



**2018**

**Three Year Rolling Grower  
Contract**

**Confidential**

## TERMS AND CONDITIONS – THREE YEAR ROLLING GROWER CONTRACT

### Preamble

The Three Year Rolling Grower Contract provides a strategic choice for growers and the post harvest sector to strengthen the single point of market entry which underlies the industry's competitive advantage and ultimately the in market premiums paid by our customers for New Zealand Kiwifruit. Through the Three Year Rolling Grower Contract, growers and the post harvest sector make an on-going commitment to supply 100% of their Class 1 fruit to Zespri and growers in return share directly in the tangible benefits of the integrated market channel through receiving the Loyalty Premium.

This Three Year Rolling Grower Contract is entered into on the following terms:

### Commitment to supply

1. The Grower agrees to:
  - (a) supply to Zespri Group Limited ("**Zespri**") in accordance with a Supply Agreement (for marketing by Zespri alone or under a collaborative marketing arrangement), for the next three seasons commencing with the 2018 season, all Class 1 Kiwifruit to which the Grower has title while it is on the vine that is grown on any and all properties that, at any time during the duration of this contract, it owns or controls;
  - (b) obtain all post harvest services for all such Class 1 Kiwifruit (including all Services under a Supply Agreement) from the time it is packed only from post harvest operators and a Registered Supplier or Registered Suppliers who:
    - (i) have been appointed by Zespri and remain as exclusive suppliers; and
    - (ii) provide post harvest services (including Services under a Supply Agreement) for Class 1 Kiwifruit only if it is supplied to Zespri; and
  - (c) ensure that each of its contracts, if any, with such Registered Suppliers and post harvest operators:
    - (i) require the Registered Suppliers and post harvest operators (and any person that they contract with for post harvest services in respect of the Grower's Class 1 Kiwifruit) to meet the conditions specified in clause 1(b); and
    - (ii) provide for the contract to be terminated by the Grower if the Registered Supplier or a post harvest operator ceases to meet the conditions specified in clause 1(b).
2. For the avoidance of doubt, the commitment of the Grower to supply all Class 1 Kiwifruit to Zespri under clause 1:
  - (a) applies to all properties that the Grower acquires or controls while this contract continues; and
  - (b) ceases to apply in respect of any property:
    - (i) that the Grower sells to another person;

- (ii) that the Grower no longer controls (e.g. because the lease or licence is sold to another person or lapses).

### **Extension to and termination of supply commitment**

3. The Grower's commitment under clause 1 will at the end of each season extend automatically for a further season unless by 15 March in any year the Grower gives notice to Zespri that this is not to occur.
4. If notice is given under clause 3:
  - (a) the Grower's commitment under clause 1 continues for the two remaining seasons of its term;
  - (b) Zespri's obligation under clause 8 to pay the Loyalty Premium applies only in respect of the season in which the notice was given, and only if the Grower meets its commitment under clause 1 for the two further full seasons after notice is given;
  - (c) for the avoidance of doubt:
    - (i) Zespri is not required to pay the Loyalty Premium for the two remaining seasons after notice is given, even if the Grower meets its commitment under clause 1 for those seasons; and
    - (ii) Zespri may exercise its remedies under clause 13 to withhold or recover any Loyalty Premium paid for the season in which the notice was given, if the Grower does not meet its commitment under clause 1 for that season or for the two remaining seasons following the giving of the notice; and
  - (d) this contract will terminate at the end of the second full season after notice is given.
5. Zespri agrees that each year it will include in the annual grower contract documentation an express opportunity for the Grower to give notice under clause 3.
6. The Grower's commitment under clause 1 will cease at the end of a season if Zespri gives notice accordingly by 15 March in that season.
7. If notice is given under clause 6:
  - (a) Zespri's obligation under clause 8 to pay the Loyalty Premium applies only in respect of the season in which notice was given and only if the Grower meets its commitment for that season; and
  - (b) this contract will terminate on the day after the last day on which payment is or may be due for that season in accordance with clause 9, provided that Zespri's obligation to pay any Loyalty Premium due shall survive termination of this contract.

### **Payment of Loyalty Premium**

8. Subject to clause 11, in return for the Grower meeting its commitment under clause 1 and supplying all Class 1 Kiwifruit to Zespri at the point of purchase (whether that Kiwifruit is marketed

by Zespri alone or under a collaborative marketing arrangement), Zespri agrees that it will pay a Loyalty Premium of:

- (a) NZD\$0.25 plus GST per tray of Class 1 Kiwifruit supplied to Zespri at FOBS in the relevant season ("Tray"); and
  - (b) if, after paying the Loyalty Premium in clause 8(a), the NZ Supply EBIT (post-Loyalty) would be more than 1.00% of Net Sales ("excess EBIT"), an additional amount per Tray equal to half the excess EBIT, divided by total Trays supplied to Zespri at FOBS by all Growers that have signed a Three Year Rolling Grower Contract with Zespri, plus GST.
9. Subject to clauses 10 and 11, the Loyalty Premium for Class 1 Kiwifruit supplied to Zespri at FOBS in each season under this Three Year Rolling Grower Contract will be paid in two instalments – the first, being \$0.10 plus GST per tray, will be paid by the end of January of the season of harvest and the second within 30 days of 7 June of the following season.
  10. Without limiting Zespri's rights under clause 11, Zespri may postpone payment of the first instalment of the Loyalty Premium if the Zespri Board reasonably believes that it has (or will have) grounds to reduce the Loyalty Premium pursuant to clause 11. Zespri shall advise the IAC as soon as reasonably practicable if it intends to postpone the first instalment of the Loyalty Premium pursuant to this clause 10.
  11. Zespri may reduce any part of the Loyalty Premium referred to in clause 8(a) not yet paid, if and to the extent the Zespri Board considers payment of such amount would result in the NZ Supply EBIT (post-Loyalty) being less than 0.0% of Net Sales. Zespri shall advise the IAC as soon as reasonably practicable if it intends to reduce the Loyalty Premium pursuant to this clause 11.
  12. To avoid doubt, clauses 10 and 11 allow Zespri to reduce, cancel or delay the first instalment of the Loyalty Premium, reduce or cancel the second instalment of the Loyalty Premium, or elect to exercise any combination of those options whatsoever (including, to avoid doubt, postponing the first instalment and then later reducing or cancelling it).

#### **Withholding payment of Loyalty Premium and termination of contract**

13. Zespri may withhold or suspend payment of some or all of the Loyalty Premium not yet paid and may recover some or all of the most recent Loyalty Premium paid to the Grower, in respect of all the Grower's properties, and may exercise any other legal remedies (including terminating this contract), where:
  - (a) the Grower breaches clause 1(a) or any of the Grower's related parties supply any Class 1 Kiwifruit to a person other than Zespri; or
  - (b) even if clause 13(a) does not apply:
    - (i) the Grower receives a benefit from the supply of Class 1 Kiwifruit by any other person to a person other than Zespri; or
    - (ii) the Grower has the power, alone or jointly, to direct or influence to whom any other person may supply Class 1 Kiwifruit, and that person supplies Class 1 Kiwifruit to a person other than Zespri; or

- (c) subject to clause 15:
  - (i) any post harvest operator who provides post harvest services (including Services under a Supply Agreement) in respect of Class 1 Kiwifruit subject to this contract, provides services for Class 1 Kiwifruit (supplied by the Grower or another person) that is supplied to a person other than Zespri; or
  - (ii) any Registered Supplier who provides post harvest services (including Services under a Supply Agreement) in respect of Class 1 Kiwifruit subject to this contract, provides services, other than services which it subcontracts to a post harvest operator, for Class 1 Kiwifruit (supplied by the Grower or another person) that is supplied to a person other than Zespri.
- 14. Where Class 1 Kiwifruit grown on a property that the Grower or a related party owns or controls is found by Zespri in a market outside New Zealand and Australia, and that Kiwifruit was not exported by Zespri or under a collaborative marketing arrangement, clause 13(a) will apply and Zespri may exercise the remedies in clause 13 against the Grower, unless the Grower proves that it took all reasonable steps to meet the obligations in clause 1 and that Grower or related party was not involved in or did not influence, in any way, the export of the Kiwifruit from New Zealand to that market or the re-export of that Kiwifruit from another market to the market where the Kiwifruit is found.
- 15. Where clause 13(c) applies Zespri must not exercise its remedies under clause 13 and must reverse the effect of any remedy previously exercised if the Grower terminates the contract with the relevant Registered Supplier or post harvest operator as soon as possible and thereafter complies with clause 1 of this contract, provided that:
  - (a) the Registered Supplier or post harvest operator was not a related party of the Grower; and
  - (b) the Grower was not involved in or had not influenced the Registered Supplier or post harvest operator in any way, in providing services for Class 1 Kiwifruit that was supplied to a person other than Zespri.
- 16. Where clause 2(b) applies, Zespri may (in addition to its rights under clause 13) withhold or suspend payment of some or all of any Loyalty Premium not yet paid, and recover any Loyalty Premium already paid to the Grower, in respect of the relevant property that the Grower sells or no longer controls, where:
  - (a) a related party of the Grower owns or controls the property and the related party does not or has not entered into a Three Year Rolling Grower Contract with Zespri; or
  - (b) the property is not sold to, owned, or controlled by, a related party of the Grower but:
    - (i) the Grower receives, or may receive, a benefit if Class 1 Kiwifruit from the property is supplied to a person other than Zespri; or
    - (ii) the Grower has the power, alone or jointly, to direct the supply of, or influence a decision to supply, Class 1 Kiwifruit from the property to a person other than Zespri,

but Zespri will otherwise pay any Loyalty Premium in respect of the Kiwifruit supplied from that property due up to the date that the commitment to supply Class 1 Kiwifruit from the property ceases.

17. Without limiting any other provision in this Agreement, Zespri may withhold payment of some or all of the Loyalty Premium not yet paid to the Grower and other growers, and may terminate this and other like contracts with other growers, if not all Class 1 Kiwifruit is supplied to Zespri in a season.

#### **Commitments by Zespri**

18. Zespri will accept for supply at FOBS all Class 1 Kiwifruit from the Grower from all properties that the Grower owns or controls, in accordance with the Supply Agreement, provided:
  - (a) the Grower complies with this Agreement; and
  - (b) no other event occurs that would give Zespri the right to withhold or suspend payment of all or some of the Loyalty Premium under clauses 13 or 14.
19. Zespri will ensure, in entering into the Supply Agreement each year, that the Supply Agreement does not contain any provisions that are inconsistent with the rights of the Grower under this Agreement or that would prevent Zespri from exercising its obligations under this Agreement, unless the Grower agrees otherwise or the IAC approves the Supply Agreement under clause 20(a).
20. Zespri will not enter into the Supply Agreement each year unless:
  - (a) the Supply Agreement, including all provisions for fruit and incentive payments in respect of the Grower's Class 1 Kiwifruit, has been approved by the IAC; or
  - (b) if the Supply Agreement is not approved by the IAC under clause 20(a), Zespri has consulted with IAC on the Supply Agreement and considered all IAC comments before finalising the Supply Agreement.

#### **Review Panel**

21. If the Grower is dissatisfied with any decision that Zespri makes under clauses 9 to 14 of this contract, the Grower may apply to the review panel for that decision to be reconsidered.
22. The review panel will consist of the CEO of NZKGI, the Zespri General Counsel, and a person appointed by the IAC, who must be independent from the Kiwifruit industry, and have no material interest in any business or person associated with the Kiwifruit industry. The CEO of NZKGI and the Zespri General Counsel are not prevented from representing the interests of NZKGI or the Grower, and Zespri, respectively, when acting as part of the review panel.
23. In making a decision, the review panel will take into account:
  - (a) the terms of this contract;
  - (b) the benefit all growers receive from each grower meeting its commitments under this and other like contracts without the basis for withholding or suspending payments arising;

- (c) the extent to which Zespri's decision is fair to the Grower and other growers;
  - (d) the extent to which the Grower receives a benefit from the supply of Class 1 Kiwifruit to a person other than Zespri or is able to direct or influence to whom that Kiwifruit was supplied; and
  - (e) any other matter the panel considers relevant.
24. Any decision by the review panel will be binding on Zespri and the Grower, but either party may refer the decision to a court.

#### **Provision of information by Zespri**

25. Zespri agrees that it will:
- (a) maintain a list of all post harvest operators and Registered Suppliers who are currently appointed as Zespri exclusive suppliers on its website, and publish the list in the KiwiFlier (as at the date 5 days prior to publication) in January, February, and March of each year;
  - (b) inform the Grower of the number of trays in respect of which the Grower receives a Loyalty Premium, at the same time as paying the Loyalty Premium to the Grower;
  - (c) publish industry wide information on the Loyalty Premiums paid to growers each year in the KiwiFlier.
26. Zespri will provide information to the Grower about the Kiwifruit supplied under this Agreement, including information on the Grower's Kiwifruit held in inventory by suppliers, the quality of the Grower's Kiwifruit against the requirements of the Quality Manual, and the payments to be made or that have been made in respect of the Grower's Kiwifruit. The information to be provided each year will be specified in the Supply Agreement.
27. Zespri will notify the relevant assignee (if any) of the Loyalty Premium assignment in place for any season and will obtain and rely on bank account information provided by the assignee.

#### **Amendment**

28. Zespri may amend this contract and all other Three Year Rolling Grower Contracts, provided that it makes the same amendment to all such contracts and the amendment is approved by an IAC resolution in writing. The parties agree to be bound by any such amendment.

#### **Definitions**

29. Terms used in this contract have the meanings set out in the Supply Agreement unless the context requires otherwise, except that:
- (a) "collaborative marketing arrangement" means any collaborative marketing arrangement approved under regulation 28 of the Kiwifruit Export Regulations 1999;
  - (b) "control", in relation to a property, means any property that a person leases, holds under a licence, manages or otherwise uses to grow Kiwifruit;

- (c) "Class 1 Kiwifruit" means any Kiwifruit graded as Class 1 in accordance with the Supply Agreement for the relevant season or that would have been so graded, if it had been supplied to Zespri, including, for the avoidance of doubt, any such Kiwifruit marketed under a collaborative marketing arrangement, but excluding any such Kiwifruit sold in New Zealand or exported for consumption in Australia.
- (d) "Loyalty Agreement" means the Three Year Rolling Grower Contract between Zespri and individual kiwifruit growers supplying New Zealand grown kiwifruit.
- (e) "Net Sales" is defined in the Pricing and Payment Manual for Kiwifruit and Services contained in the Supply Agreement.
- (f) "NZ Supply EBIT (post-Loyalty)" means the "Zespri Earnings before Interest, Tax and Loyalty Premium from NZ Kiwifruit" (calculated in accordance with the Zespri Segment Allocation Manual) less the total loyalty premium paid to growers under the Loyalty Agreements.
- (g) "related parties" means:
  - (i) persons connected by blood relationship, marriage, or adoption, and for the purposes of this definition:
    - A. parents, children and siblings are connected by blood relationship;
    - B. a trustee of a trust under which a person, who is connected to another person by blood relationship, benefits or is eligible to benefit is connected to the other person by blood relationship;
    - C. persons are connected by marriage if one is married to the other or to a person who is connected by blood relationship to the other or they are in a de facto relationship or are civil union partners;
    - D. persons are connected by adoption if one has been adopted as the child of the other or as a child of a person to whom the other person is connected by blood relationship;
  - (ii) persons who are partners to whom the Partnership Act 1908 applies; or
  - (iii) bodies corporate that consist substantially of the same members, shareholders, or proprietors, or that are under the direct or indirect control of the same persons; or
  - (iv) a body corporate and a person who has the power, directly or indirectly, to exercise, or control the exercise of, the rights to vote attached to 25 percent or more of the voting securities of the body corporate; or
  - (v) a body corporate and a person who is a director or officer of the body corporate;
  - (vi) any trustee of a trust and any person who benefits or is eligible to benefit under that trust; and
  - (vii) any trustee of a trust and the settlor of the trust.



- (h) "point of purchase" means the point when Zespri takes title to Kiwifruit under the Supply Agreement applying in each season.
- (i) "season" means the period commencing on 1 April in any year and ending on 31 March in the following year, except that any Class 1 Kiwifruit supplied to Zespri at the point of purchase in February or March in any season will be deemed to be supplied in the following season.
- (j) "Supply Agreement" means an agreement between Zespri and a Contractor for the supply of Kiwifruit and/or services to Zespri in a season.
- (k) "Zespri Segment Allocation Manual" means the Zespri Segment Allocation Manual approved by IAC resolution from time to time.