



Biosecurity (Readiness and Response—Kiwifruit Levy) Order 2015

Jerry Mateparae, Governor-General

Order in Council

At Wellington this 2nd day of February 2015

Present:

His Excellency the Governor-General in Council

Pursuant to section 100ZB(1) of the Biosecurity Act 1993, His Excellency the Governor-General makes the following order, acting—

- (a) on the advice and with the consent of the Executive Council; and
- (b) on the recommendation of the Minister for Primary Industries given after being satisfied of the matter described in section 100ZB(6) of that Act.

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Order

- 1 Title**
This order is the Biosecurity (Readiness and Response—Kiwifruit Levy) Order 2015.
- 2 Commencement**
This order comes into force on 6 March 2015.
- 3 Interpretation**
 - (1) In this order, unless the context otherwise requires,—
Act means the Biosecurity Act 1993

agreement—

- (a) means the deed; and
- (b) includes any operational agreement of the kind referred to in section 100Z(3) of the Act that is made between—
 - (i) the Director-General; and
 - (ii) The KVH Foundation Incorporated and Kiwifruit Vine Health Incorporated

annual general meeting means a combined annual general meeting of The KVH Foundation Incorporated and Kiwifruit Vine Health Incorporated held in accordance with the rules of those societies

deed—

- (a) means the Biosecurity Readiness and Response Government Industry Agreement entered into by The KVH Foundation Incorporated and Kiwifruit Vine Health Incorporated on 20 May 2014 (as may be revised or amended from time to time); and
- (b) includes a deed of the kind described in section 100Z(2) of the Act that replaces the deed referred to in paragraph (a)

export means export to any place other than Australia

exporter means any person who exports kiwifruit for sale

grower means a person whose business is, or includes, growing kiwifruit

industry organisation means The KVH Foundation Incorporated and Kiwifruit Vine Health Incorporated acting jointly

kiwifruit means the fruit of any plant of the genus *Actinidia* other than the species *Actinidia arguta*

Kiwifruit Vine Health Incorporated—

- (a) means Kiwifruit Vine Health Incorporated; and
- (b) includes any body corporate that succeeds that society as a party to the deed

levy means the levy imposed by clause 5

levy money means the money paid under this order as a levy

levy rates means the levy rates described in clause 8

levy year means,—

- (a) for the 2015 levy year, the period starting on 6 March 2015 and ending on 31 March 2016; and

- (b) for every subsequent levy year, the period of 12 months starting on 1 April and ending on 31 March

post-harvest operator means a business that provides services to the kiwifruit industry in relation to the harvesting, sorting, packing, and cool storage of kiwifruit prior to its distribution to market

response activity has the meaning given in section 100Y of the Act

The KVH Foundation Incorporated—

- (a) means The KVH Foundation Incorporated; and
- (b) includes any body corporate that succeeds that society as a party to the deed

tray equivalent means 3.6 kilograms of kiwifruit.

- (2) Unless the context otherwise requires, any term or expression that is defined in the Act and used, but not defined, in this order has the meaning given in the Act.
- (3) The provisions of this order must be read with all appropriate modifications if The KVH Foundation Incorporated and Kiwifruit Vine Health Incorporated are together succeeded as parties to the deed by a single body corporate.

4 When order ceases to apply

- (1) This order ceases to apply if The KVH Foundation Incorporated or Kiwifruit Vine Health Incorporated withdraws from, or is removed as a signatory to, the part of the agreement that consists of the deed.
- (2) The order ceases to apply at whichever of the following is the relevant point in time:
 - (a) the time at which the society's withdrawal takes effect; or
 - (b) the time at which the society receives notice from the Minister that he or she has removed the society as a signatory.
- (3) Despite subclause (1), an amount of levy remains payable in accordance with this order if—
 - (a) the payment of that amount became due before the relevant point in time under subclause (2); and
 - (b) that amount was unpaid at that point in time.

- (4) Despite this clause, this order continues to apply if either or both of the societies referred to in subclause (1) are succeeded as a party to the deed by another body corporate.

5 Levy imposed

- (1) A levy is payable to The KVH Foundation Incorporated on kiwifruit that is grown in New Zealand and exported.
- (2) The KVH Foundation Incorporated receives the levy on behalf of the industry organisation.

6 How levy may be spent

- (1) The industry organisation must spend all levy money paid to it on meeting its commitments under the agreement.
- (2) The industry organisation may invest levy money until it is spent.

Determination of levy

7 Basis for calculating levy

- (1) The levy must be calculated on the basis of—
- (a) cents per kilogram of kiwifruit exported; and
 - (b) the weight of the kiwifruit at the time at which the fruit is loaded on board a ship or an aircraft for export.
- (2) Despite subclause (1)(b), the weight of the fruit may be determined at the time at which the fruit is graded and sorted for export.

8 Different rates of levy apply

- (1) Different levy rates apply in relation to the different classes of kiwifruit being exported, as specified in subclause (2).
- (2) The levy rates are as follows:
- (a) levy rate 1, which applies in respect of varieties, or cultivars, of green kiwifruit (*Actinidia deliciosa*);
 - (b) levy rate 2, which applies in respect of varieties, or cultivars, of gold and red kiwifruit (*Actinidia chinensis*);
 - (c) levy rate 3, which applies in respect of any varieties, or cultivars, of kiwifruit not referred to in paragraph (a) or (b).

9 Maximum rate of levy

The maximum rate of levy is 0.28 cents per kilogram for all levy rates.

10 Rate of levy payable

- (1) For the 2015 levy year, the levy is payable at a rate of 0.17 cents per kilogram for all levy rates.
- (2) In relation to the levy payable in respect of a levy year after the 2015 levy year, the industry organisation must—
 - (a) include the setting of the levy rates as an agenda item for discussion at its annual general meeting; and
 - (b) permit all growers (whether or not those growers are members of The KVH Foundation Incorporated or Kiwifruit Vine Health Incorporated) to—
 - (i) attend the meeting; and
 - (ii) have speaking rights in respect of the proposed levy rates; and
 - (c) set the levy rates before the beginning of the levy year to which they relate.
- (3) As soon as practicable after setting the levy rates, the industry organisation must notify both the levy rates and the levy year to which they apply—
 - (a) in the *Gazette*; and
 - (b) in the industry organisation's newsletter or other similar publication; and
 - (c) by post or email to all growers and exporters known to the industry organisation (whether or not those growers or exporters are members of The KVH Foundation Incorporated or Kiwifruit Vine Health Incorporated).
- (4) If the industry organisation fails to set the levy rates in accordance with subclause (2), the levy rates for the previous levy year continue to apply.
- (5) One or more of the levy rates set in accordance with this clause or clause 11 may be set at zero.
- (6) This clause is subject to clause 11.

11 Power to vary rate of levy for response activity*Process for setting varied rates*

- (1) The industry organisation may vary the levy rates in accordance with this clause without holding an annual general meeting.
- (2) The variation of the levy rates (the **varied rates**) and the period during which the varied rates will apply (the **variation period**) must be approved—
 - (a) by a decision of the board of The KVH Foundation Incorporated made in accordance with that society's rules; and
 - (b) by a decision of the board of Kiwifruit Vine Health Incorporated made in accordance with that society's rules.
- (3) Each board may approve the varied rates and the variation period only if the board is satisfied, on reasonable grounds, that the varied rates need to apply for that period to enable the industry organisation to undertake a response activity.
- (4) The variation period must—
 - (a) start after the date on which the industry organisation notifies the varied rates and variation period; and
 - (b) end on a date that is not more than 3 years after the date on which the period starts.
- (5) The industry organisation must notify the varied rates and the variation period—
 - (a) in the *Gazette*; and
 - (b) in the industry organisation's newsletter or other similar publication; and
 - (c) by post or email to all growers and exporters known to the industry organisation (whether or not those growers or exporters are members of The KVH Foundation Incorporated or Kiwifruit Vine Health Incorporated).
- (6) The industry organisation is deemed to have given notice for the purpose of subclause (5)(c),—
 - (a) if the notice is sent by post, at the time at which the notice would have been delivered in the ordinary course of post; or
 - (b) if the notice is sent by email, at the time of transmission.

- (7) The varied rates apply for the duration of the variation period.
- (8) If the industry organisation fails to notify the varied rates and variation period before the start date of the variation period specified in the notice, the period is deemed to start on the day after the date on which notice is given.
- (9) After the date on which the variation period ends, the following levy rates apply:
 - (a) the levy rates set, in accordance with clause 10(2), for the levy year in which the day after the last date of the variation period falls; or
 - (b) if the industry organisation has failed to set the levy rates for that levy year in accordance with clause 10(2), the levy rates that applied immediately before the variation period started.

Payment of levy

12 Grower responsible for payment of levy

The grower is the person responsible for paying the levy.

13 No exemptions from responsibility for payment of levy

There are no exemptions for growers from the responsibility for the payment of the levy under clause 12.

14 When and how levy must be paid

- (1) The payment of the levy becomes due on the date on which the kiwifruit is loaded on board a ship or an aircraft for export.
- (2) The latest date for payment of the levy is the 90th day after the date on which the payment becomes due.
- (3) The levy must be paid to the exporter (*see* clause 16).
- (4) An exporter may recover the amount of any levy payable, and any goods and services tax payable on it, from the grower as a debt due to the exporter by the grower.
- (5) An exporter who buys kiwifruit directly from a grower or exports kiwifruit on a grower's behalf may recover the amount of the levy, and any goods and services tax payable on it, by deducting the amount from the exporter's payment to the grower.

15 Additional levy for late payment

- (1) If any amount of the levy due under clause 14 remains unpaid after the latest date for payment, the payment of an additional levy equal to 5% of that amount becomes due.
- (2) For each month that the amount is outstanding, the payment of an additional levy equal to 2% of the total of that amount plus any additional levies owing under this clause becomes due.
- (3) The latest date for payment of an additional levy under this clause is the day on which it becomes due.

16 Exporter responsible for collecting levy

- (1) The exporter is responsible for collecting the levy.
- (2) The exporter must pay the levy to The KVH Foundation Incorporated (which receives the levy on behalf of the industry organisation).

17 Exporter must make returns to The KVH Foundation Incorporated

- (1) An exporter must, when paying the levy to The KVH Foundation Incorporated, provide a completed return in a form approved by the industry organisation.
- (2) The return must include, in relation to the levy being paid,—
 - (a) the quantity of kiwifruit exported; and
 - (b) the date or dates on which the kiwifruit was exported; and
 - (c) the amount of levy paid per kilogram, or tray equivalent, of kiwifruit exported on behalf of each grower; and
 - (d) the name or names of the grower or growers of the kiwifruit.

18 Recovery fee may not be charged

The exporter is not entitled to charge a fee for recovering the levy.

*Miscellaneous***19 Records**

- (1) A grower must keep records, for each levy year, of—
 - (a) the quantity of kiwifruit produced and sold; and

- (b) the name of the post-harvest operator or exporter that the grower uses; and
 - (c) the amount of levy money paid to the exporter in accordance with clause 14 or the Director-General in accordance with clause 20, as the case may be; and
 - (d) the quantity of kiwifruit to which the levy paid relates.
- (2) An exporter must obtain and keep records, for each levy year, of—
 - (a) the quantity of kiwifruit exported; and
 - (b) the amount of levy money paid, in respect of each grower, to The KVH Foundation Incorporated in accordance with clause 16; and
 - (c) the name of each grower of kiwifruit exported; and
 - (d) the quantity, values, and classes of kiwifruit exported; and
 - (e) a copy of every Customs declaration in respect of the kiwifruit exported.
- (3) The industry organisation must keep records, for each levy year, of the following:
 - (a) each amount of levy money it receives; and
 - (b) for each amount of levy money,—
 - (i) the date on which the money is received; and
 - (ii) the name of the person who paid the money; and
 - (c) for all levy money paid to it, how the money has been spent or invested.
- (4) Records must be kept for at least 2 years after the levy year to which the records relate.
- (5) Every grower and exporter who is required to keep records must provide the industry organisation with information from the records as soon as is reasonably practicable after receiving a request, by post or email, from the industry organisation for the information.

20 Conscientious objectors

- (1) A grower who objects on conscientious or religious grounds to paying the levy in the manner provided for by this order may pay the amount concerned to the Director-General.

- (2) The Director-General must pay the amount to The KVH Foundation Incorporated (which receives the amount on behalf of the industry organisation).

21 Remuneration payable to auditor

- (1) An auditor appointed under section 100ZF of the Act is entitled to receive remuneration (as provided for under section 100ZF(8) of the Act) for the auditor's fees and allowances.
- (2) The fees and allowances referred to in subclause (1) are payable by the industry organisation at a rate agreed to by the Minister and the industry organisation.

Arbitration in case of dispute

22 Appointment of arbitrator

- (1) This clause applies to any dispute about—
 - (a) whether a person is required to pay the levy; or
 - (b) the amount of levy payable.
- (2) The parties to a dispute may agree to submit the dispute to arbitration.
- (3) If the parties to a dispute are unable to agree on the appointment of an arbitrator, the arbitrator must be appointed in accordance with Schedule 1 of the Arbitration Act 1996.
- (4) For the purposes of the Arbitration Act 1996,—
 - (a) an agreement under subclause (2) is an arbitration agreement; and
 - (b) the arbitrator (whether appointed by agreement or under subclause (3)) is an arbitral tribunal.

23 Application of Arbitration Act 1996 to dispute

- (1) The provisions of the Arbitration Act 1996 (including the provisions for procedures to be followed by an arbitral tribunal) apply to the resolution of a dispute submitted to arbitration under this order.
- (2) However, the provisions of this order prevail if there is any inconsistency between those provisions and the provisions of the Arbitration Act 1996.

24 Payment of arbitration costs

The costs of the arbitration (including the arbitrator's remuneration) must, unless the parties agree otherwise, be determined under Schedule 2 of the Arbitration Act 1996.

25 Appeal to District Court

- (1) A party to a dispute who is dissatisfied with the decision made by an arbitrator may appeal to a District Court against the decision.
- (2) The appeal must be brought by the filing of a notice of appeal within 28 days after the making of the decision concerned, or within any longer time that a District Court Judge allows.
- (3) The Registrar of the court must—
 - (a) fix the time and place for the hearing of the appeal and notify the appellant and the other parties to the dispute; and
 - (b) serve a copy of the notice of appeal on all parties to the dispute.
- (4) Any party to the dispute may appear and be heard at the hearing of the appeal.
- (5) On hearing the appeal, the District Court may confirm, vary, or reverse the decision appealed against.
- (6) The filing of a notice of appeal does not operate as a stay of any process for the enforcement of the decision appealed against.

Michael Webster,
Clerk of the Executive Council.

Explanatory note

This note is not part of the order, but is intended to indicate its general effect.

This order, which comes into force on 6 March 2015, imposes a levy on kiwifruit that is grown in New Zealand and exported. The levy must be paid by growers, collected by exporters, and paid to The KVH Foundation Incorporated, which receives the levy on behalf of

the industry organisation. The industry organisation must spend the levy money paid to it on meeting its commitments under the Biosecurity Readiness and Response Government Industry Agreement (and any related operational agreements).

Clause 3 defines—

- export as meaning export to any place other than Australia:
- grower as meaning a person whose business is, or includes, growing kiwifruit:
- industry organisation as meaning The KVH Foundation Incorporated and Kiwifruit Vine Health Incorporated acting jointly.

Under section 100ZH(2) of the Biosecurity Act 1993, this order will be deemed to be revoked at the close of 30 June 2016 unless it has been confirmed by an Act of Parliament passed before or on that day.

Issued under the authority of the Legislation Act 2012.

Date of notification in *Gazette*: 5 February 2015.

This order is administered by the Ministry for Primary Industries.
