in respect of the one consignment focused on by the plaintiffs.
79. The result of the claimed duty of care, if the plaintiffs were successful, would be that the Crown would act as the insurer in the event a biosecurity incursion could be found to have been the result of some error or insufficient effort on the part of a government official involved in biosecurity.
80. The scale of the potential liability, and of the task of preventing biosecurity incursions, is immense:
 - 80.1 The plaintiffs say Psa3 was imported into New Zealand in 2009. In the 2009/10 financial year, the combined Orchard Gate Return for New Zealand kiwifruit growers was \$490.3m.⁸⁷ Additionally, Zespri paid \$21.995m in dividends that year.⁸⁸
 - 80.2 In the 2009/10 financial year, New Zealand's main primary industries had the following export values:⁸⁹

⁸⁶ Amended Statement of Claim at [121] and [127].

⁸⁷ CB v21 p 18182. See Brief of Evidence of Lain Jager at [54] for explanation of the orchard gate return (the amount received by the grower after Zespri controlled costs, the Zespri margin and the post-harvest costs). A Waikato University report has estimated kiwifruit production for the Bay of Plenty region for the year 2015/16 contributes \$2.06bn to GDP: CB v42 p 35122 at 35147.

⁸⁸ CB v21 p 18182 at 18214.

⁸⁹ Situation and Outlook for New Zealand Agriculture and Forestry, June 2010. See CB v19 p 15573 for New Zealand's trade in the previous year. The figures for fisheries (wild capture) and aquaculture are taken from MPI's publicly available historical data (not included in the June 2010 Situation and Outlook document for MAF, as in that year fisheries were the responsibility of the Ministry of Fisheries). See also CB v19 p 15573 and CB v40 p 33974.

- (a) Dairy \$9.9 billion.
- (b) Forestry \$3.7 billion;
- (c) Lamb \$2.5 billion;
- (d) Beef \$1.7 billion;
- (e) Fisheries \$1.1 billion;
- (f) Wine \$1.08 billion;
- (g) Kiwifruit \$1.04 billion;
- (h) Vegetables \$0.5 billion;
- (i) Wool \$0.5 billion;
- (j) Apples and pears \$0.4 billion;
- (k) Aquaculture \$0.25 billion; and
- (l) Venison \$0.2 billion.

80.3 In 2009 there were approximately 14,852 biosecurity plant pests and pathogens listed on MAF's unwanted organisms register.⁹⁰

80.4 In 2009 there were approximately 19,000 plant species eligible for import.⁹¹

80.5 In 2009, 17.4m tonnes of sea freight were imported into New Zealand, 39.1m international mail items were cleared by MAF, and 4.4m passengers entered by plane or boat.⁹²

⁹⁰ It is a similar figure today. This means that these pests are subject to regulatory controls in the event they are found in New Zealand. This figure forms part of the 30,000 biosecurity pests and pathogens of concern to New Zealand, the difference being those pests for which there is insufficient information to make a decision as to regulatory controls being required. Brief of evidence of Stephen Butcher at [52].

⁹¹ It is a similar figure today. Brief of evidence of Stephen Butcher at [49]; Brief of Evidence of Vivian Campbell at [30].

⁹² Brief of evidence of Steve Gilbert at [28.3] & [27.1]; Statistics New Zealand, Overseas Cargo: Total Imports by New Zealand Port 2009-2013, cited in Environmental Health Indicators New Zealand, Massey University.

- 80.6 MAF's total departmental income for 2009/10 was \$227.372m.⁹³ \$185.6m of this was appropriated for MAF's biosecurity functions (the remainder being for agriculture and forestry functions).⁹⁴
- 80.7 The sum of \$185.6m was expected to cover: export certification, investigation and prosecution of individuals and organisations who breach biosecurity legislation, policy advice on biosecurity issues and ministerial servicing, setting biosecurity standards for imports (including risk analysis), monitoring border pathways, border clearance services (including inspection and clearance of aircraft, vessels, cargo, containers, mail and passengers), surveillance for new organisms in the terrestrial and aquatic environments and response to the arrival of new organisms, including their eradication or management.⁹⁵
- 80.8 There were 21 biosecurity responses conducted by MAF in the 2009/10 year.⁹⁶ On average 2 to 4 of the responses conducted by MAF in any year are likely to be major responses.⁹⁷ By way of example, already in 2017, MAF has had to respond to three major biosecurity incursions: the oyster parasite *Boanmia ostreae* (Stewart Island); the myrtle rust fungus, which affects pohutukawa and manuka (Northland, Waikato, Taranaki and the Bay of Plenty); and the cattle disease *Mycoplasma bovis* (South Canterbury).
- 80.9 The cost of responses can range from under \$5,000 to tens of millions of dollars.⁹⁸ For example, the MAF response to the 1999 painted apple moth incursion cost \$65m.⁹⁹
- 80.10 An Economic Impact Assessment published in 2014 estimates that in a large scale foot and mouth incursion the loss in real GDP over the years 2012 to 2020 would be \$16.2bn.¹⁰⁰

⁹³ CB v17 p 13805 at 13898.

⁹⁴ Brief of Evidence of Murray Sherwin at [83].

⁹⁵ Estimate of Appropriations 2009/10. CB v17 p 14071.

⁹⁶ CB v41 p 34667 at 34685.

⁹⁷ Brief of Evidence of David Yard at [17].

⁹⁸ Brief of Evidence of David Yard at [17].

⁹⁹ CB v15 p 11966 at 12023.

81. The plaintiffs' analysis is that if these losses are a result of a failure to meet the standard of reasonable care, the Crown (i.e. taxpayers) must bear the burden of liability.
82. Additionally, on the plaintiffs' analysis, such a duty of care would also extend to any loss incurred by affected members of the public as a result of breach by any government officials involved at the border. This would include any negligent activity of officials from Customs, the Police, the Civil Aviation Authority, the Department of Internal Affairs (citizenship), and the Ministry for Building, Innovation and Employment (immigration).
83. But the duty would have even wider implications than that. Because New Zealand's decided cases have not recognised a common law duty of care owed by public servants when exercising functions in the general public interest,¹⁰¹ a finding in favour of the plaintiffs on duty would have ramifications across the whole government, not just those functions exercised in respect of the border.

¹⁰⁰ DSB-60696 at 60702.

¹⁰¹ The building inspection cases are *sui generis* (*Attorney-General v Carter* [2003] 2 NZLR 160 (CA) at [35] per Tipping J for the Court), not least because they are about services provided by both public authorities and private individuals, for private individuals, for a fee.

THE PLEADED DUTY OF CARE IS MISCONCEIVED

84. The plaintiffs assert that there is a common law duty to exercise reasonable care and skill in undertaking functions and responsibilities in relation to biosecurity, including in respect of IHSs and risk analysis (first cause of action) and at the border (second cause of action).
85. In summary, the defendant responds that the pleaded duty of care in respect of either cause of action is misconceived:
- 85.1 There is no common law duty of care owed to individuals in respect of the exercise of functions in the general public interest.¹⁰² Functions are exercised under the Biosecurity Act in that public interest in the broadest sense.¹⁰³ They are not exercised for the benefit of private economic interests.
- 85.2 There is no private law analogue to the claimed duty of care.
- 85.3 There is no close and direct relationship between the parties. The kiwifruit industry is no more vulnerable to a biosecurity incursion than any other primary industry in New Zealand.
- 85.4 There is no gap in the private law that needs to be fixed. Existing remedies cover the field, specifically the tort of breach of statutory duty (which requires parliamentary intention to provide a remedy) and the tort of misfeasance in public office (which requires deliberate injury by the deliberate disregard of official duty). Those are not pleaded in this case, doubtless because the plaintiffs (correctly) do not think that they can succeed on those torts. The plaintiffs might also have sought judicial review had they been concerned about the way in which MAF was fulfilling its statutory obligations.¹⁰⁴ The plaintiffs have not done so.
- 85.5 The plaintiffs are asking the Court to find that the content of delegated legislation (the Nursery Stock IHS) is subject to a private

¹⁰² *Takaro Properties Ltd v Rowling* [1987] 2 NZLR 700 (PC); *Fleming v Securities Commission* [1995] 2 NZLR 514 (CA).

¹⁰³ Brief of Evidence of Barry O'Neil at [24]. For example, protecting indigenous species CB v17 p 14281; CB v42 p 35408 and protecting human health CB v30 p 25256.

¹⁰⁴ *Takaro Properties Ltd v Rowling* [1987] 2 NZLR 700 (PC).

law duty and subject to the Court's assessment that it has been negligently made. The plaintiffs are also asking the Court to require the imposition of particular levies under the Biosecurity Act 1993 to cover the costs that would be imposed if the standard of care is as argued by the plaintiffs.¹⁰⁵ Law making cannot be subject to a common law duty of care, nor has a court any legal yardstick to assess the merits of such law making.¹⁰⁶

- 85.6 Discretionary decisions on the allocation of resources or the distribution of risks are matters most appropriately determined by the executive branch of government.¹⁰⁷ If the claimed duty of care is held to exist under either cause of action, a complete recasting of funding allocations would be required (not just within Vote Biosecurity, but across the entire parliamentary appropriations).
- 85.7 It is of fundamental importance that there is no appropriate legal yardstick by which to measure the acts and omissions complained of by the plaintiffs. The decisions involve the balancing of risk against various interests and international obligations, in circumstances of evolving knowledge and scientific uncertainty, and limited resource. Those are decisions which are ill-suited to the descriptor "negligent".¹⁰⁸
- 85.8 The claimed duty of care would likely introduce new complications into the Crown's approach to New Zealand's international obligations under the SPS Agreement, and New Zealand's obligations in its bilateral trade agreements. This is relevant to both the pre-border and at border activities of MAF: the SPS Agreement imposes obligations at both stages. In addition, if the claimed duty of care exists, the claimed duty would bring MAF officials into conflict with obligations to those who would be adversely affected by the conservative approach advocated by the plaintiffs' expert witnesses.

¹⁰⁵ Plaintiffs' opening submissions at [1.3](e). See ss 90 & 137 of the Biosecurity Act 1993.

¹⁰⁶ *Takaro Properties Ltd v Rowling* [1987] 2 NZLR 700 (PC).

¹⁰⁷ *Takaro Properties Ltd v Rowling* [1987] 2 NZLR 700 (PC).

¹⁰⁸ *Takaro Properties Ltd v Rowling* [1987] 2 NZLR 700 (PC).

85.9 The claimed duty of care would expose the Crown to indeterminate liability.¹⁰⁹ The classes of persons, extent of damage, and length of time during which loss can be incurred, are unknown in the case of biosecurity incursions.¹¹⁰

85.10 The claimed duty of care would impose a financial risk on the Crown that is disproportionate to any moral culpability associated with the alleged breaches of duty.¹¹¹ The claim implies that the loss is (at least) the sum of, for every kiwifruit grower:¹¹²

- (a) the number of kiwifruit trays each orchard “should” have, but did not, produce;
- (b) multiplied by \$8 profit per gold kiwifruit tray or \$6 profit per green kiwifruit tray;
- (c) for at least the years 2012, 2013 and 2014.

(The first plaintiffs’ losses (alone) on the above calculation are approximately \$8.8m.¹¹³ Seeka claims additional post-harvest operator losses of \$92.6m).¹¹⁴

85.11 However, the risk that the pleaded duty implies must extend to circumstances where the entire kiwifruit harvest was lost for, say, four years. That would include (on the main species):¹¹⁵

- (a) Total 2010/11 production of 69.9m green trays at \$6 lost profit per tray - \$419.4m.
- (b) Total 2010/11 production of 21.1m gold trays at \$8 lost profit per tray - \$168.8m.
- (c) \$618.2m for at least four years - \$2,472.8m.

¹⁰⁹ *North Shore City Council v Attorney-General* [2012] NZSC 49, [2012] 3 NZLR 341 [*The Grange*] at [159].

¹¹⁰ See the evidence in chief of the plaintiffs’ own expert, Fraser Colegrave (Brief of Evidence at [68]-[71]).

¹¹¹ *The Grange* at [159] citing *Fleming* at 552.

¹¹² Schedule 1 to the Amended Statement of Claim.

¹¹³ Schedule 1 to the Amended Statement of Claim (total of the figures in bold for the years 2012-2014). Other miscellaneous costs are also claimed.

¹¹⁴ Notice of particulars of loss dated 27 September 2016. The losses claimed include loss of profit, the diminution in the value of assets, a loss on the sale of shares, and, capital expenditure on new packing facilities.

- 85.12 The conservative biosecurity system advocated for by the plaintiffs is not the policy adopted for MAF's biosecurity system. There are good reasons for the system adopted by MAF.¹¹⁶
86. Separately, and in addition to the above points which apply to both plaintiffs, the duty of care does not exist in respect of the losses claimed by the second plaintiff in the proceeding, Seeka Industries Ltd.
87. Seeka is claiming as the second plaintiff in its capacity as a PHO.¹¹⁷ In its PHO capacity, Seeka does not own any kiwifruit vines and did not suffer any property damage. Seeka simply provides growers with post-harvest services and charges growers for those services. Seeka's alleged loss – loss in revenue – arises solely from a loss of business from its contracts with the growers.¹¹⁸ Seeka's claim is therefore one for contractual or economic loss.¹¹⁹
88. The common law has long set its face against recovery of relational economic loss, including because there is no duty to protect against such losses, such losses are too remote, and liability will often be indeterminate in nature.¹²⁰
89. Similar factors apply to the claims by:
- 89.1 grower plaintiffs who merely operated or leased kiwifruit orchards¹²¹ (who were able to protect themselves under contractual arrangements that the defendant is not privy to); and
- 89.2 grower plaintiffs who sold their orchards (such orchards not being infected with Psa3) for less than they hoped for.¹²²

¹¹⁵ Brief of Evidence of Lain Jager, p.24 at figure 9.

¹¹⁶ *Attorney-General v Carter* [2003] 2 NZLR 160 (CA); *Takaro Properties Ltd v Rowling* [1987] 2 NZLR 700 (PC); *Fleming v Securities Commission* [1995] 2 NZLR 514 (CA).

¹¹⁷ Seeka also has 155 "grower plaintiff" claims, in respect of 153 KPINs "leased" by Seeka (138 three-year lease orchards and 15 long-term lease orchards) and 2 orchards owned by Seeka.

¹¹⁸ CB v17 p 13700; CB v21 p 18072; CB v29 p 24986; CB v34 p 28450; CB v38 p 31602; CB v39 p 32780; CB v40 p 33647; CB v41 p 34134. CB v40 p 33579.

¹¹⁹ Seeka also has a claim for capital costs which is perplexing, given Seeka has the benefit of the capital expenditure.

¹²⁰ *D Pride & Partners v Institute for Animal Health* [2009] EWHC 685 (QB).

¹²¹ Schedule 3 of the Amended Statement of Claim at (3).

¹²² Schedule 3 of the Amended Statement of Claim at (5).

MAF OFFICERS ACTED REASONABLY

90. As noted, the plaintiffs seek to impugn 11 decisions made by MAF officers between 2006 and 2010. The complaints have been blurred in the plaintiffs' opening submissions.¹²³
91. In essence, the plaintiffs say MAF officers breached the claimed duty of care in two ways:
 - 91.1 In not prohibiting or severely restricting the importation of kiwifruit pollen; and
 - 91.2 In not visually inspecting a consignment of kiwifruit pollen in June 2009.
92. Importantly, the actions and omissions complained of occurred over an extended period of time (2006-2010). It is unclear at what point the Court is to assess any particular decision against the usual criteria for negligence.
93. There was some suggestion during the plaintiffs' opening submissions that the plaintiffs may try to pursue an argument that the Crown is directly liable in negligence for a systemic failure.¹²⁴ The defendant's duty of care arguments would also apply to such a claim. It is also unclear what the systemic failure is. None has been pleaded. The defendant does not consider any systemic failure has occurred. New Zealand operates a risk mitigation biosecurity system. The fact that a risk has eventuated is not surprising, it is contemplated as one of the trade-offs implicit in the system.
94. But in any event, the Crown is not directly liable under New Zealand law. The Law Commission recommendation for changing the Crown Proceedings Act 1950 in order to allow for direct Crown liability was laid before Parliament on 14 December 2015, in accordance with s 16(2) of the Law Commission Act

¹²³ Plaintiffs' opening submissions at [3.2]-[3.4].

¹²⁴ Mr Salmon referred to a "portfolio of negligent acts that are actionable negligence collectively and individually..." NoE p 55 ll 18-19.

1985.¹²⁵ The proposals relating to direct Crown liability were rejected, with that rejection also being tabled in Parliament.¹²⁶

95. Accordingly, the plaintiffs must identify a specific individual who has breached the alleged duty, in order for there to be vicarious liability such that the Crown could be liable in tort under s 6 of the Crown Proceedings Act. This approach aligns with the way in which Parliament has assigned responsibility under the Biosecurity Act. Particular decisions are made by those in particular statutory roles (Chief Technical Officers, the Director-General, or by warranted officers under s 103). The statutory regime is not one of collective legal obligations.
96. The defendant says that the MAF officials who made the decisions under scrutiny in this case were not negligent. In particular, the evidence will show that:
 - 96.1 MAF officers involved in risk analysis and plant imports made reasonable choices on the basis of the science at the time; and
 - 96.2 MAF officers involved at the border made reasonable choices in light of the nature of the June 2009 consignment.
97. When considering the plaintiffs' allegations of breach, the following factors are relevant:
 - 97.1 The fact that a different course of action was available and would have prevented harm does not affect the defendant's liability. A defendant will not be held liable simply because others in the same field might hold different opinions. What is required is that a reasonable choice was made.
 - 97.2 The decisions of the MAF officers involved must not be judged with the benefit of hindsight, particularly in respect of scientific advancements.

¹²⁵ Law Commission, *The Crown in Court – A Review of the Crown Proceedings Act and National Security Information in Proceedings*, Report 135 E.31

¹²⁶ Government Response to Part A of the Law Commission's Report: *The Crown in Court: A Review of the Crown proceedings Act and National Security Information in Proceedings*, presented to the House of Representative on 13 June 2016 in accordance with Standing Order 249.

- 97.3 There is no legal standard against which law making can be assessed for the purpose of a claim in negligence.
- 97.4 An omission to exercise a statutory power will only be negligent if it was irrational not to exercise the power.
- 97.5 In questions involving the evaluation of risk, predictive judgmental assessments, evolving science, or decisions of a political nature (including the allocation of resource to risk), a considerable margin should be afforded to the primary decision-maker.
- 97.6 If an activity is socially valuable and guarding against danger is difficult, then a finding of negligence is less likely. The Court must bear in mind the expense (in the broad sense) of taking alleviating action.
- 97.7 Breach of statute is not conclusive evidence that the requisite standard of care was not met. Breach of statute without fault can only sound in damages under the narrow tort of breach of statutory duty, which the plaintiffs have not pleaded. Careless performance of a statutory obligation does not of itself give rise to liability for common law negligence.¹²⁷
- 97.8 It will be extraordinarily rare that the misconstruction of primary or delegated legislation, or a mistake of law, will be “negligent”.

¹²⁷ S Todd *The Law of Torts in New Zealand* (7th ed), 2016 Thomson Reuters, Wellington at 442-444.

THE JUNE 2009 CONSIGNMENT IS NOT THE SOURCE OF PSA3

98. The plaintiffs have called all of their witnesses of fact. The evidence does not satisfy the plaintiffs' burden of establishing how the alleged breaches caused the losses the plaintiffs claim they have suffered.

99. The amended statement of claim says only this about causation:¹²⁸

The anthers consignment was subsequently processed in New Zealand at Kiwi Pollen's premises, and the first Psa symptoms were noticed in October 2010 on orchards neighbouring each other and in close proximity to Kiwi Pollen's premises (being locations RP1 and RP2 as referred to in paragraph 22 above).

100. The pleadings have obviously been drafted on the mistaken impression that the June 2009 consignment was processed at Kiwi Pollen (NZ) Ltd's mill building on the corner of Mark Road and Te Matai Road.

101. The evidence is that in fact the June 2009 consignment was processed at Kiwi Pollen's *Main Road* premises. The machine needed to process the consignment was at Main Road. The mill on the corner of Te Matai and Mark Road was only taken possession of in July 2009, and was not commissioned until September 2009.¹²⁹ Accordingly, there is no physical proximity as alleged in the amended statement of claim.

102. The plaintiffs need to prove:

102.1 The June 2009 consignment infected Kairanga or Olympos orchard.

102.2 The infection occurred at a time which meant symptoms would first be noticed in the first week of October 2010 (for Kairanga) or by 21 October 2010 (for Olympos).

102.3 The June 2009 consignment was infected with Psa3.

103. The best evidence before the Court is that the June 2009 consignment went into the commercial rubbish collection at Kiwi Pollen (NZ) Ltd's Main Road premise.¹³⁰

¹²⁸ Amended statement of claim at [117].

¹²⁹ CB v17 p 13671. CB v17 p 14422. CB v19 p 15427.

¹³⁰ Brief of Evidence of Jill Hamlyn at [88] & [91]; NoE p 778 ll 3-21; 839 ll 22-30 (Jill Hamlyn).

104. The evidence does not establish that the June 2009 consignment somehow infected Olympos or Kairanga orchards:
 - 104.1 The timing of symptoms first being noticed means that pollen is not likely to be the source of infection; and
 - 104.2 There is no evidence of direct application of pollen from the June 2009 consignment to either Olympos or Kairanga orchard (or, for that matter, any other orchard); and
 - 104.3 The prospect of indirect application of pollen via cross-contamination is so unlikely as to be purely speculative; and
 - 104.4 There is no evidence to support any anthers waste being the source of infection.
105. The Court is yet to hear the genetic evidence as to the source of Psa3. The plaintiffs say the source can be pin-pointed to a specific orchard in Shaanxi, China, and that was the orchard Kiwi Pollen (NZ) Ltd sourced the June 2009 consignment from.
106. The plaintiffs will not be able to rely on genetic or statistical evidence to prove those claims. Different Psa strains have been identified in the Shaanxi province (and in China more generally). None of the strains identified in Shaanxi (or China) are identical to the Psa3 strain present in New Zealand.

IN ANY EVENT, NO CAUSATIVE BREACH

107. Even if the Court considers breach is established, and that the June 2009 consignment was the source of New Zealand's Psa3 incursion (both of which are denied), the breach must have a sufficient nexus with the alleged harm for it to be said to be a "causative breach". It is not sufficient for the plaintiffs to show that MAF officials have created an opportunity for loss to occur.
108. This requirement for there to be a sufficient connection is not addressed in the plaintiffs' opening submissions. In particular, there is no consideration of the following matters.

Pre-border

109. Since 2010, it has been established that pollen can be contaminated with Psa, and that there is no such thing as "pure pollen". Only total prohibition of pollen would have stopped Kiwi Pollen (NZ) Ltd from (legally) importing kiwifruit pollen.
110. Accordingly, the causative omission would be a failure to use MAF's statutory powers to prohibit the import of kiwifruit pollen. That causative requirement is important to bear in mind when considering the various decisions impugned by the plaintiffs in respect of the risk analysis and plant imports process. To a large extent, many of the complaints are irrelevant.
111. It is also important to bear in mind that:
 - 111.1 the source of the possible Psa threat was from Italy, not China; and
 - 111.2 by the time MAF received official notice of the Italian threat (the EPPO alert received on 18 December 2009), the June 2009 consignment (on which the plaintiffs' case relies) had already been in New Zealand for 6 months, including over the kiwifruit flowering season.

Border

112. Regardless of whether the June 2009 consignment was stopped at the border or not, pollen from China would have been brought in for viability testing by Kiwi Pollen (NZ) Ltd one way or the other.

113. The importation of kiwifruit pollen from China was intended to make Kiwi Pollen (NZ) Ltd significant money. It is implausible that Ms Hamlyn would have been deterred if the June 2009 consignment was not cleared on account of it being anthers; she simply would have arranged for pollen to be extracted from anthers in China for a replacement consignment.¹³¹ The point is not even hypothetical – we know that Ms Hamlyn did import more pollen from China in 2010.¹³²
114. The plaintiffs’ complaint that there was a failure to visually inspect the June 2009 consignment is based on factors that have no nexus to Psa:
- 114.1 Visual inspection is conducted to detect visible pests. Psa is not visible (to the naked eye or under an optical microscope).
- 114.2 There was no responsibility to confirm the actual commodity matched the commodity declared by the importer. Such a responsibility, if imposed across the border, would bring the border to a standstill.
115. The plaintiffs’ complaint about discrepancies in the documentation also has no nexus to Psa:
- 115.1 The difference in exporter name and the described weight of the consignment are irrelevant;¹³³ and
- 115.2 The difference in species (*Actinidia arguta* v *Actinidia deliciosa*) is also irrelevant; the difference would not have concerned the Plant Imports officials if raised with them, and in any event the importer has confirmed it was a typo – *arguta* pollen was not imported.¹³⁴

¹³¹ CB v22 p 18406. CB v35 p 29473.

¹³² Brief of Evidence of Jill Hamlyn at [100]-102].

¹³³ Brief of Evidence of Vivian Campbell at [152]-[153]; Brief of Evidence of David Hodges at [70].

¹³⁴ Brief of Evidence of Jill Hamlyn at [96]. NoE p 471 114-9 (Murray Judd). Brief of Evidence of Stephen Butcher at [197].

116. The law of negligence requires a transaction in which the defendant has directly impinged upon the plaintiffs' rights. The alleged wrongdoing must actually result in loss. There are no such rights here, there has been no "wrongdoing", and there is no causative connection that can establish impingement.

PARLIAMENT HAS PROVIDED A DEFENCE

117. The defendant considers the claim can be disposed of on the above grounds. The law does not, and should not, recognise the claimed duty of care. There has been no breach of any such alleged duty. The acts complained of did not, and cannot, have caused the New Zealand Ps3 incursion.
118. But, in any event, the Biosecurity Act provides an applicable statutory immunity from liability:

163 Protection of inspectors and others

An inspector, authorised person, accredited person, or other person who does any act or omits to do any act in pursuance of any of the functions, powers, or duties conferred on that person by or under this Act or a pest management plan or a pathway management plan shall not be under any civil or criminal liability in respect of that act or omission, unless the person has acted, or omitted to act, in bad faith or without reasonable cause.

119. Under the Crown Proceedings Act 1950, the immunity applies where the Crown is being sued in a vicarious capacity for the acts or omissions of the Crown's servants or agents:

6 Liability of the Crown in tort

- (4) Except as provided in subsection (4A) or (4B), any enactment which negatives or limits the amount of the liability of any government department or officer of the Crown in respect of any tort committed by that department or officer shall, in the case of proceedings against the Crown under this section in respect of a tort committed by that department or officer, apply in relation to the Crown as it would have applied in relation to that department or officer if the proceedings against the Crown had been proceedings against that department or officer.
120. There is no suggestion that MAF employees have acted in bad faith. The plaintiffs' only response to the statutory immunity is that the words "reasonable cause" in fact mean "reasonable care". That cannot be correct.
121. The words "reasonable cause" are not the same as the standard associated with negligence. Rather, they are associated with the tort of misfeasance of public office and the concept of reckless indifference. Parliament's intention was to preserve the misfeasance tort, which the plaintiffs have not pleaded.
122. The plaintiffs' argument is made all the weaker by the fact that the immediately following section in the legislation uses different words (emphasis added):

164 Liability for goods

The Crown shall not be under any civil liability in respect of any loss or damage to any goods suffered—

(a) while those goods are in the custody of the Crown by reason of the exercise, in good faith and with **reasonable care**, of authority under this Act; or

(b) as a result of or in the course of any treatment, handling, or quarantine of those goods undertaken or required in good faith and with **reasonable care** by an inspector or any other person acting in the exercise of authority under this Act.

123. Parliament is presumed to have intended to use the actual words contained in legislation, and different words are to be given different meanings. Reasonable cause is about *why* a particular action was taken; reasonable care is about *how* somebody went about a particular activity. There is no suggestion that any of the decisions complained of were made without justification.
124. The immunity is available to the Crown. The evidence will show that the impugned decisions were made with reasonable cause (and, in any event, also with reasonable care).

FACTUAL NARRATIVE

125. The Nursery Stock IHS was first promulgated in 1993.¹³⁵ The Nursery Stock IHS came into force in its current form in 1998, following the Biosecurity Amendment Act 1997. It is a large and complex document that identifies import requirements for over 19,000 plant species.¹³⁶ Special import conditions for certain plants are contained in schedules to the Nursery Stock IHS. The *Actinidia* schedule provides for 22 species of *Actinidia*, in the form of cuttings or tissue culture, to be imported.¹³⁷

The Actinidia schedule to the IHS is amended

126. During a 2003 review of the Nursery Stock IHS, conducted by Dr Gerard Clover, the import requirements for nursery stock of *Actinidia* (kiwifruit) were considered. The review covered budwood/cuttings and plants in tissue culture of *Actinidia* species from all countries.¹³⁸

127. A “CAT” (categorisation) file and pest datasheet were generated.¹³⁹ Phytosanitary measures (e.g. specific testing requirements) commensurate with the risk posed by each pest for *Actinidia* were then developed, drafted into a schedule for the IHS, and consulted on.¹⁴⁰ Rob Taylor, a MAF scientist, peer reviewed the schedule.¹⁴¹

128. The Horticulture and Food Research Institute of New Zealand (now Plant & Food) and Zespri provided submissions on the proposed schedule. Zespri’s submission noted that importation of genetic material was important in its development of new cultivars.¹⁴²

129. Some minor amendments were made to the schedule, the schedule was peer reviewed again, and it was then incorporated into the Nursery Stock IHS with effect from 28 May 2004.¹⁴³ Importantly, the outcome of the 2004 review of

¹³⁵ Brief of Evidence of Gerard Clover at [31].

¹³⁶ Brief of Evidence of Vivian Campbell at [29].

¹³⁷ CB v03 p 01576.

¹³⁸ Brief of Evidence of Gerard Clover at [32] & [35].

¹³⁹ Brief of Evidence of Gerard Clover at [36].

¹⁴⁰ Brief of Evidence of Gerard Clover at [37].

¹⁴¹ Brief of Evidence of Robert Taylor at [10]-[11] Brief of Evidence of Gerard Clover at [37].

¹⁴² Brief of Evidence of Gerard Clover at [38].

¹⁴³ Brief of Evidence of Gerard Clover at [40].

the Nursery Stock IHS and the creation of the *Actinidia* schedule, was that Psa was identified as a pest on *Actinidia*.

130. The amended IHS required that nursery stock undergo testing upon import into New Zealand. This testing was called polymerase chain reaction (**PCR**) testing. At the time the types of “primers” used in the PCR testing were considered to be reliable for detecting Psa.¹⁴⁴ The testing occurred in post entry quarantine (**PEQ**) and significant work went into developing the testing protocol for Psa in 2005 and 2006.¹⁴⁵

Requirements for the importation of pollen

131. As part of the development of a PEQ Testing Manual for *Actinidia* in 2006, the question arose as to how *Actinidia* pollen imported for breeding purposes should be treated. Pollen was seen as an important source of germplasm, providing new DNA for plant breeding. This was (and remains) important to ensure industries remained competitive and sustainable.¹⁴⁶
132. Imported pollen is particularly important for the kiwifruit industry because kiwifruit plants are dioecious, meaning that the reproductive organs are split between female and male kiwifruit vines. Male pollen is required to pollinate female kiwifruit vines. Only the female kiwifruit vines produce fruit. Accordingly, if pollen can be imported at the right price, kiwifruit orchards can be planted with only fruit-bearing plants.¹⁴⁷ Imported pollen for artificial pollination of kiwifruit vines was first raised with MAF at the end of 2005.¹⁴⁸
133. In 2006 MAF’s Plant Health and Environment Laboratory (**PHEL**) had not validated any methods for directly testing pollen for regulated pests or diseases, so instead the seed from plants pollinated in PEQ was tested.¹⁴⁹ Importers became frustrated with the costs and delays involved in PEQ testing requirements.¹⁵⁰

¹⁴⁴ Brief of Evidence of Gerard Clover at [41]. Brief of Evidence of Joel Vanneste [165]-[172]. Primers are short strands of complementary DNA necessary to amplify DNA for testing.

¹⁴⁵ Brief of Evidence of Gerard Clover at [43]-[50].

¹⁴⁶ KIWI.400.008.0282. CB v13 p 10323 and CB v13 p 10003. This remains an issue for MAF: CB v40 p 33302.

¹⁴⁷ DSB-60737.

¹⁴⁸ CB v9 p 06870.

¹⁴⁹ Brief of Evidence of Gerard Clover at [52].

¹⁵⁰ Brief of Evidence of Gerard Clover [62.2]; Brief of Evidence of Stephen Butcher at [118].

134. The requirement in the Nursery Stock IHS for the importation of pollen was that an import permit was required.¹⁵¹ A requirement to obtain an import permit is usually included in an IHS in order to provide some flexibility in the event unpredicted requests are made for imports, or for requests where import conditions would vary from species to species. The import permit process means that MAF can make an individual assessment of the request, specific to the conditions of the request.¹⁵² There was no written procedure for this assessment, partly because of the complexity of the process and the vast range of potential circumstances.¹⁵³
135. In late August 2006, Dr Veronica Herrera, Dr Sathyapala and Susan Cooper met to discuss pollen imports.¹⁵⁴ One of the action items from this meeting was the preparation of a review of pollen-transmitted plant pathogens.

The PHEL review is prepared

136. In July 2006 an internal MAF literature review on pollen-transmitted plant pests and diseases was prepared (**PHEL Review**).¹⁵⁵ The drivers for the literature review were the increased discussions around the barriers to importing germplasm in the preceding years, that the information on the pests and diseases transmitted by pollen was not easily accessible (compared to seed or whole plants) and that there was comparatively little scientific literature on pollen-transmitted pests and diseases.¹⁵⁶ Dr Stuart Card prepared the literature review on instruction from Dr Clover.¹⁵⁷
137. The literature review was developed by Dr Card and Dr Clover into a paper outlining pests and diseases which are pollen-transmitted. It was then sent for peer review ultimately by 11 people, including by Associate Professor Michael Pearson of the University of Auckland (a plant pathologist).
138. An article was then prepared for independent publication. It was eventually published in the *Australasian Plant Pathology* journal in September 2007. The

¹⁵¹ IHS paragraph 2.2.3.

¹⁵² Brief of Evidence of Stephen Butcher at [121].

¹⁵³ Brief of Evidence of Stephen Butcher at [124].

¹⁵⁴ CB v11 p 08816; Brief of Evidence of Shiroma Sathyapala at [18] and following.

¹⁵⁵ Brief of Evidence of Gerard Clover at [66].

¹⁵⁶ Brief of Evidence of Gerard Clover at [71].

¹⁵⁷ Brief of Evidence of Gerard Clover at [69].

article is referred to as the “Card Paper”.¹⁵⁸ The Card Paper conclusion from the literature was that there were no pollen-transmitted bacteria.

Import permits for kiwifruit pollen

139. The first request (that was pursued) for an import permit for kiwifruit pollen after the preparation of the PHEL Review was from Kiwi Pollen (NZ) Ltd. The request was to import pure kiwifruit pollen from Italy and China.
140. A risk assessment for the import permit request was undertaken by Dr Sathyapala of the MAF Risk Analysis Group (**RAG**), in discussion with the Manager of the Plant Imports Team and the Group Manager. As a result of the conclusion in the PHEL Review, Dr Sathyapala and the two managers did not understand there to be any known pests that could be transmitted by kiwifruit pollen.¹⁵⁹ Accordingly, these MAF officials considered the possibility of contamination of the pollen by pests.¹⁶⁰
141. Importantly, contaminants are not catalogued and risk assessed in the same way an actual commodity is (since by definition, a contaminant is an impurity).¹⁶¹ So the risk of contaminants is considered generally in terms of risk mitigation, keeping in mind New Zealand’s acceptable level of risk.¹⁶²
142. It was decided the conditions to be imposed would be that the pollen come from hand-picked unopened flower buds and be certified as such by the exporting country’s authority. This would mitigate the risk of contamination by insects and weather.¹⁶³ It was comparable to the conditions applied by Australia. The import permit was issued but never used.
143. There had been some consideration of requiring a microscopic inspection on import (commonly used for pests such as mites and other small insects which

¹⁵⁸ Brief of Evidence of Gerard Clover at [92].

¹⁵⁹ Brief of Evidence of Shiroma Sathyapala at [55].

¹⁶⁰ As part of this consideration, MAF asked the importer about the milling process. Brief of Evidence of Shiroma Sathyapala at [57] and [63]. CB v12 p 09968.

¹⁶¹ Stuart Card NoE at p 887.

¹⁶² Veronica Herrera NoE at p 942-943, 946.

¹⁶³ Brief of Evidence of Shiroma Sathyapala at [57]-[66].

might contaminate a commodity), however this was not imposed.¹⁶⁴ In any event, such microscopic inspection would not have detected Psa.¹⁶⁵

144. A later request by Kiwi Pollen (NZ) Ltd in 2007 to import pollen milled by the vacuum method from opened kiwifruit flowers was considered but declined, as the risk of contamination was too great.¹⁶⁶
145. Import permits were subsequently issued to and used by Kiwi Pollen (NZ) Ltd for kiwifruit pollen, as follows:¹⁶⁷

August 2008	Permit to bring New Zealand pollen back into the country from Thailand. ¹⁶⁸ The pollen had been taken to Thailand to demonstrate germinability to a client, but the luggage was temporarily lost and so the pollen was not used. ¹⁶⁹
November 2008	Permit for Chilean pollen. ¹⁷⁰ First Chilean consignment under this permit was cleared on 20 January 2009. ¹⁷¹ Second Chilean consignment under this permit was cleared on 28 March 2009. ¹⁷²
April 2009	Permit for Chinese pollen. ¹⁷³ Chinese consignment cleared on 30 June 2009. ¹⁷⁴
November 2009	Permit for Chilean pollen. ¹⁷⁵ First Chilean consignment under this permit was cleared on 1 December 2009. ¹⁷⁶ Second Chilean consignment under this permit was cleared on 3 May 2010. ¹⁷⁷
June 2010	Permit for Chinese pollen. ¹⁷⁸

¹⁶⁴ Wayne Hartley NoE p 1124, 1117–1125.

¹⁶⁵ Reply Brief of Evidence of Rob Taylor at [15]–[16.8].

¹⁶⁶ Brief of Evidence of Shiroma Sathyapala at [68].

¹⁶⁷ A number of permits were issued but not used. These are not included in the table.

¹⁶⁸ CB v16 p 12893.

¹⁶⁹ CB v16 p 12895.

¹⁷⁰ CB v16 p 13135.

¹⁷¹ CB v17 p 14239.

¹⁷² CB v17 p 14498.

¹⁷³ CB v18 p 15293.

¹⁷⁴ CB v19 p 15682.

¹⁷⁵ CB v21 p 17875.

¹⁷⁶ CB v21 p 17951.

¹⁷⁷ CB v23 p 19151.

	Chinese consignment cleared on 18 June 2010. ¹⁷⁹
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146. The imports reflect the main kiwifruit growing regions outside of New Zealand.

The June 2009 consignment

147. The plaintiffs' case is that the consignment of kiwifruit pollen from China, cleared on 30 June 2009, was actually a consignment of kiwifruit anthers which caused the New Zealand Psa3 incursion in October 2010. The details of MAF's interactions with that consignment are as follows.

Electronic application for biosecurity clearance

148. On 23 June 2009 Kiwi Pollen (NZ) Ltd made an electronic application for biosecurity clearance of a consignment described as "kiwifruit pollen" from China. The import permit accompanying the application referred to the consignment as "frozen kiwifruit pollen".¹⁸⁰
149. The application was lodged through an electronic system called "EBACCA". The application was received by Giselle Edel-Singh, a MAF officer working as a "risk screener" in the Auckland Biosecurity Centre.
150. Risk screening or risk profiling is now referred to as Target Evaluation. Target Evaluation is the initial screening of documents for goods that require biosecurity clearance. A Target Evaluator (or "risk screener" in 2009) assesses the documents and then decides what will happen to the goods, for example holding the goods until further documentation is provided, sending the goods for treatment or inspection, or releasing them.
151. The point of Target Evaluation is to minimise the consignments that are sent for inspection, so that Quarantine Inspectors inspect the most risky goods.¹⁸¹ This is an important part of MAF's approach to risk. It recognises that scarce resources must be deployed effectively across the biosecurity system, to meet the vast range of goods and people arriving in New Zealand.

¹⁷⁸ CB v23 p 19297.

¹⁷⁹ CB v23 p 19174.

¹⁸⁰ CB v19 p 15603 at 15605.

¹⁸¹ Brief of Evidence of Fiona Wilmot (née Stewart) at [94].

The consignment is held until a phytosanitary certificate is provided

152. When the electronic application was lodged through EBACCA, it was missing the phytosanitary certificate required by the import permit. Mrs Edel-Singh issued a “hold” on the consignment, pending presentation of the certificate. The consignment was to be held at MAF’s Auckland Air Cargo Office.
153. Mrs Edel-Singh also loaded a charge in MAF’s computer system. The computer system was (and is) called “QuanCargo”. The charge was for \$25, and was loaded in anticipation of there being double handling of the application for biosecurity clearance, on account of the phytosanitary certificate not being provided at the time the application was made.

The consignment is given clearance

154. The consignment was given biosecurity clearance on 30 June 2009 by David Hodges, a MAF officer working as a Quarantine Inspector at MAF’s Auckland Air Cargo Office. The Auckland Air Cargo Office processed 10,653 consignments in 2009.¹⁸²
155. Mr Hodges does not remember if he inspected the consignment, but – from reading the records – does not think he did so. In particular, the relevant screen in QuanCargo to record that an inspection has occurred is blank for this consignment. He does not recall what his reasons were for not inspecting the consignment. Mr Hodges considers relevant factors, in terms of a decision not inspect, may have been:
- 155.1 There was nothing in the pollen section of the Nursery Stock IHS¹⁸³ or on the import permit¹⁸⁴ that stated the pollen was required to be inspected.
- 155.2 There would be nothing he could usefully inspect because the consignment was frozen.
- 155.3 Frozen products are usually lower risk.
- 155.4 He would be worried to cut into a parcel of frozen pollen, in case he affected its viability.

¹⁸² CB v42 p 35170.

- 155.5 He would be worried about being able to properly reseal the package in order to keep it frozen.

It was not usual to inspect frozen kiwifruit pollen

156. There are 14 imports of kiwifruit pollen recorded in MAF's QuanCargo system, ten in the cargo pathway and four in the passenger pathway (i.e. that were cleared at the airport). Of the ten cargo imports:¹⁸⁵

- 156.1 Four of them appear to have had their packaging (only) inspected as per the relevant import permit; and

- 156.2 The remaining six had no inspection, whether of the packaging or the contents (there were no specific requirements for inspection on the relevant import permits for these imports).

157. MAF did not have any further involvement with the consignment after 30 June 2009.

Psa in Italy

158. New Zealand grown kiwifruit are only able to be sold for 6 to 9 months of the year, due to the seasonal nature of the fruit and storage capability. Zespri aims to supply Zespri-branded kiwifruit to the international market 12 months of the year. Accordingly, Zespri also grows fruit in Italy, France, Japan and Korea. This ensures year-round supply.¹⁸⁶

Psa is identified on Italian orchards

159. Shane Max of Zespri became aware of a bacterial disease on Hort16A kiwifruit orchards in Italy in June 2008.¹⁸⁷ He did not consider this to be Psa at the time.¹⁸⁸ It was not until the European spring of 2009 that Zespri became concerned about the disease (which the Italians called "Batteriosi").¹⁸⁹

¹⁸³ CB v 18 p 14599 at 14618.

¹⁸⁴ CB v 18 p 15293.

¹⁸⁵ Brief of evidence of Fiona Willmot (née Stewart) at [155]-[160]. Cf [2.78] of the plaintiffs' opening submissions.

¹⁸⁶ Brief of Evidence of Simon Limmer at [7].

¹⁸⁷ Brief of Evidence of Shane Max at [89]-[92].

¹⁸⁸ Brief of Evidence of Shane Max at [89]-[96].

¹⁸⁹ Brief of Evidence of Shane Max at [97]. Brief of Evidence of Simon Limmer at [19]-[20], [21].

160. It was unclear what the disease was. In March 2009 Zespri arranged for Dr Joel Vanneste and Mike Manning (a mycologist) of Plant & Food to go to Italy to investigate and diagnose the disease.¹⁹⁰ Information was subsequently made available to Zespri growers in April 2009.¹⁹¹
161. Zespri was not concerned about the possibility of a Psa outbreak in New Zealand, because of the different climatic conditions. The Psa outbreak had occurred in Italy following two consecutive extremely cold and wet winters. These climate conditions were unusual for Italy and became a significant focus for Zespri in determining why Psa had become such a problem in Italy.¹⁹² Zespri considered Psa would not thrive in the milder climate conditions in New Zealand, particularly Te Puke.¹⁹³
162. Importantly, Psa was known to have been present in Italy since 1992. It was not until 2010 that the 2009 Italian outbreak was identified to have been caused by a new strain of Psa. Accordingly, although hindsight now shows that the Italian outbreak seems to have been the start of a global pandemic, this was not clear in 2009.

EPPO issues an alert in November 2009

163. On 18 December 2009, the European and Mediterranean Plant Protection Organisation (**EPPO**) circulated an alert for Psa, because of economic losses in 2007/2008 in the Italian kiwifruit growing region of Lazio, and the possible spread of the disease to other kiwifruit regions in Italy.¹⁹⁴ The EPPO Secretariat had decided to add it to the EPPO Alert List as Psa was considered to be an emerging risk in the Mediterranean region.¹⁹⁵ The alert stated, in terms of pathways:¹⁹⁶

Plants for planting of *Actinidia* spp. (infected fruits cannot be totally excluded but seem very unlikely).

¹⁹⁰ Brief of Evidence of Shane Max at [99]. Brief of Evidence of Joel Vanneste at [31].

¹⁹¹ CB v18 p 14589.

¹⁹² Brief of Evidence of Shane Max at [83].

¹⁹³ Brief of Evidence of Shane Max at [123]-[124]. Brief of Evidence of Simon Limmer at [42]-[43].

¹⁹⁴ The alert is dated November 2009 but was not circulated until 18 December 2009.

¹⁹⁵ CB v21 p 17824 17832. The disease was spreading with increased incidence (Brief of Evidence of Françoise Petter at [68]).

¹⁹⁶ CB v21 p 17824 at 17833.

164. MAF staff received the alert, including Dr Mike Ormsby, a member of the RAG team. Dr Ormsby searched in QuanCargo for any imports that might be a possible pathway for Psa. Pollen did not come up in Dr Ormsby's searches. He concluded that nursery stock was the only pathway of concern, and then identified that nursery stock was required to go into PEQ for observation and testing under the Nursery Stock Import Health Standard. Accordingly, he considered the risks were appropriately managed.¹⁹⁷

Concerns are raised regarding imports of Italian kiwifruit

165. Italian kiwifruit is imported into New Zealand to supply the domestic market prior to the New Zealand harvest. In early 2010 various concerns were raised about these imports of fresh fruit, including the risk of Psa from Italy.¹⁹⁸
166. In response, in April 2010 MAF conducted a pest risk analysis for Psa in fresh kiwifruit from Italy.¹⁹⁹ The analysis concluded that the pathogen may exist on the surface of mature fruit, but it was improbable that cells would survive to infect seed or seedlings. The analysis also referred to what the 2009 EPPO alert had said: "infected fruits cannot be totally excluded but seem very unlikely."²⁰⁰
167. In mid-2010 Dr Dave Tanner and Simon Limmer of Zespri met with Dr Sathyapala of MAF and requested that MAF impose measures on fruit imports as a result of Psa in Italy. Zespri had not previously raised concerns about Psa in Italy with MAF. Opotiki Packing and Coolstorage Ltd (**OPAC**) (part owned by Seeka), also had operations in Italy and had been affected by the Psa outbreak there. OPAC had not raised any concerns with MAF.
168. Dr Sathyapala explained to Dr Tanner and Mr Limmer from Zespri that from MAF's perspective, it was unlikely there was sufficient technical evidence to justify limiting the imports of kiwifruit.²⁰¹ Dr Sathyapala was concerned that clear evidence was needed before considering putting any measures on fruit,

¹⁹⁷ Brief of Evidence of Michael Ormsby at [24]-[31].

¹⁹⁸ CB v22 p 18653.

¹⁹⁹ Brief of Evidence of Shiroma Sathyapala at [92]-[95].

²⁰⁰ Brief of Evidence of Shiroma Sathyapala at [101].

²⁰¹ Brief of Evidence of Shiroma Sathyapala at [105].

including because of the dispute at the time with Australia about the transmission of fire blight on mature apples.²⁰²

169. At this time, Plant & Food was researching whether Psa could survive treatment under the current protocol for imports of fruit from Italy. The research was being conducted by Dr Vanneste, with some Zespri funding.²⁰³ Dr Vanneste's draft report was considered by MAF staff on 18 October 2010. MAF staff concluded that the report did not provide enough information for MAF to impose provisional measures on Italian kiwifruit imports.²⁰⁴
170. A workshop was held with industry. MAF and Plant & Food decided to collaborate on further research (to be conducted by Dr Vanneste).²⁰⁵ New Zealand importers present at the industry workshops decided to stop importing Italian kiwifruit. This meant that there was no change to New Zealand border regulation, but Italian kiwifruit imports would not occur that season.²⁰⁶
171. Soon after the workshop with industry, the Psa incursion was identified. Because MAF had not imposed trade barriers on kiwifruit imports, New Zealand was able to continue to export its kiwifruit despite the arrival of Psa in New Zealand. Had the more conservative decision been taken, it is almost certain that New Zealand's trading partners would have refused imports of New Zealand kiwifruit after the Psa incursion. This is a real life counter-factual that shows the delicate balancing exercise required of MAF officials when making decisions under the SPS framework.

PSA incursion in New Zealand

Symptoms are seen in early October 2010

172. Red angular leaf spotting was observed on Kairanga Orchard in the first week of October 2010.²⁰⁷

²⁰² Brief of Evidence of Shiroma Sathyapala at [111].

²⁰³ Brief of Evidence of Shiroma Sathyapala at [107] & [123].

²⁰⁴ Brief of Evidence of Shiroma Sathyapala at [125].

²⁰⁵ Brief of Evidence of Shiroma Sathyapala at [132].

²⁰⁶ Brief of Evidence of Shiroma Sathyapala at [134].

²⁰⁷ Graeme Crawshaw NoE p 640 11-19; p 641 ll 1-11. CB v 27 p 22607.

173. Based on the dates bees were delivered to and collected from Kairanga Orchard, flowering began around 7 October 2010²⁰⁸ and was finished by 29 October 2010.²⁰⁹ Invoices for organic pollen were issued by Kiwi Pollen to Kairanga Orchard on 1 October and 15 October 2010,²¹⁰ and as Graeme Crawshaw usually used artificial pollination every second day during peak flowering,²¹¹ it is likely that artificial pollination took place over a period of several days at a point between 7 and 29 October 2010.
174. Flowering began on Olympos Orchard on 3 October 2010²¹² and was at full bloom on 16 October 2010.²¹³ It was artificially pollinated on 13 and 16 October 2010.²¹⁴
175. A pruning contractor saw a “sick vine” on Olympos Orchard on 21 October 2010 and told the orchard manager, Peter West. Two days later Peter West recorded in his diary that there was a “funny speckle on the gold leaves”.²¹⁵ Samples of the leaves were delivered to Plant & Food for testing.²¹⁶

Psa is confirmed and MAF responds to the incursion

176. On Friday 5 November 2010 Plant & Food advised staff at MAF that the leaves had tested positive for Psa.²¹⁷ At that time it was not known that there were two different strains of Psa in New Zealand (or that the PCR test used could not identify between the strains).
177. MAF prepared a response team over the course of the weekend (6-7 November 2010). The team was operational in Te Puke by Monday 8 November 2010.²¹⁸ The response was run collaboratively with Zespri, and

²⁰⁸ Brief of Evidence of Lee Crawshaw at [15].

²⁰⁹ Brief of Evidence of Lee Crawshaw at [17].

²¹⁰ Graeme Crawshaw NoE p 726 ll 11-18; CB v22 p 18684; Graeme Crawshaw NoE p 665 ll 26-30, CB v21 p 18050.

²¹¹ Brief of Evidence of Graeme Crawshaw at [13].

²¹² Peter West NoE p 327 ll 18-20.

²¹³ Peter West NoE p 329 ll 17-21.

²¹⁴ Brief of Evidence of Peter West at [22].

²¹⁵ Brief of Evidence of Peter West at [27].

²¹⁶ Brief of Evidence of Heather Pearson at [46]. Brief of Evidence of Peter West at [34].

²¹⁷ Brief of Evidence of Robert Taylor at [23].

²¹⁸ Brief of Evidence of David Yard at [29]-[30].

many of the MAF response field team staff were based at Zespri's office in Mount Maunganui.²¹⁹

178. Importantly, the identification of Psa in New Zealand occurred between the end of gold kiwifruit flowering and the start of green kiwifruit flowering. Further pollination (through the movement of beehives and artificial pollination) was imminent. Those involved in the response quickly turned their minds to the possibility that pollination could spread the infection further.
179. Restricted place notices were issued for Olympos and Kairanga orchards.²²⁰ A surveillance and sampling programme was then conducted to try and delimit the infection.²²¹ More orchards with Psa-like symptoms were identified almost immediately. Some had advanced Psa symptoms, for example RP13 (Hungerford Orchard), which is 3.64km distance from Olympos and Kairanga.²²²
180. The first positive Psa results outside of the Bay of Plenty were returned on Tuesday 16 November 2010 (from orchards in Napier and Hastings).²²³ By 21 November 2010, 65 restricted place notices had been issued. By that stage, positive Psa results had been received from orchards from South Auckland to Nelson.²²⁴

The \$50m recovery package

181. By 14 November 2010 the industry (led by the Industry Advisory Council) had decided that it wanted to lead the response.²²⁵ MAF was concerned that the disease was too far spread to eradicate. The kiwifruit industry wanted to try and aggressively manage the disease. The industry put a proposal to the Government, that the Government would match a dollar-for-dollar aggressive containment approach, to be run by the industry.²²⁶

²¹⁹ Brief of Evidence of David Yard at [31].

²²⁰ Brief of Evidence of Heather Pearson at [36] & [44].

²²¹ Brief of Evidence of David Yard at [53]-[60].

²²² CB v29 p 24577; CB v29 p 24523; CB v29 p 24507. CB v29 p 24628.

²²³ Brief of Evidence of Robert Taylor at [46].

²²⁴ Brief of Evidence of David Yard at [62].

²²⁵ Brief of Evidence of Barry O'Neil at [132]; CB v27 p 23063; CB v27 p 23098.

²²⁶ Brief of Evidence of Barry O'Neil at [126]-[143]; CB v28 p 23412.

182. On 18 November 2010 the Government announced its agreement to give \$25m to industry for the Psa response. The Minister for Biosecurity considered it was a living example of the Government Industry Agreement approach which MAF had been pursuing since 2003, where both Government and industry contributed to the cost of readiness and response for biosecurity incursions.²²⁷
183. An incorporated society called Kiwifruit Vine Health (**KVH**) was established.²²⁸ The Government, Zespri and KVH signed a detailed funding agreement on 18 February 2011.²²⁹
184. The rapid and co-ordinated response from the kiwifruit industry, and the establishment of KVH, are illustrative of the nature of the kiwifruit industry. It is self-determined, resilient and optimistic. It benefits from structured governance arrangements, which include representation of kiwifruit growers, Zespri (the marketer) and post-harvest operators.

Two different strains of Psa are identified

185. In early December 2010 Dr Vanneste and PHEL identified that there were two strains of Psa in New Zealand.²³⁰
- 185.1 One strain was low virulence (commonly referred to as Psa-LV, the “LV” standing for low virulence). This is also known as Psa 4, but now as Pfm.
- 185.2 One strain was more virulent (commonly referred to as Psa-V, the “V” standing for virulent). This is also known as Psa3.
186. The PCR test available in late 2010 could not detect the difference between these two bacteria.
187. We now know that many of the orchards that tested positive during the initial response to the incursion in November 2010 were in fact only positive for Pfm. They did not have Psa3. This uncertainty and evolving knowledge illustrates the complexities of biosecurity management:

²²⁷ Brief of Evidence of Barry O’Neil at [139]; CB v41 p 34645; CB v15 p 11966; CB v15 p 12484.

²²⁸ CB v29 p 24634.

²²⁹ CB v30 p 25616. CB v31 p 26241. CB v38 p 31956.

²³⁰ Brief of Evidence of Joel Vanneste at [121].

- 187.1 The pest or pathogen that has actually caused the harm is the subject of evolving scientific knowledge, to the point where its particular existence may not be known until after an incursion has happened (and, as in this case, knowledge may still be developing at the time of trial).
- 187.2 A lack of knowledge about how the pest or pathogen operates, and how to detect it, means that it is difficult to make reasoned decisions about how to treat the incursion. Originally, MAF hoped to eradicate Psa. However, because samples showed that it was present across New Zealand, MAF decided that eradication was not feasible. We now know that Psa3 was only in the Bay of Plenty. With hindsight, we can see that it may have been possible that a different approach (which could have stopped the disease or limited its effects) could have been taken with the information we have today.²³¹

The industry pays growers with Psa to cut out

188. KVH's purpose was to administer the \$50m government-industry fund and lead the response to the Psa incursion. \$17.2m was spent on financial assistance packages for growers who agreed to cut out their orchards (in order to stop the creation and spread of inoculum). The financial assistance packages were based on a range of factors, including a lump sum payment for the crop on the vine and a per hectare payment for vines cut back to the stump or leader (spread over a period of 1-4 years).²³²
189. Seven of the grower plaintiffs in this proceeding have received sums from KVH ranging from \$162,681.53 to \$814,072.50.²³³ Two of the KPINs in respect of which Seeka claims have also received payments.²³⁴ The first plaintiff, Strathboss, received \$26,950.25 in spray subsidies from KVH to respond to Psa. Seeka orchards received \$155,516.60 in spray subsidies from

²³¹ Brief of Evidence of Barry O'Neil at [125].

²³² Brief of Evidence of Barry O'Neil at [160]; CB v30 p 25408; CB v44 p 36923; CB v44 p 36901; CB v44 p 36872; CB v39 p 32569; CB v31 p 26608; CB v30 p 25318; CB v31 p 26595; CB v44 p 36870; CB v39 p 33010; CB v42 p 35428; DSB-60540.

²³³ Brief of Evidence of Barry O'Neil at [162].

²³⁴ Brief of Evidence of Barry O'Neil at [163].

KVH.²³⁵ Seeka also contracted its services to KVH to monitor and test for Psa.²³⁶

190. The cut out programme was stopped in March 2011 because the disease had spread outside of Te Puke and there was a lack of tools to feasibly eradicate Psa.²³⁷

²³⁵ Brief of Evidence of Barry O'Neil at [167] [169]; CB v33 p 27912.

²³⁶ Brief of Evidence of Michael Franks at [67].

²³⁷ Brief of Evidence of Barry O'Neil at [165].

Zespri releases G3

191. The New Zealand Intellectual Property Office grants Plant Variety Rights (**PVR**). These are a form of intellectual property. Zespri owns the PVR for the Hort16A gold kiwifruit variety. The PVR gives Zespri exclusive rights to produce this variety of kiwifruit for sale, and to license others to produce this variety.
192. The rights under the PVR expire in November 2018. From that date, Hort16A becomes a public variety and there will be no constraint on planting it (either in New Zealand or internationally). The value of Hort16A will decrease after November 2018.
193. In light of this prospect, Zespri had begun a plant breeding programme in 2008. The purpose of the programme was to breed new and improved cultivars which Zespri could obtain exclusive rights to. The programme is run through Plant & Food. On 1 October 2009 Zespri entered into a co-funding agreement for the development of new cultivars with the Foundation for Research, Science and Technology (a New Zealand Government entity, **FORST**). The Government agreed to contribute up to \$13.5m to the programme.²³⁸
194. One of the cultivars that came out of this breeding programme was the G3 cultivar. It is this cultivar that has largely replaced Hort16A (which was very badly affected by Psa, compared to the green Hayward variety).
195. Prior to the Psa incursion, Zespri had considered a capped and limited release of G3 to extend the season for selling gold kiwifruit.²³⁹ However, in early 2012, in response to the impact of Psa on the 2011/12 crop, Zespri decided to release G3 licences on a “one for one” basis, effectively providing existing gold kiwifruit growers (Hort16A) with an automatic right to a G3 licence (in return for their Hort16A licence). G3 was also released to green kiwifruit growers on identical commercial terms under a fixed price bid process, as well as under a

²³⁸ CB v21 p 18182 at 18208.

²³⁹ CB v23 p 19210.

commercial tender bid process.²⁴⁰ Over 2012-2013, 1,854 hectares were grafted with G3.²⁴¹

196. G3 has led to record returns for kiwifruit growers.²⁴²

Zespri sold more kiwifruit in 2015/2016 than in any year in the history of the New Zealand kiwifruit industry. Total sales of New Zealand kiwifruit were 117 million trays, including...over 27 million trays of SunGold [market name for G3].

197. G3 licences were originally provided for \$8,000 per hectare.²⁴³ They have a market value of \$270,000 per hectare in 2017.²⁴⁴

198. Before the Psa incursion green kiwifruit orchards were selling on average for \$250,000 per hectare. In March 2017 they were selling for \$360,000 to \$400,000 per hectare. Before the Psa incursion gold orchards were selling for approximately \$400,000 per hectare. In March 2017 they were selling for \$700,000 to \$770,000 per hectare.²⁴⁵

199. In October 2010, before the Psa incursion, Zespri's plan was to triple export revenue from \$1bn to \$3bn by 2025. Zespri is now planning on the basis of export revenue of \$4.5bn by 2025.²⁴⁶

The industry agrees to a National Pest Management Plan

200. The Chief Executive of KVH was initially John Burke, whose company is a plaintiff in this proceeding. In March 2012 Barry O'Neil was appointed by the Board of KVH as Chief Executive. A National Pest Management Plan (**NPMP**) was prepared by KVH, promulgated by Order in Council, and came into force in May 2013. NPMPs are provided for under the Act. Under the NPMP, KVH became the national management organisation for Psa, and was given powers to control Psa.

201. Before being provided to the Minister, KVH consulted on the draft NPMP. The issue of compensation for powers exercised under the NPMP arose. In

²⁴⁰ Brief of Evidence of Simon Limmer at [86]; CB v36 p 30184.

²⁴¹ Brief of Evidence of Simon Limmer at [90].

²⁴² Brief of Evidence of Simon Limmer at [92]. CB v41 p 34225 at 34242; CB v41 p 34150.

²⁴³ CB v36 p 30185; CB v44 p 37101 at 37103.

²⁴⁴ Brief of Evidence of Simon Limmer at [96]-[100]; **CB v23 p 19210; CB v42 p 35001.**

²⁴⁵ Brief of Evidence of Simon Limmer at [102].

²⁴⁶ CB v47 p 41795 at p 41796 & 41810.

the end no compensation was provided for in the NPMP. 77% of kiwifruit growers voted in favour of the NPMP.²⁴⁷

The industry enters into a Government Industry Agreement

202. The Kiwifruit Industry Advisory Council gave unanimous support for entering into a Government Industry Agreement (**GIA**) on 23 May 2013. The deed with government was signed in May 2014.²⁴⁸ The GIA provides for cost-sharing between the government and industry for readiness and response activities (such as fruit fly,²⁴⁹ brown marmorated stink bug²⁵⁰ and a fungal pathogen called *Ceratocystis fimbriata*).²⁵¹
203. The statement of claim in this proceeding was filed on 28 November 2014.

²⁴⁷ Brief of Evidence of Barry O'Neil at [175]-[181].

²⁴⁸ CB v39 p 32474.

²⁴⁹ CB v41 p 34642.

²⁵⁰ CB v42 p 34992.

²⁵¹ Brief of Evidence of Barry O'Neil at [182]-[190].

OUTLINE OF WITNESSES AND EVIDENCE

204. The evidence to be called by the defendant can be broadly categorised as follows (with some overlap):

- 204.1 The creation, organisation, operation and resourcing of New Zealand's biosecurity system;
- 204.2 New Zealand's international obligations under the SPS Agreement, including as to the conduct of risk analysis and imposing provisional measures;
- 204.3 The risk analysis and plant imports process within MAF, including in respect of kiwifruit pollen;
- 204.4 The operation of the border, including clearance of the June 2009 consignment;
- 204.5 The kiwifruit industry, including Zespri and post-harvest operators;
- 204.6 The response to the Psa incursion, including evidence regarding time to symptoms; and
- 204.7 Genetic evidence and associated statistical analysis of the origin of New Zealand's Psa3.

New Zealand's biosecurity system

205. Murray Sherwin

- Mr Sherwin was the Director-General of MAF between 2001 and 2010. Mr Sherwin holds a Masters of Social Sciences (Hons) in Economics (Waikato University) and was a Deputy Governor of the Reserve Bank of New Zealand. Since January 2011 Mr Sherwin has been the Chair of the New Zealand Productivity Commission.
- Mr Sherwin is a witness of fact, albeit with significant experience in government. His evidence is about the management and resourcing of the biosecurity system, how priorities were set within MAF, and the relationship between Ministers, Cabinet and MAF.

206. Barry O'Neil

- Mr O'Neil was the Deputy Director-General (Biosecurity) of MAF between 2007 and 2010. Mr O'Neil holds a Bachelor of Veterinary Science with Distinction (Massey University), and was elected the President of the World Organisation for Animal Health between 2006 and 2009. Mr O'Neil is now the Chief Executive of Kiwifruit Vine Health (KVH), the organisation established by industry to respond to the New Zealand Psa incursion. Mr O'Neil has owned kiwifruit orchards in the Bay of Plenty since 1984.
- Mr O'Neil is a witness of fact. His evidence is about the establishment and operation of Biosecurity New Zealand, the Psa incursion and the establishment and operation of KVH.

International obligations and risk analysis

207. Gretchen Stanton

- Ms Stanton chaired the negotiations on what became the Sanitary and Phytosanitary Agreement (SPS Agreement) from 1989 to 1995. Between 1995 and 2015 Ms Stanton was the secretary of the SPS Committee, and between 1995 and 2016 was the head of the team in the Agriculture Division of the WTO that was responsible for overseeing all aspects of WTO work related to the implementation of the SPS Agreement. Ms Stanton is based in Maine, USA and will give evidence by AVL.
- Ms Stanton is an expert witness. Her evidence is about the operation of the SPS Agreement and obligations on member-states under the SPS Agreement.

208. Françoise Petter

- Ms Petter is the Assistant Director of the European and Mediterranean Plant Protection Organisation (EPPO), and co-ordinates and implements the Diagnostics and Pest Risk Analysis Programme for that organisation. Ms Petter has a Masters of Engineering in Agronomy with a specialisation in plant protection (École Nationale Supérieure d'Agronomie de Nancy). Ms Petter is based in Paris and will be giving evidence by AVL.
- Ms Petter is an expert witness. Her evidence is about the role of EPPO (including its alert list), various EPPO reports, EPPO's pest risk analysis on Psa, and her opinion of the risk analysis activities undertaken by MAF.

Risk analysis and plant imports at MAF

209. Melanie Newfield

- Ms Newfield is the MPI Team Manager of the Plants and Pathways Risk Assessment Team. Ms Newfield was a Senior Adviser in the Risk Analysis (Plants Team) between 2005 and 2009. Ms Newfield has a Masters in Botany and Biological Sciences (University of Auckland).

- Ms Newfield is a witness of fact. Her evidence is about the nature of risk analysis at MAF, including specifically in relation to Psa.

210. Dr Mike Ormsby

- Dr Ormsby is a Senior Adviser in the Risk Analysis Group at MPI. Dr Ormsby has a PhD (Botany) and a BSc (Hons), (Victoria University of Wellington).
- Dr Ormsby is a witness of fact. Dr Ormsby's evidence is about his peer review of the PHEL literature review of pollen-transmitted plant pathogens, the November 2009 EPPO alert about Psa, and MAF's response to a journalist's query about Psa in April 2010.

211. Dr Shiroma Sathyapala

- Dr Sathyapala was the MAF Team Manager for the Plants Risk Analysis Team between 2006 and 2010, and the Team Manager for the Fresh Produce Team from February 2010. Dr Sathyapala has a PhD in Agriculture (Miyazaki University, Japan). Dr Sathyapala currently works for the Food and Agricultural Organisation of the United Nations in Rome and will be giving evidence by AVL.
- Dr Sathyapala is a witness of fact. Her evidence is about the risk assessment for the first request by Kiwi Pollen (NZ) Ltd to import kiwifruit pollen, and the conditions imposed on the import. Her evidence is also about the decision not to ban imports of Italian kiwifruit in 2010.

212. Dr Stephen Butcher

- Dr Butcher is the manager of the Plant Imports and Exports Group at MPI, responsible for decisions about imports and exports of plants and plant products, including nursery stock and fruit. Dr Butcher has held this position since August 2008. Dr Butcher has a PhD in plant physiology and molecular biology (Massey University).
- Dr Butcher is a witness of fact. His evidence is about the international framework for managing plant pests and trade, the scale of the challenge of preventing plant pests from entering New Zealand (including the prioritisation of plant pests, risk analyses and IHSs), the process for importing plant material into New Zealand, the role of the Plant Imports Team, the Nursery Stock Import Health Standard and the actions of MPI officers regarding kiwifruit nursery stock and Psa, and Australia's approach to Psa.

213. Dr Gerard Clover

- Dr Clover worked at MAF in various positions between 2001 and 2013, including as the National Adviser responsible for nursery stock from January 2003. Dr Clover has a doctorate in Plant Pathology (University of Nottingham) and a BSc (Hons) (Bristol University). Dr Clover is now

the Head of Plant Health at the Royal Horticultural Society in the United Kingdom.

- Dr Clover is a witness of fact. His evidence is about the Nursery Stock portfolio, the revision of the *Actinidia* schedule in the Nursery Stock Import Health Standard in 2004, pollen imports 2003-2006, the 2006 PHEL Review on pollen-transmitted plant pathogens (Card Paper), and the first pollen import request from Kiwi Pollen (NZ) Ltd.

214. Vivian Campbell (nee Dalley)

- Ms Campbell is the senior adviser responsible for nursery stock in the MAF Plant Imports Team (and has held this position since November 2010). Ms Campbell has a BSc in chemistry (Victoria University of Wellington).
- Ms Campbell is a witness of fact. Her evidence is about MAF's process for issuing import permits for pollen (including kiwifruit pollen in particular), Kiwi Pollen (NZ) Ltd's enquiries about pollen imports between 2008 and 2010, and decisions made regarding *Actinidia* nursery stock imports, including pollen, following the Psa incursion.

Biosecurity at the border

215. Fiona Willmot

- Mrs Willmot (née Stewart) was a Target Evaluation Team Leader at the Auckland Biosecurity Centre in June 2009. Mrs Willmot has BSc in biological sciences (University of Auckland).
- Mrs Willmot is a witness of fact. Her evidence is about the Target Evaluation process and the consignment of Chilean kiwifruit pollen she gave biosecurity clearance to in January 2009.

216. Giselle Edel-Singh

- Mrs Edel-Singh is a Target Evaluator in the Auckland Biosecurity Centre. Ms Edel-Singh has a BSc in biological sciences (University of Auckland).
- Mrs Edel-Singh is a witness of fact. Her evidence is about the processing of the initial electronic application for biosecurity clearance of the June 2009 consignment of kiwifruit pollen from China.

217. David Hodges

- Mr Hodges was a MAF Quarantine Inspector at the Auckland Air Cargo Office in 2009. Mr Hodges has a Bachelor of Horticulture from Massey University.
- Mr Hodges is a witness of fact. His evidence is about his clearance of the June 2009 consignment of kiwifruit pollen from China.

218. James McLaggan

- Mr McLaggan is a MAF Senior Quarantine Officer who assisted with inspections at the MAF Auckland Air Cargo office, and who was the Team Manager for Target Evaluation during 2008-2015.
- Mr McLaggan is a witness of fact. His evidence is about his experience of giving biosecurity clearance to small, air-freighted, government-certified goods.

219. Stephen Gilbert

- Mr Gilbert is the MPI Director of Border Clearance Services.
- Mr Gilbert is a witness of fact. His evidence is about the scale of the border task and the decisions made about allocation of resource to risk.

The kiwifruit industry

220. Lain Jager

- Mr Jager is the Chief Executive of Zespri.
- Mr Jager is a witness of fact. His evidence is about the role and operation of Zespri, an overview of the New Zealand kiwifruit industry (including the post-harvest sector and how money is made in the kiwifruit industry), Zespri's knowledge of PsA prior to the incursion in New Zealand, Zespri's and the industry's response to PsA, and the impact of PsA on the New Zealand kiwifruit industry.

221. Simon Limmer

- Mr Limmer is the Chief Operating Officer of Zespri. Mr Limmer was the General Manager of Zespri Global Supply from 2008 to 2011.
- Mr Limmer is a witness of fact. His evidence is about Zespri's operations in Italy (including knowledge of PsA in Italy), Zespri's view of the risk of PsA coming to New Zealand, Zespri's concerns about Italian fruit imports, and the G3 kiwifruit variety and its role in the PsA recovery.

222. Dr David Tanner

- Dr Tanner was Zespri's General Manager of Science and Innovation in 2010. Dr Tanner has a PhD in Food Engineering (Massey University).
- Dr Tanner is a witness of fact. His evidence is about the Italian PsA outbreak and Zespri's perception of risk of PsA coming to New Zealand, Zespri's concerns regarding kiwifruit imports from Italy, and Zespri's initial response to PsA in New Zealand.

223. Anthony Hawken

- Mr Hawken was the Chief Executive of Eastpack (a kiwifruit post-harvest operator) between 1983 and 2014.
- Mr Hawken is a witness of fact. His evidence is about the structure of the post-harvest sector and what post-harvest operators do, packing costs and the calculation of orchard gate returns, the effect of Psa on the post-harvest sector, and Taskforce Green.

224. Craig Greenlees

- Mr Greenlees is the Managing Director of DMS Pro growers Ltd (a kiwifruit and avocado post harvest operator). Mr Greenlees was the Chair of Zespri between 2003 and 2008, and was on the Zespri Board between 1999 and 2014.
- Mr Greenlees is a witness of fact. His evidence is about the effect of Psa on the post-harvest sector and what DMS did in response to Psa.

The Psa incursion

225. David Yard

- Mr Yard was the MAF response manager for the New Zealand Psa incursion. Mr Yard has a BSc (Hons) in biological science from Leicester University and is a qualified Environmental Health Officer.
- Mr Yard is a witness of fact. His evidence is about MAF's biosecurity response function, and the Psa response in particular.

226. Heather Pearson

- Ms Pearson was a MAF incursion investigator for the New Zealand Psa response.
- Ms Pearson is a witness of fact. Her evidence is about the initial investigation into the Olympos and Kairanga orchards, the wider trading and pathways investigations for the introduction of Psa into New Zealand and the spread of Psa between orchards.

227. Pam Campbell

- Ms Campbell was the orchard supervisor for Kairanga Orchard in 2009 and 2010.
- Ms Campbell is a witness of fact. Her evidence is about symptoms seen on Kairanga in early October 2010.

228. Rob Taylor

- Mr Taylor is a senior scientist and bacteriologist at PHEL. He was previously the National Adviser for fresh produce in the Plant Imports Team and a senior scientist at Hort Research.
- Mr Taylor is a witness of fact. His evidence is about his initial observation of symptoms on orchards during the response, and his laboratory testing of leaf samples from orchards and pollen during the response. Mr Taylor has also re-tested the pollen samples from the initial survey conducted by MAF during the response.

Psa experts

229. Shane Max

- Mr Max was the Zespri Innovation Leader responsible for communicating best practice to Zespri's international growers and for leading Psa recovery programmes for the European and New Zealand Psa incursions.
- Mr Max is both a factual and expert witness. His factual evidence is about the difference between the Italian and New Zealand kiwifruit industries, his knowledge of Psa during the Italian incursion, Zespri's response to the Italian incursion, his perception of the risk of Psa arriving in New Zealand, his observations on Olympos and Kairanga orchards and his experience with the testing of Psa during the New Zealand incursion. His expert evidence is about how Psa infects kiwifruit vines, the varying impact of Psa in different growing regions, and orchard management and hygiene practices in the New Zealand kiwifruit industry before and after the Psa incursion.

230. Dr Joel Vanneste

- Dr Vanneste is a senior scientist at the New Zealand Institute for Plant & Food Research Limited (Plant & Food). Dr Vanneste's expertise is in the fields of plant pathology, bacteriology and plant protection, and research into Psa and fire blight.
- Dr Vanneste is both a factual and expert witness. His factual evidence is about his knowledge of and research on Psa before 2009, his work arising out of the Italian Psa outbreak, his involvement in the Psa response in New Zealand, and his scientific work during 2010 and 2011 relating to the molecular characterisation of Psa strain types. His expert evidence is on the evolution of knowledge about Psa over time, the taxonomy of Psa, the different diagnostic methods for testing Psa, Psa transmission on pollen, Psa in China, the likely timing of Psa3 infection in New Zealand, and the plaintiffs' possible pathways of infection.

Nature of scientific knowledge

231. Professor Richard Newcomb

- Professor Newcomb is a Professor of Evolutionary Genetics at the University of Auckland and the Chief Scientist at the New Zealand Institute of Plant & Food Research Ltd.
- Dr Newcomb is an expert witness. His evidence is about the nature of scientific knowledge and the scientific research process.

Genetics of Psa strains

232. Dr Honour McCann

- Dr McCann is a post-doctoral researcher at the New Zealand Institute for Advanced Study at Massey University. Dr McCann's doctorate is in the evolution and host specificity and virulence in the plant pathogen *Pseudomonas syringae* (University of Toronto). Her expertise is in scientific research in the field of plant pathogen genomic and evolution.
- Dr McCann is an expert witness. Her evidence is about the robustness of Dr Poulter's methodology to analyse genetic changes in Psa3 and Dr Poulter's conclusions regarding the origins of Psa3. Dr McCann will also give evidence about her genomic analysis of New Zealand and international Psa strains, and her views on the robustness of the methodology used by Dr Mazzaglia to analyse Psa3 and his conclusions.

233. Professor Edward Holmes, Fellow of the Royal Society

- Professor Holmes is a Professor in Biology and Medicine at the University of Sydney. Professor Holmes's expertise is in the field of evolutionary biology, microbiology and virology, with a specific expertise in phylogenetics (the science of determining the evolutionary relationships between organisms, including bacteria).
- Professor Holmes is an expert witness. His evidence is about fundamental genetic techniques and whole-genome sequencing vs different forms of analysis; and the robustness of the methodology and conclusions from Dr Poulter, Dr Mazzaglia and Dr McCann.

234. Professor David Bryant

- Professor Bryant is a Professor of Mathematics at Otago University. Professor Bryant's expertise is the theory and methodology of evolutionary analysis of genetic data.

- Professor Bryant is an expert witness. His evidence is about the robustness of the methodology and conclusions of Professor Curran (in respect of statistical regression analysis).

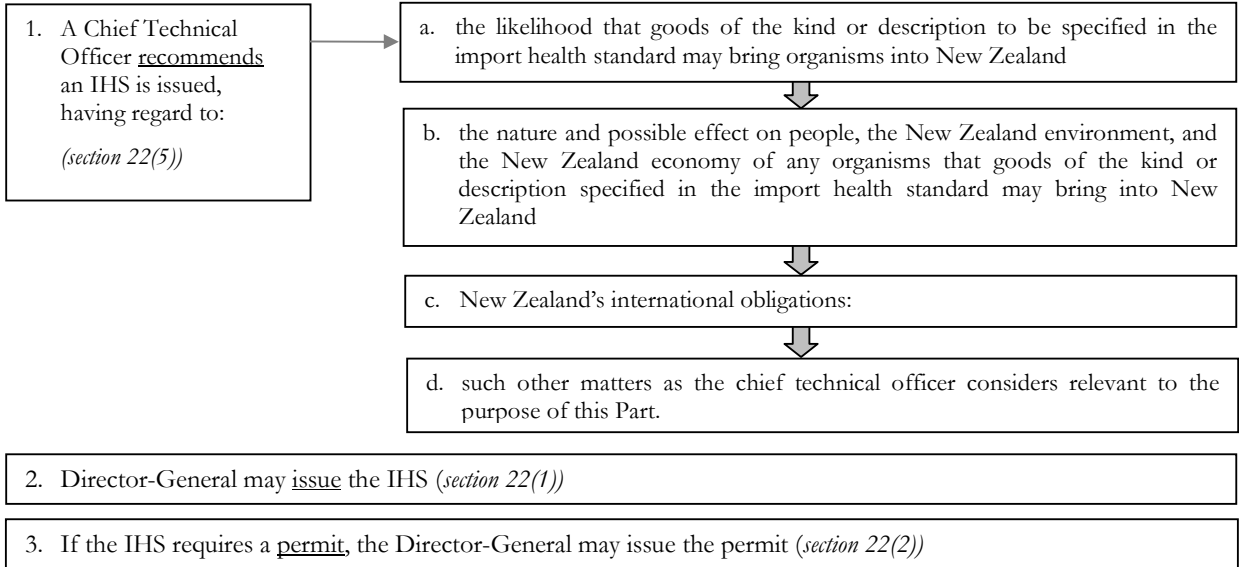
J E Hodder QC / S V McKechnie / J C Catran / P H Higbee
Counsel for the defendant

APPENDIX A – OPERATION OF PART 3 BIOSECURITY ACT 1993

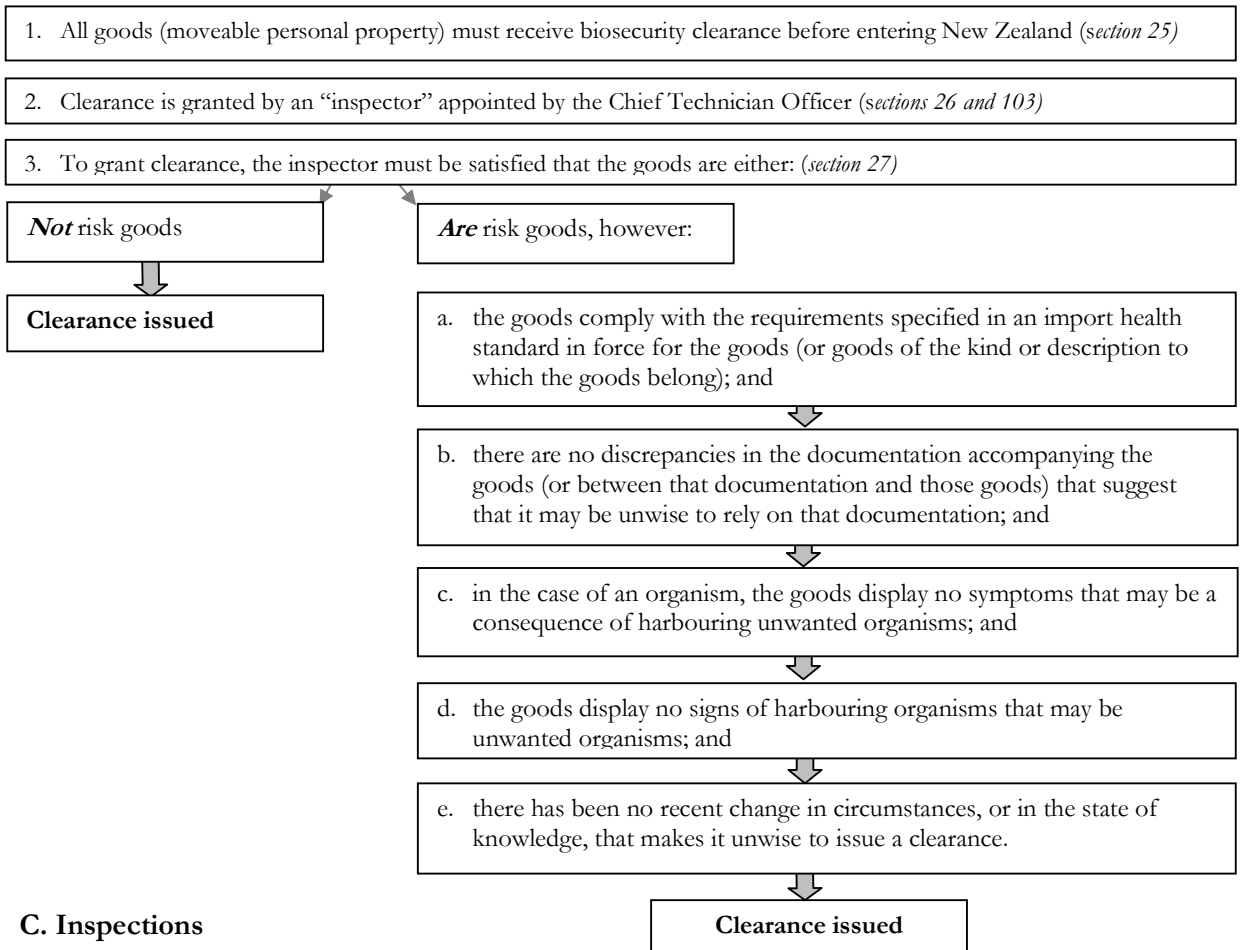
Part 3 - Importation of Risk Goods

(section 16: The purpose of this Part is to provide for the effective management of risks associated with the importation of risk goods.)

A. Import Health Standards



B. Clearance of risk goods



C. Inspections

An inspector has a discretion to inspect any unaccompanied goods that are in a transitional facility or biosecurity control area (section 30.4)

APPENDIX B – CHRONOLOGY

Date	Event	Reference
1992	Psa first detected in Italy	CB v 45 p 40214
1 October 1993	Biosecurity Act 1993 comes into force	
November 1993	National Agricultural Security Standard (NASS) 155.02.06 promulgated	CB v01 p 00001
10 April 1994	SPS Agreement is signed	
1 January 1995	SPS enters into force and the WTO comes into existence	CB v44 p 37043
26 November 1997	Biosecurity Amendment Act 1997 comes into force	
6 August 1998	MAF Regulatory Standard for nursery stock issued (amendment No. 1)	CB v01 p 00506
August 2003	Biosecurity Strategy 2003 published	CB v04 p 02722
2004	Biosecurity New Zealand established	B. O’Neil (BoE) at [13]
28 May 2004	<i>Actinidia</i> Schedule to the Nursery Stock IHS amended and reissued after a process of review/consultation. Psa included as a pest	CB v06 p 04357 CB v06 p 04368
July 2006	MAF initiates review of scientific literature on plant pests and diseases associated with pollen	G. Clover (BoE) at [69]
August 2006	<i>Actinidia</i> PEQ Testing Manual released	CB v11 p 08000
29 August 2006	Internal MAF discussion about reviewing import requirements for pollen	CB v11 p 08827
23 November 2006	PHEL Review is finalised	CB v12 p 09764 CB v12 p 09592
23 November 2006	Kiwi Pollen (NZ) Ltd first contacts MAF about importing kiwifruit pollen	CB v12 p 09759
December 2006	Risk assessment discussion takes place between senior members of the plants risk analysis and plants imports teams, during which it is decided that kiwifruit pollen for artificial pollination may be imported subject to certain conditions	S. Sathyapala (BOE) at [55]-[66], [69]
13 April 2007 (on or about)	PHEL Review approved for use in risk assessments	CB v14 p 11526 G. Clover (BOE) at [125.8]
16 April 2007	MAF issues first permit to Kiwi Pollen (NZ) Ltd to import kiwifruit pollen from China (unused)	CB v14 p 11532

Date	Event	Reference
21 May 2007	Heads of agreement planned between Bexley Inc and Kiwi Pollen (NZ) Ltd for the export of 1,000kg of pollen from China	CB v14 p 11688
28 May 2007	MAF declines Kiwi Pollen's request to import vacuum-collected kiwifruit pollen from Italy	CB v14 p 11692
September 2007	Dr Card's, Dr Clover's and Associate Professor Pearson's Review of pollen transmitted plant pathogens published in the <i>Australasian Plant Pathology</i> journal	CB v45 p 40395
April 2009	Dr Vanneste of Plant & Food travels to Italy to work on Psa for Zespri	J. Vanneste (BoE) at [27]
7 April 2009	Import Health Standard for nursery stock issued (amendment No. 10)	CB v18 p 14599
30 April 2009	MAF issues import permit to Kiwi Pollen (NZ) Ltd for kiwifruit pollen from China	CB v18 p 15293
6 June 2009	Exporter (Bexley) emails Kiwi Pollen (NZ) Ltd confirming an export permit for kiwi pollen from China has been obtained and requesting Jill Hamlyn test the viability of the consignment after it has cleared Customs in New Zealand	CB v19 p 15598
23 June 2009	Electronic application made for biosecurity clearance of C2009/140782 from China	CB v41 p 34637
23 June 2009	MAF directs C2009/140782 from China is held pending presentation of a phytosanitary certificate. Charge is entered for the double handling of paperwork required	CB v19 p 15612
23 June 2009	Bexley emails Kiwi Pollen (NZ) Ltd requesting that Jill Hamlyn advise the viability immediately after clearing Customs	CB v35 p 29474
24-26 June 2009	Bexley, Kiwi Pollen NZ Ltd and Import Cargo Express arrange for a second phytosanitary certificate to be couriered after the original cannot be found by Air New Zealand (original appears to be CB v19 p 15601).	CB v19 p 15666
30 June 2009	Phytosanitary certificate is presented and MAF gives biosecurity clearance to a 4.5kg consignment of kiwifruit pollen (C2009/140782) imported from China by Kiwi Pollen (NZ) Ltd	CB v19 p 15682
1 October 2009	Section 2.2.3 of the Nursery Stock IHS	CB v19 p 16032

Date	Event	Reference
	amended	
18 December 2009	EPPO circulates alert on the Italian Psa incursion	CB v21 p 17843
31 March 2010	OPAC writes off its \$7.1m investment in an Italian kiwifruit orchard as a result of a bacterial disease threatening the orchard	CB v22 p 18897
8 April 2010	MAF receives a query from a journalist regarding the Italian outbreak of Psa	CB v22 p 18918
10 April 2010	Pest risk assessment conducted on Psa associated with fresh kiwifruit from Italy	CB v22 p 18960
17 May 2010	Plant & Food raises concern about fresh kiwifruit from Italy in light of Psa raised with MAF	CB v23 p 19171
Mid-2010	Strain of Psa isolated from Italy confirmed to be different to the strains previously known to be present in Italy	J. Vanneste (BoE) at [48] CB v45 p 40604
May 2010	MAF Emerging Risks and Opportunities Committee has its first meeting	CB v23 p 19195 CB v22 p 18501 CB v22 p 18389
14 July 2010	Zespri raises concern about fresh kiwifruit from Italy in light of Psa raised with MAF	CB v23 p 19406
29 September 2010	Dr Vanneste emails preliminary conclusions regarding Psa in pollen, budwood and fruit to Zespri	CB v25 p 21077
30 September 2010	Dr Vanneste's preliminary conclusions are forwarded to MAF	CB v25 p 21096
7 October – 5 November 2010	Zespri emails MAF requesting the border is closed to fresh fruit from Italy. MAF considers Zespri's request to stop imports of fresh fruit from Italy (including holding a working group meeting with Zespri on 22 October), but declines due to lack of scientific evidence	CB v25 p 21453 CB v26 p 21769 CB v26 p 22205 CB v26 p 22206
21 October 2010	Bobby Singh tells Peter West about a sick vine on Olympos Orchard	P. West (BoE) at [26]
1 November 2010	Samples from Olympos Orchard sent to Plant & Food for testing	P. West (BoE) at [34]
4 November 2010	MAF decision document recommends reviewing <i>Actinidia</i> Schedule to the Nursery Stock IHS	CB v26 p 22193
5 November 2010	Plant & Food reports to MAF that it has found Psa in the Olympos Orchard samples. Confirmed by MAF testing	D. Yard (BoE) at [28].

Date	Event	Reference
6 November 2010	MAF issues Restricted Place notice for Olympos Orchard (RP1)	CB v26 p 22265
7 November 2010	First IAC (Industry Advisory Council) meeting on Psa. IAC continues to meet every few days through this period	CB v26 p 22474
8 November 2010	First MAF response team arrives in Te Puke and begins field investigation	H. Pearson (BoE) at [39]
8 November 2010	MAF issues Restricted Place notice for Kairanga Orchard (RP2)	CB v26 p 22511
9 November 2010	Australia includes nursery stock from New Zealand in its review of import conditions for <i>Actinidia</i> propagative material	CB v27 p 22721
12 November 2010	MAF suspends imports of kiwifruit pollen	CB v27 p 22926
14 November 2010	The idea of joint industry/government funding of the response was initiated by the IAC	CB v27 p 23098
17 November 2010	Zespri and Ministers agree to a \$50m response package and that industry will lead the response	CB v44 p 37013 CB v28 p 23412
19 November 2010	Australia suspends imports of kiwifruit pollen, and includes pollen in its review of import conditions for <i>Actinidia</i> propagative material	CB v28 p 23703
20 November 2010	MAF announces the detection of Psa on New Zealand pollen	CB v28 p 23716
24 November 2010	MAF informed trading partners that NZ pollen samples had tested positive for Psa from 2007-2010. MAF updated NPPOs on the two NZ isolates and ongoing research into pollen. MAF kept NZ pollen exporters updated on the requirements of trading partners: Japan and Korea did not make Psa a quarantine pest for several years.	CB v28 p 23807 CB v30 p 25396 CB v37 p 31491 CB v37 p 31402 CB v37 p 31405 CB v37 p 31492 CB v37 p 31537
6 December 2010	Kiwifruit Vine Health (KVH) is incorporated	CB v42 p 35320
9 December 2010	Psa-LV (Pfm)/Psa-V(Psa3) difference confirmed	R. Taylor (BoE) at [78]
January 2011	KVH establishes and manages a compensation package for growers who agree to cut out their orchards	B. O'Neil (BoE) at [160] CB v30 p 25408 at 25409
March 2011	Italy imposed emergency measures on kiwifruit pollen and informed MAF that NZ kiwifruit pollen must be sourced from a pest-	CB v37 p 31102 CB v37 p 31402

Date	Event	Reference
	free area on 4 April	
May 2011	Dr Vanneste's research on Psa association with pollen published	J. Vanneste (BoE) at [61] CB v46 p 40821
15 July 2011	Australian draft PRA for Psa published for consultation	CB v31 p 26630
27 July 2011	KVH stops paying compensation	CB v31 p 26583 at 26584 CB v31 p 25919 CB v31 p 25923 CB v31 p 25926
26 October 2011	KVH data records Strathboss Orchard as Psa3 positive	CB v33 p 27652
18 November 2011	Australian final PRA for Psa published	CB v33 p 27784
5 December 2011	MPI publishes Pathway Tracing Report	CB v33 p 28247
9 May 2012	Zespri advises growers that G3 cultivar licences will be made available at one for one pricing (G3 licences made available on 18 June 2012)	CB v36 p 30184
September 2012	EPPO express PRA on Psa published	CB v37 p 31102
June 2012	Cabinet approves Primary Sector Recovery Policy and Biosecurity Recovery Framework	CB v36 p 30595
December 2012	The Psa incursion is classified as an adverse event	CB v37 p 31480
5 December 2012	EU adopts emergency measures to prevent the introduction of Psa	F. Petter (BoE) at [20.3]
20 December 2012	Chile requested information to conduct a risk assessment into kiwifruit pollen	CB v37 p 31537
17 May 2013	Biosecurity (National Psa-V Pest Management Plan) Order 2013 comes into force	CB v38 p 32078
19 May 2014	GIA deed entered into	CB v39 p 32474
16 September 2014	Japan imposed import requirements on NZ kiwifruit pollen	CB v40 p 33357
November 2018	Plant variety rights expire on Hort16A variety	CB v40 p 33440 at 33442

APPENDIX C – SELECTED GLOSSARY

<i>Actinidia</i>	Latin word for kiwifruit
Contamination	The action of making impure or polluting; defilement, infection; Something which contaminates; an impurity
EPPO	European & Mediterranean Plant Protection Organisation
Germplasm	The genetic material contained in the germ cells (the reproductive cells such as gametes in humans)
G3	A gold kiwifruit cultivar, also known as Gold 3 or Sun Gold
Hayward	A green kiwifruit cultivar
Hort 16A	A gold kiwifruit cultivar
IAC	Industry Advisory Council (for the kiwifruit industry)
Inoculum	A population of a pathogen (such as Psa)
KPIN	Unique identifying number given to a kiwifruit orchard
NPMP/NPMS	National Pest Management Plan, previously called a National Pest Management Strategy (created under Part 5 of the Biosecurity Act 1993)
PCR (polymerase chain reaction)	A laboratory test to detect Psa
PEQ	Post Entry Quarantine
Pfm	The most recent name for Psa-LV
PHEL	Plant Health Environment Laboratory. MPI's laboratory that provides diagnostic testing and technical expertise for new pests and diseases affecting plants and the environment. Over 30 staff – based in Auckland and Christchurch.
Phytosanitary	Plant health
Psa (<i>Pseudomonas syringae</i> pv. <i>Actinidiae</i>)	A type of pathogenic bacterium that affects kiwifruit
Psa-LV	Low-virulent Psa
Psa-V	Virulent Psa
Psa-3	The most recent name for Psa-V
SPS	Sanitary and Phytosanitary Agreement
Tissue culture	Plant material that has been grown under sterile conditions on a nutrient culture medium of known composition