

BEFORE THE COMMERCE COMMISSION

DECISION NO 221

IN THE MATTER of the Commerce Act
1986 (The Act)

and

IN THE MATTER of an application by the
NEW ZEALAND KIWIFRUIT EXPORTERS
ASSOCIATION (INC) as agents for and on
behalf of NEW ZEALAND KIWIFRUIT GROWERS
and by the NEW ZEALAND KIWIFRUIT
COOLSTORERS ASSOCIATION (INC) for
authorisation of a collective agreement
to enter into and give effect to certain
price fixing provisions of an arrangement
to be negotiated in each growing season,
being a scale of maximum load-out
allowances for export kiwifruit held in
coolstorage and charged by coolstore
operators.

DECISION OF THE COMMISSION

<u>The Commission</u>	J G Collinge	(Chairman)
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	A L Jenkin	
<u>Representation</u>		
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<u>For New Zealand</u>	W Bowyer	
<u>Kiwifruit Coolstorers</u>	M Yortt	
<u>Association (Inc)</u>		
<u>For Kiwifruit Sector</u>	V Watkins	
<u>Committee</u>	H Moore	
<u>For New Zealand</u>	B Nisbett	
<u>Fruitgrowers Federation</u>	P Heywood	
<u>For Kiwifruit Transcool</u>	G Crossman	
<u>Limited</u>	N Dromgool	
	F Graveson	
<u>For Cold Storage Co-op</u>	K Howard	
<u>(Nelson) Limited</u>		
<u>For Motueka Cold Storage</u>	C Trueman	
<u>Limited</u>		

Date of Decision 15 September 1988

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I INTRODUCTION

The Application

- 1.1 An application for authorisation of a restrictive trade practice was lodged on 2 November 1987 by the New Zealand Kiwifruit Exporters Association Inc. (the Exporters Association) as agents for and on behalf of New Zealand kiwifruit growers and by the New Zealand Kiwifruit Coolstorers Association Inc. (the Coolstorers Association) who together are called "the applicants".

Following registration the Commission gave public notice of the application pursuant to s.60(2)(d) of the Act in the New Zealand Gazette and in a number of metropolitan and provincial newspapers.

Other people who, in the Commission's opinion, were likely to have an interest in the application were given notice pursuant to s.60(2)(c).

Authorisation is sought to enter into and give effect to a national collective pricing agreement (NCPA), being certain price fixing provisions of an arrangement between the Coolstorers Association on behalf of its members and the Exporters Association on behalf of its members.

These provisions form part of a wider agreement providing for the conditions and standards of primary coolstorage of kiwifruit after they have been harvested and packed, and while awaiting export. A copy of the type of arrangement referred to, as agreed for the 1986 season, is attached as Appendix 1.

The authorisation sought relates to the entering into and the giving effect to those provisions of the arrangements negotiated in each growing season, being a scale of maximum load-out charges for kiwifruit held in coolstorage and charged by coolstore operators.

A draft determination was prepared and a conference held on 7-8 June 1988 at which interested parties presented their views.

The Practice and the Act

- 1.2 The application for authorisation made in terms of s.60 of the Commerce Act 1986 relates to a practice of the kind detailed in s.58(1)(a) and (b) of the Act. Authorisation was therefore sought:
 - (a) to enter into a contract or arrangement, or arrive at an understanding, to which s.27 of the Act applies.

- (b) to give effect to a provision of a contract or arrangement or understanding to which s.27 of the Act applies.

Section 27 states:

"Contracts, arrangements, or understandings substantially lessening competition prohibited -

- (1) No person shall enter into a contract or arrangement, or arrive at an understanding, containing a provision that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market.
- (2) No person shall give effect to a provision of a contract, arrangement, or understanding that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market.
- (3) Subsection (2) of this section applies in respect of a contract or arrangement entered into, or an understanding arrived at, whether before or after the commencement of this Act.
- (4) No provision of a contract, whether made before or after the commencement of this Act, that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market is enforceable".

Section 30 states:

"Certain provisions of contracts, etc., with respect to prices deemed to substantially lessen competition -

- (1) Without limiting the generality of section 27 of this Act, a provision of a contract, arrangement, or understanding shall be deemed for the purposes of that section to have the purpose, or to have or to be likely to have the effect, of substantially lessening competition in a market if the provision has the purpose, or has or is likely to have the effect of fixing, controlling, or maintaining, or providing for the fixing, controlling, or maintaining, of the price for goods or services, or any discount, allowance, rebate, or credit in relation to goods or services, that are -
 - (a) Supplied or acquired by the parties to the contract, arrangement, or understanding, or by any of them, or by any bodies corporate that are interconnected with any of them, in competition with each other;or
 - (b) Resupplied by persons to whom the goods are supplied by the parties to the contract, arrangement, or understanding, or by any of them, or by any bodies corporate that are interconnected with any of them in competition with each other."

The applicants set out the "Particulars of the Practice" under paragraphs 2.2, 2.3 and 2.4 of their application as follows:

- "2.2 Authorisation is sought to enter into and give effect to certain price fixing provisions of an arrangement between the New Zealand Kiwifruit Coolstorers Association (Inc) ("the Coolstorers Association") on behalf of all of its members and the New Zealand Kiwifruit Exporters Association ("the Exporters Association") on behalf of its members.
- 2.3 These provisions form part of a wider agreement providing for the conditions and standards of primary coolstorage of kiwifruit after they have been harvested and packed, and while awaiting export. A copy of the type of arrangement referred to, as agreed for the 1986 season, appears in Schedule A.
- 2.4 The authorisation sought relates to the entering into and the giving effect to those provisions of the arrangements negotiated in each growing season, being a scale of maximum load out allowances for kiwifruit held in coolstorage and charged by coolstore operators".

Paragraph 2.6 states:

- "2.6 It must be noted that while coolstorage for kiwifruit is required from the time of harvest until they are purchased by the consumer, this application is concerned only with primary coolstorage, i.e. the coolstorage which is provided following packing and which occurs prior to movement for export. We are not in this application concerned with other coolstorage services such as transit storage or coolstorage in the marketplace".

In paragraph 2.2 of the application for authorisation the particular practice for which authorisation is sought is identified as "certain price fixing provisions" of an arrangement between the Coolstorers Association and the Exporters Association.

The "service" for which price fixing is proposed is also generally identified in the application as being the primary coolstorage of kiwifruit which is provided following packing and which occurs prior to movement for export. This service is "supplied" by members of the Coolstorers Association and "acquired" by members of the Exporters Association.

The price fixing "provisions" are identified in paragraph 2.4 of the application as the negotiation in each growing season of a scale of maximum load out allowances for kiwifruit held in coolstorage and charged by coolstore operators.

Application of the Act

- 1.3 S.30 deems the price fixing provisions of such an agreement to have a substantial lessening effect on competition and hence the agreement is prohibited by s.27. When an otherwise

prohibited practice is the subject of an application for authorisation, s.61(6) of the Act states that the Commission shall not make a determination granting an authorisation unless it is satisfied that the contract or arrangement will result or be likely to result in a benefit to the public which will outweigh the lessening of competition. If the applicants can show public benefit from the agreement, then the Commission proceeds to consider the actual degree of lessening of competition and its effects, and then proceeds to the weighing process referred to above.

The Commission, in authorising an agreement, has the power in s.61(2) of the Act to impose conditions not inconsistent with the Act, and to authorise the agreement for such period as it thinks fit. The Commission also has the power in s.65 of the Act to vary or revoke any authorisation granted, if there has been a material change in circumstances.

The Commission in the Whakatu decision (No. 205) made the observation that:

"For the Commission to balance public benefit flowing from the agreement against the degree of lessening of competition caused by the practice, it will clearly be of assistance to test the detriment to the public arising from the lessening of competition against the benefit found. Such balancing of benefit and detriment flowing from the agreement enables a judgement to be made as to where the public interest lies - between the desirability of encouraging competition and the fostering of other public benefit seen to flow from the practice. The Act is worded broadly and there appears no limitation as to the nature of public benefit which may be claimed, nor indeed the competitive detriment to the public flowing from the lessening of competition".

Further, it must be established that the public benefit claimed derives from the practice (as defined by the Act) to which the application relates. In relation to the lessening of competition it is necessary to consider such matters as the extent of adherence to the practice, the identity of the parties and their role within the market and other competitive pressures which might impact on the agreement in the context of the relevant market. The Commission also examines the extent to which the deemed lessening of competition exists. Once this has been done then a realistic balancing with any benefits to the public can take place.

II INDUSTRY INFORMATION

Historical and Background Information

- 2.1 The commercial potential of kiwifruit as an export commodity was recognised in the early 1970's although kiwifruit has been exported in significant amounts since 1954 when the fruit was known as the "Chinese gooseberry".

The kiwifruit industry grew up around the Te Puke (Bay of Plenty) area and the production of kiwifruit for export is a rapidly expanding industry. In 1975 there were 1,000 hectares of planted area compared with 18,000 hectares in 1987.

One of the most important characteristics of kiwifruit for cultivation as an export commodity is its ability to be stored for long periods (up to 8 months) under appropriate conditions. It is this feature that has made transportation to the Northern Hemisphere markets by sea feasible (over 95% of the export product is transported by sea to overseas markets).

New Zealand is currently the world's leading supplier of kiwifruit. New Zealand export production for the year ended March 1988 was approximately 47 million trays and by 1992 this is expected to increase to 72 million trays. Export kiwifruit had an F.O.B. value of \$443.5 million in the year ended June 1987.

Kiwifruit is New Zealand's main horticultural crop. At present, kiwifruit accounts for 55% of all New Zealand's horticultural exports and 3% of total exports by value. More than 95% of the New Zealand crop is exported to Europe, Japan, North America and many other smaller markets.

The marketing channel for export kiwifruit moves fresh kiwifruit from the grower to the overseas consumer. A number of individuals and firms perform this task - growers, packhouse operators, coolstore operators, exporters, transport firms, shipping organisations, overseas importers, wholesalers and retailers, promotion agents, the New Zealand Kiwifruit Authority, and the Exporters Association.

The Role of the New Zealand Kiwifruit Authority (The Authority)

- 2.2 The kiwifruit industry is regulated by the Kiwifruit Marketing Licensing Regulations. These regulations were promulgated in 1977 pursuant to the Primary Products Marketing Act 1953. The Regulations set up the Authority which has eight members. Five members represent growers, two represent licensed exporters and one member represents the Government.

The main responsibilities of the Authority are:

- (i) to promote the export of kiwifruit and to encourage the marketing of kiwifruit outside New Zealand;

- (ii) to assist in the general development of the kiwifruit industry;
- (iii) to require minimum standards for packaging, sizing, and quality of export kiwifruit no lower than those standards set by regulation or notice made under the Plants Act 1970;
- (iv) to license exporters of kiwifruit.

To obtain the funding to carry out these responsibilities, the Authority is empowered to collect a kiwifruit levy. The Ministry of Agriculture sets the levy rate annually on the recommendation of the Authority. For the kiwifruit season ended March 1988 the levy was 67 cents/tray (44.67 cents from the grower and 22.33 cents from the exporter).

The Authority's role with regard to coolstorage facilities is to ensure that the standard of operational procedures and performance reach the levels necessary for kiwifruit.

The Role of the Exporter as Agent

- 2.3 The primary function of the Authority is to license kiwifruit exporters. Every year the Authority is required to consider whether the number and quality of licences currently held are sufficient for the requirements of the industry. At the date of the conference there were seven licensed kiwifruit exporters:

- Crown International
- Elders Horticulture
- Fruitfed Exports Ltd
- Kiwi Harvest Ltd
- Turners and Growers Exports Ltd
- Wilson Neill Kiwifruit Exports Limited
- Wrightson Horticulture

The Authority sets the conditions to apply to each export licence.

The exporters obtain their income by means of commission on the revenue received from the sale of kiwifruit in overseas markets. The commission rate charged by exporters is between 7.5% and 10% (approximately) of the F.O.B. value.

As early as October of the previous season, exporters negotiate with growers for supplies of kiwifruit. Exporters offer such incentives as advance payments and bonus payments for volume commitments to secure growers' crops. Contracts between the grower and the exporter are usually made on an annual basis, although more recently some exporters have been seeking long term fruit commitment for periods beyond one year. In return for a commission, the individual exporter arranges or is involved in arranging each step of post-harvest activity, from packhouse to the overseas market.

From 1982-1986, one of the exporters' activities has been to represent growers in the annual negotiations with the Coolstorers Association to agree upon coolstorage rates for export kiwifruit. In 1986 the Commerce Commission investigated an "Agreement for the Coolstorage of Export Kiwifruit", negotiated between the Exporters Association and the Coolstorers Association for the 1986 season. The view was formed by the Commission, on the information available, that the parties to that agreement were in contravention of s.27 (via s.30) of the Commerce Act 1986.

Accordingly, the parties were advised by the Commission to terminate the said agreement forthwith and to desist from entering into any comparable agreements in the future without prior authorisation from the Commission. Subsequently both parties advised the Commission of their intentions to carry out the advice proffered.

The Exporters Association

- 2.4 The Exporters Association is a duly incorporated body under the Incorporated Societies Act 1908 whose objects include the promotion and advancement of export marketing and distribution outside New Zealand of kiwifruit, and communication with representatives of both local and overseas governments, local growers' associations, packaging manufacturers, rail and transport operators, coolstore operators, shipping companies and trade unions.

Membership currently consists of 7 bodies corporate which are bona fide merchants/exporters licensed by the New Zealand Kiwifruit Authority. The Exporters Association's activities are concentrated in three areas: shipping and transportation, co-ordination of markets and "operations". It is this last area of activity with which the application is concerned.

Operations managers from each exporter form the Exporters Association Operations and Shipping Committee, a planning and problem solving group which is active in many fields of operation, one of which is coolstorage. For the 1982-1986 export seasons, coolstorage for the kiwifruit industry was arranged on a national basis as the result of an agreement jointly prepared by the Exporters Association and the Coolstorers Association. This arrangement meant that there was a standard fixed price for coolstorage nationwide. The Exporters Association Operations and Shipping Committee co-ordinated exporter participation in the discussions on national coolstorage standards and rates for export kiwifruit which took place prior to the annual negotiations with representatives of the Coolstorers Association. The subcommittee attended these negotiations as agents for and on behalf of New Zealand kiwifruit growers.

The Coolstorers Association

- 2.5 The Coolstorers Association is a duly incorporated body under the Incorporated Societies Act 1908 whose objects include the promotion and facilitation of coolstorage of kiwifruit, the

fostering and establishment of a closer bond of unity and co-operation amongst coolstore operators, the establishment and maintenance of an association of kiwifruit coolstore operators for the mutual benefit and assistance of the members, the negotiation of any appropriate agreement on annual charges for coolstorage with representatives of the Exporters Association and the acquisition and dissemination of any knowledge that is likely to be of interest or practical service to members of the Association.

Product Market

- 2.6 S.3(1) of the Act defines "Market" as "a market for goods or services within New Zealand that may be distinguished as a matter of fact and commercial common sense."

In the application for authorisation the product market was described as the provision of primary coolstorage facilities for export kiwifruit. This was not controverted at the hearing and is accepted by the Commission.

Primary Coolstorage as distinct from Transit Coolstorage:

- 2.7 Primary coolstorage refers to the coolstorage of kiwifruit while awaiting export. Coolstorage facilities for primary coolstorage are located in the regions where kiwifruit is grown and are generally situated in close proximity to kiwifruit orchards and/or packhouses. Primary coolstorage forms part of the strategic facilities of the kiwifruit industry in the same way that packhouses do and these facilities are essential for the functioning of the kiwifruit industry.

Transit coolstorage refers to the coolstorage used to facilitate the orderly marshalling of cargo on to a ship and thus reduce total loading costs. It is related to cargo loading and shipping costs and is not part of coolstorage costs. Transit coolstores are ideally, but do not necessarily have to be, located on-wharf, adjacent to the berth(s) at which ships are loaded.

It is stated in the application that the agreement for which authorisation is sought is not intended to and does not apply to kiwifruit which is intended for sale on the domestic market. (Less than 5% of the New Zealand crop is sold on the New Zealand market). Furthermore, the coolstorage of kiwifruit for the domestic market is a service which is physically separated from the coolstorage of export kiwifruit in accordance with industry standards as published by the Authority, i.e. "Fruit of non-export quality cannot be stored with fruit packed for export. In addition, coolstore operators are to ensure that fruit of non-export quality will not be stored in adjacent rooms or in areas where the export fruit can be contaminated by air/ethylene ingress from the non-export fruit." It is also stated that the application is not concerned with other coolstorage services such as transit storage or storage in the market place.

The statements in the application that less than 5% of the New Zealand crop is sold locally and that coolstorage of kiwifruit for the domestic market is a physically separated service have been confirmed.

All coolstore facilities which provide coolstorage for export kiwifruit are checked by the Authority to ascertain whether the facility is operating at the standards required by the Authority and it is the responsibility of the exporter to ensure that those standards are maintained.

There are no minimum standards required for the coolstorage of kiwifruit for the domestic market. Domestic kiwifruit coolstorage is the responsibility of the individual grower and concerns neither the Authority nor the kiwifruit exporters. Rates for the storage of domestic market kiwifruit are negotiated directly between the grower and the coolstore operator concerned and bear no relation to the rates charged for export kiwifruit. Few growers specifically provide kiwifruit for the domestic market.

Geographic Considerations

- 2.8 In the application for authorisation the geographic market is described as regional in the supply-side sense and national in the demand-side sense. It is stated in the application that the proposed collective pricing agreement would apply nationally.

Geographic areas in which kiwifruit are grown are:

Kerikeri, Whangarei, other	- Northland Region
Auckland, Franklin, other	- Auckland Region
Waihi, Kati Kati, Tauranga, Te Puke	
Whakatane, Opotiki, other	- Bay of Plenty Region
Coromandel	
Waikato	
Gisborne	
Hastings, other	- Hawkes Bay Region
Wanganui, Horowhenua, Manawatu, other	- Taranaki Region
Nelson Motueka, Golden Bay,	
Karamea, other	- Nelson Region
Blenheim	
Remaining South Island	

Geographic areas in which export kiwifruit are stored in primary coolstorage are:

Northland
Auckland
Bay of Plenty
Poverty Bay
Southern North Island
Nelson

Size of Market

- 2.9 According to the New Zealand Kiwifruit Authority 28.9 million trays of kiwifruit were exported during the 1986 season (source New Zealand Kiwifruit Authority Annual Report 1987), and 46.9 million trays were exported in 1987. By 1992, kiwifruit export production is estimated to be around 72 million trays (source NZKA).

Primary coolstorage static capacity available for export kiwifruit for the 1987 season was 13,660,692 trays. Estimated static capacity available for 1988 is 35,242,192 trays. (source NZKA).

Some coolstore operators and exporters throughout New Zealand consider that there is currently an under or over-supply of coolstorage in various areas taken on a regional basis.

For the 1988 kiwifruit season, regions identified as having an under-supply of coolstorage are:

The Southern part of the North Island
particularly Horowhenua and Hawkes Bay.

Regions identified as having an over supply of coolstorage are:

Northland, Auckland, Waikato and Bay of Plenty
(marginally).

Substitutability

- 2.10 The Authority sets the standards of coolstorage operational procedures and performance levels required for the storage of kiwifruit for export and checks those standards.

Largely as a result of the stringent standards required by the Authority for the storage of kiwifruit for export and other factors identified earlier in this decision to ensure optimum quality of fruit during storage, the market is characterised by the unique service facilities required for the storage of export kiwifruit.

It is noted that there is a recent trend in the market to upgrade and convert cold storage facilities provided by other industries (e.g. the dairy industry) so that primary coolstorage of kiwifruit for export can be offered during their "off-season".

However, no such existing cold storage facilities can be used for coolstoring kiwifruit for export unless they have been upgraded and converted in order to meet the requirements of the Authority.

Number of Competitors

- 2.11 There were approximately 219 coolstore operators in New Zealand registered with the Authority as at June 1988 as providing primary coolstorage for export kiwifruit.

Of these 219, 148 were financial members of the Coolstorers Association as at March 1988.

Members of the Coolstorers Association pay a levy to the Association, the amount levied being determined by the size of the coolstorage facility provided (static capacity).

Of the 148 financial members of the Coolstorers Association, the breakdown of static capacities is grouped as follows:

<u>Grade</u>	<u>Static Capacity</u>	<u>Number of Members</u>
1	Up to 100,000 trays	81
2	100-200,000 trays	38
3	200-500,000 trays	16
4	500,000 plus trays	<u>13</u>

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Thus the majority of coolstores built for storage of export kiwifruit are small facilities, typically situated on orchards and owned by growers. A 1986 study revealed that 90% of coolstores were owned by growers either individually or corporately (Onshore Kiwifruit Transportation Study 1986; McGregor, Murray Allan & Co) although this percentage is likely to have decreased (not significantly) by 1988, due to the recent entry into the market for primary coolstorage for kiwifruit of private sector kiwifruit industry participants, especially some exporters.

The above situation is due to the historical development of the coolstorage industry whereby coolstorage was provided by growers as an adjunct to the growing and packing of the fruit without it being considered as a separate function. This tradition is reflected in current practice but operates alongside the more recent emergence of contract packing and storage and corporate investment in post-harvest activities.

Vertical Integration

- 2.12 The kiwifruit industry is characterised by vertical integration at many levels. The most common form of vertical integration is the individual or syndicate grower-packer-coolstore operator combination. There is a more recently developing trend for kiwifruit export companies to become involved in various aspects of the industry other than in their traditional capacity as agents for their grower principals. Vertical integration as the industry by kiwifruit export companies is especially evident in their post-harvest activities. There is a general industry distrust of exporters' motives in acquiring financial interests in aspects of the industry other than their

traditional role of agent. This distrust is due to a strong belief within the industry that the exporter/agent should remain exclusively the agent of the grower and should not seek financial reward from other sectors of the industry.

Wrightson Horticulture (100% owned by Fletcher Challenge Ltd) has direct financial investments in orchard, packhouse and coolstorage sectors of the industry.

Considerable concern has been expressed by many industry participants about Wrightson's investment in the coolstorage sector of the industry and in particular with regard to its public announcement in October 1987 of a 15 cents per tray rebate on "whatever the nationally agreed rate", to growers who use Wrightson coolstore facilities. It is understood that the rebate was to apply as follows:

10 cents standard rebate to any grower who used the coolstorage facility.

5 cents "efficiency rebate" to those growers who also committed their crop to Wrightson as their export agent.

It was understood by Commission staff at the time of the investigation that, should the application not be authorised, Wrightson would discount on their competitors' average rates by the same amount (i.e. 15 cents). Wrightson established a figure of 15 cents by averaging coolstore charges over the past three years and considered it could still make an acceptable profit by discounting up to 15 cents per tray.

Some of the concerns that were expressed are:

- (a) Growers fear that Wrightson, backed by Fletcher Challenge, may "take over" not only the coolstorage sector, but also the entire kiwifruit industry. Growers fear that they may lose control of "their" industry. In short, growers are suspicious of Wrightson's intentions as to its investment in and subsequent control of the entire kiwifruit industry;
- (b) Coolstore operators fear that they may be pushed out of the market as a result of not being able to compete with Wrightson, the end result being that Wrightson assumes control of the industry.

The Commission understands that Wrightson Horticulture has an open policy of vertical integration within the kiwifruit industry. Wrightson sees a need for an integrated service from the orchard gate to a final overseas marketplace, where the export kiwifruit is sold. Wrightson maintains that the industry as a whole will benefit from its involvement in coolstorage through increased efficiency in the coolstorage sector, resulting in a reduction of costs to growers. Wrightson also believes that by negotiating lower rates for coolstorage on behalf of its grower principals it is improving its own competitive position vis-a-vis the other licensed kiwifruit exporters.

Choice of Coolstore

2.13 It appears to be the established practice in the majority of cases that the grower's choice of packer determines the coolstore where the fruit will be held following packing. This arises because of three common situations:

- (a) The packer may also be a coolstore owner, either as a member of a co-operative or privately. The two services are therefore linked together because of the vertical integration from grower through packer and coolstorer.
- (b) Rebates or other inducements may be offered by coolstore operators to packers or growers in order to attract their business.
- (c) Coolstores are located close to packhouses.

According to the applicants, the grower's choice of coolstore is therefore often determined by factors other than the load-out allowances, (e.g. the incentive rebate offered) and other areas of competitiveness (e.g. services offered).

The long-term coolstorage of export kiwifruit has, as a system, some unique features. These features all spring from the severance between the input to coolstorage, which is handled by the grower, and the output from coolstorage, which is handled by the exporter.

The various aspects of coolstorage employment: selection, pricing, utilisation, performance evaluation and payment, have developed over time and been divided between the two "users" in a manner which results in a dislocation between performance and reward.

Thus, the grower selects and pays for the coolstorage, but the exporter negotiates the rates, monitors the performance and determines the storage period and the time of load-out. The exporter and the Authority between them, in practical terms, are responsible for coolstorage performance - the exporter rightly so in so far as coolstorage performance has a very significant impact on the whole export function - but the exporter neither selects nor pays for the coolstorage.

The exporter selects every expenditure item which falls into the national pool, the results of which reflect that exporter's overall performance, with the single exception of the coolstorage which is selected by the grower.

An effect of this unique system is that the performance of the coolstorer is only indirectly related to the decision to contract and to the reward for that performance. It appears that the grower (the payer) may not always take that performance into account in selecting the coolstore in the first place. Further, the grower (through the exporter) is not paying that particular coolstorer, but only a national average price.

The Pool System

- 2.14 Although authorisation is not sought for the pool system, it is desirable to explain the system, because it is alleged by the applicants that the NCPA in this case is a necessary element of the pooling system.

Two of the characteristics of the post-harvest sector of the kiwifruit industry are pooled prices and national price averaging mechanisms.

In its early days the industry was geographically localised and involved small volumes of crop. There were benefits to be had by sharing the costs and risk throughout the industry and maintaining administrative simplicity on the part of the exporter.

(a) Revenue Pools

Income is distributed to all growers on the basis of quantity and size supplied from the individual exporters' revenue pools. The homogenous nature of the product, the extended marketing period and the number of different markets and selling prices received, indicate why a revenue pool is claimed to be the most practical and equitable method of accounting for and distributing income to growers. Such a pooling system, relating as it does to exports, is exempted from the Act by s.44.

(b) Cost Pools

Each exporter operates a cost pool based on quantity through which the marketing costs are deducted from the revenue received. The exporter is responsible for payment in the first instance of post-packing costs such as coolstorage, shipping and overseas costs.

(c) Coolstorage as a Pooled Cost

The decision as to the coolstore engaged is with the grower, who also takes responsibility for delivery to the coolstore. However, in order to market the product effectively and to exercise total control over fruit flow from the coolstores, once the fruit is in the coolstore, exporters take physical responsibility for the coolstorage and pay coolstore operators for the cost of coolstorage in the first instance. Individual growers have no influence or control over when their fruit is exported. If the growers paid for coolstorage directly, one grower might pay for 6 weeks coolstorage and another might pay for only 2 weeks coolstorage. Individual exporters, who control the use of coolstorage, pool coolstorage costs incurred during the entire season on behalf of the growers and allocate these costs to growers on an average basis, having regard to the quantity stored, at the end of the season. Rebates or incentives may also be given by coolstore operators direct to individual growers.

The majority of the applicants believe that the practice of pooling coolstorage costs results in equitable and fair cost-sharing between growers. In theory, the cost for coolstorage is distributed fairly and equitably as a result of the pool system. Whether this is the case in actual practice is not of relevance to this application, because approval is not sought for the pooling arrangements themselves.

III SUBMISSIONS

Views expressed in the submissions are summarised as follows:

Submissions Received From Government

- 3.1 (a) Treasury - submitted that, as the general policy stance of Government is to minimise intervention in the economy and reduce the potential for inefficiencies, Treasury would be reluctant to support intervention in situations where a contractual arrangement between consenting parties was possible.
- (b) Department of Trade and Industry - submitted that while the Department has views on this proposal, it is concerned that these views, if made public, may be taken as being those of the Minister of Trade and Industry. It would be improper for the Minister to comment on individual applications being considered by the Commission given the provisions of s.26 of the Commerce Act. It was said that it was important that the Commerce Commission be seen to be independent of the Government.

Submissions Received From Producer Boards

- 3.2 (a) The New Zealand Kiwifruit Authority - considered that, given that the responsibility for coolstorage contracts and arrangements is between the exporters and the coolstorers, it was improper for the Authority to make an independent submission.
- (b) New Zealand Horticulture Export Authority notified the Commission that after consideration it had decided not to make a submission.

Submissions Received From Fruitgrowers Associations

- 3.3 The following associations made submissions in support of the application:
- Horowhenua Fruitgrowers Association
 - Kati Kati Fruitgrowers Association Inc
 - Opotiki Fruitgrowers Association
 - Whangarei and Districts Fruitgrowers Association Inc.
 - Kiwifruit Sector Committee, New Zealand Fruitgrowers Federation
- (by way of letters of endorsement of the application).

The reasons advanced by these grower associations in support of the application were:

- (a) A need for stability within the kiwifruit industry, which can only be achieved in the coolstorage sector of the industry by having an NCPA.

- (b) An NCPA would avoid the disruptive last minute negotiations of rates which put growers' crops at risk and cause friction between the coolstorers and exporters.

The Whakatane County Fruitgrowers Association Inc submitted that some growers consider their interests are not represented by either of the applicants and that some growers consider that coolstorage charges should be paid by growers rather than exporters, so growers have direct involvement and could take part in price negotiations. The Kiwifruit Sector Committee of the New Zealand Fruitgrowers Federation letter of endorsement substantiates grower support of the NCPA application. It referred to resolutions passed in support of this concept, and also in support of the Kiwifruit Sector Committee and the Exporters Association negotiating rates with the Coolstorers Association.

Submissions Received From Coolstore Operators

- 3.4 Two coolstore operators made submissions in favour of the application. Their reasons were that, in the absence of an NCPA during 1987:
- (a) Individual exporters set storage rates nationally and were not prepared to negotiate individually with coolstore operators.
 - (b) Individual coolstore operators received differing rates from the 7 exporters for storing the same product, creating in the long term, 'unsound business practices'.
 - (c) Regional coolstore operators cannot have any 'input' into the rates set by exporters as is possible when represented nationally by the Coolstorers Association.

Certain other coolstorage companies (all non-members of the Coolstorers Association) made submissions expressing concern about the application.

- (a) One submitted that, as one of the larger cold store companies in New Zealand, in order to provide competitive rates and the highest standards of service and facilities, the company must retain the right to set its own storage rates in order to fulfill its commercial obligations to shareholders.

Previous NCPAs had not operated favourably for that company because the standard rates struck at the annual negotiations had not taken regional variations and requirements into consideration. It also submitted that the use of 'crop leverage' by grower/coolstore operators, in order to achieve high throughput in some coolstores, has increased costs to the national pools to the detriment of growers as a whole. It considered that these abuses inflate the national cost pools and the resulting costs become a benchmark for future negotiations.

It was claimed that the effect of the pooling of costs is to encourage the provision of uneconomic facilities to store kiwifruit, thereby increasing the cost of presenting kiwifruit on the export market. Because there is no substantial recognition made in NCPAs of cost effective facilities, it follows that there is no disincentive to prevent the erection of costly facilities in outlying areas, the end result being that the cost efficient grower and coolstore operator are subsidising the operations of their high cost, less efficient counterparts. Thus growers in general are paying a greater cost for storage.

It would be in the public interest if exporters negotiated individually with coolstore operators on the basis of the savings the operators would provide the individual grower. This would ensure the viability of the economic facilities and discourage uneconomic facilities, which would reduce the cost of producing kiwifruit for export and thereby increase the returns of the industry as a whole.

- (b) Another coolstore operator submitted that NCPAs have favoured coolstore operators in the traditional areas but have not been financially beneficial to other areas. The company suffered uneconomic returns for kiwifruit during the years it was a party to the NCPAs, due to the emphasis on weekly storage rates. (Some areas have a short storage period, Bay of Plenty a comparatively long one).

It was claimed that the Association is undemocratic and that under its present constitution it could not express the interests of some coolstorers. It was also claimed that non-members of the Association were "out on a limb" with respect to the application and any subsequent negotiations.

Submissions Received From Kiwifruit Export Companies

- 3.5 The following companies made submissions in favour of the application:

- (a) Turners and Growers Exports Limited stated that its position was largely contained in the application. It believed that the amount paid for coolstorage in 1987 was higher than would have been the case if an NCPA had been possible and presented documentation in support of this opinion.
- (b) Fruitfed Limited confirmed that it was a party to, and supported the application.

Submissions Received From The Exporters Association And Its Individual Members

- 3.6 (a) As the provision for coolstorage in New Zealand is essential to the marketing of kiwifruit for export it is necessary to:

- (i) assure a predictable return on investment by setting a level of coolstorage charges;
 - (ii) ensure the continuing construction of, and investment in, coolstorage by having a national industry agreement.
- (b) NCPAs reduce the cost of coolstorage to growers and at the same time establish fair and reasonable prices for both the provider and user of the service.

NCPAs on coolstorage help maintain lower costs to growers by the following means:

- (i) they provide exporters collectively with the ability to resist the pressures from coolstore operators to pay more than necessary for coolstorage, by standardising prices and setting a benchmark on which individual negotiations can be based.
 - (ii) they put exporters in a stronger bargaining position to negotiate national rates on behalf of growers.
 - (iii) they ensure there are no abuses to the pool system. They remove individual exporters from positions of compromise by, for instance, preventing them from negotiating rates favourable to those coolstore operators who are also growers in order to secure crop commitment.
 - (iv) with exporters negotiating collectively on behalf of the growers, administration costs for coolstorage are reduced, compared with the alternative where coolstorage costs are withdrawn from the pool system and growers individually negotiate rates for the service.
- (c) Under NCPAs, once the fruit is in coolstorage, exporters are in control and are able to meet the total market plan. The control of fruit flow by exporters is not impeded by disputes with coolstore operators over individual rates. Thus the smooth marketing of the product is ensured or assisted. The national marketing effort for kiwifruit overseas was particularly important to maximise kiwifruit returns and to improve exports.
- (d) NCPAs reduce administration costs to exporters and free management to engage in other important aspects of marketing of kiwifruit for export.

Submissions Received From The Coolstorers Association And Its Individual Members

- 3.7 (a) An NCPA gives rise to better utilisation of facilities within the coolstorage sector of the industry, e.g. in the absence of an agreement one operator might offer a substantial discount to achieve high throughput which causes another operator to achieve under 100% utilisation

of his facility. In this way, an NCPA protects those operators who do not achieve high throughput in their facility and helps ensure that such operators remain in business.

- (b) Many coolstores are under-utilised because they are used exclusively for storage of kiwifruit. They are operating only in the kiwifruit season and remain idle for some months of the year. An NCPA, by assuring a predictable return, offers security to the coolstore operator whose facility is not fully utilised.
- (c) An NCPA helps ensure that coolstore operators maintain the high standards required for the storage of kiwifruit for export. A nationally agreed rate on coolstorage avoids the possibility of coolstore operators taking cost-cutting measures to the detriment of the standard of quality of the fruit because they have individually negotiated low rates in order to attract custom.
- (d) In the absence of an NCPA coolstore operators are faced with a situation of having to accept 7 different rates for storing the same product and providing the same service. This gives rise to "unsound business practices" and creates increased administrative costs to the individual operator.
- (e) A single price, under an NCPA, is simple, easy to administer and results in fewer disputes between coolstore operators and exporters.
- (f) In the absence of an NCPA, individual exporters are in a stronger bargaining position and can set the rate nationally without having to negotiate individually. Coolstore operators can be manipulated into accepting rates for coolstorage that are not satisfactory to them. Competition "didn't work" in 1987 because industry exporters were not prepared to accept the rates coolstorers set for the service provided.
- (g) Nationally agreed rates are fair to all participants and in the absence of a national agreement the industry has become fragmented in its approach. Without an NCPA, a fruit war between the exporters and coolstore operators could result. An NCPA lends stability to the industry.

3.8 The points made in these submissions were reiterated and expanded upon at the conference:

In support of the application it was argued to be of importance to complete early negotiations on each season's load-out rates. This was stated to be due to:

- (i) the close link between packing and coolstoring of kiwifruit and the long lead time from the ordering of packing supplies to the actual packing period;

- (ii) the fact that once the fruit was in storage it could not easily be switched to other storage, so that effective negotiations were difficult once the harvest had begun.

It was further argued that the NCPA would assist/achieve this desirable objective. It was said that late agreement over coolstorage rates resulting in acrimony and disruption of fruit flow, as occurred in 1987, is likely to continue in the absence of an NCPA. It was claimed individual exporters appeared slow to announce their proposals in order to wait and see what others were offering, whilst coolstorers were slow to accept rates, in order to obtain the highest offered.

- 3.9 The role of the NCPA in maintaining and improving standards of coolstorage was clarified by the explanation that the Authority regulated standards of fruit quality, while the agreement also covered operational standards which had a significant impact on the export function.
- 3.10 Further submissions in support of the application referred to its role in the prevention of industrial blackmail, by coolstorers in particular. In the absence of a national agreement, it appeared that some coolstorers had threatened to "lock-out" or "lock-in" the fruit because late completion of rate schedule offers gave them the opportunity to use this form of leverage against rates thought to be inadequate or not equal to those offered by other exporters. It was said that the potential disruption to the fruit flow, so critical to overseas marketing success, could be disastrous.
- 3.11 It was argued that the collective agreement reflects a wider range of inputs than that achieved through individual negotiations. Grower representatives of the Kiwifruit Sector Committee of the New Zealand Fruitgrowers Federation are involved in the collective negotiations, as well as the exporters and coolstorers associations. It was also argued that the collectivity of negotiations for an allowance structure creates an equality of bargaining power between the respective industry participants.
- 3.12 It was further said that in the absence of an NCPA, seven national scales will always tend to be higher. Each exporter is forced to pay a rate close to the others to ensure individual coolstorers will deal with it. Further, it is likely the exporter will be more inclined to settle for a higher rate in order to ensure orderly flow of fruit from the coolstores and to prevent disputes.
- 3.13 The discussion at the conference indicated that there were a number of factors inhibiting the substitution of custom-built kiwifruit coolstores by other forms of coolstorage such as facilities operated by dairy companies. These included different locations, different racking, a more exacting temperature range and provision of forced air cooling.

3.14 To the contrary it was argued by some of the participants that an NCPA encouraged inefficiencies in the kiwifruit coolstorage industry. It was claimed that:

- (i) the bonus points for efficiencies recognised by the agreement led to a price differential of approximately 15% between highest and lowest, whereas the performance differential would be better reflected by a differential in the order of 25%;
- (ii) about 40% to 50% of coolstorage facilities were not performing as well as they could;
- (iii) coolstorage inefficiencies had a 'flow-on' effect - for example, in the form of higher transport charges caused by poor access and slower turnaround time.

3.15 Some of the points made in support of the application were disputed by other participants in the conference:

- (a) Administration and transaction costs were said to be no greater without an NCPA than with it;
- (b) In relation to predictability of income, turnover rather than load-out rates was the principal determinant of income for coolstorers;
- (c) There was not complete agreement on the necessity of the link between pack-house and coolstorage facilities.

COMMENT ON GOVERNMENTAL SUBMISSIONS

3.16 The Commission considers that, in order to avoid misunderstandings which appear to have arisen and to positively assist dealings by Government Departments with the Commission, it should briefly comment on the submissions in this case of Treasury and the Department of Trade and Industry.

Intervention

3.17 It was submitted by Treasury that the general policy stance of the Government is to minimise intervention in the economy and reduce the potential for inefficiencies. Treasury would be reluctant, it said, to support intervention by the Commission in situations where a contractual arrangement between consenting parties was possible.

3.18 In this case, this application is in respect of a collective price fixing agreement between competitors, i.e. coolstorers, and in respect of a collective purchasing agreement, i.e. kiwifruit exporters on behalf of growers. Their agreement is presumed by s.30 of the Commerce Act to "substantially lessen competition" and hence to infringe s.27 of the Act unless authorised. It is therefore important to note that it is the Act which intervenes in respect of the transaction and that the

collective pricing agreement is, by the Act, unlawful unless the Commission, in these proceedings, were to authorise it. In granting authorisation, the Commission would need to be sure either that the restrictive trade practice would result in greater net efficiency than would competition in its absence or that some other public benefit would outweigh the detriments inherent in the restriction of competition. The Treasury submission is tantamount to saying that collective pricing agreements should be authorised as contractual arrangements between consenting parties unless good reason can be shown (presumably by the Commission) why not. In fact, as indicated, the Act makes such agreements unlawful unless authorised by the Commission and the Act provides substantial penalties therefore. As the Commission has pointed out before, the Act requires the applicants to show that, on balance, public benefit flowing from the practice outweighs the detrimental effects flowing from the lessening of competition caused by the practice. In other words, the promotion of competition is the primary objective of the Act, and not the promotion of contractual relationships (which may or may not restrict that objective). In the Act, this primacy of competition has been tempered by the fact that the applicants are given the opportunity to convince the Commission otherwise. The Commission should never prejudge the conclusion, but if the applicants cannot convince the Commission that the restrictive trade practice is more beneficial than the competition which would exist without it, then the Commission must by the Act decline to authorise the practice. If the view expressed by Treasury in this case were to prevail (as distinct from that of the Government as conveyed by the Commerce Act) then that would require legislative amendment.

The Role of Government Departments

- 3.19 The Department of Trade and Industry submitted that while the Department has a view on the application it would be improper to comment on individual applications for fear its views may be taken as those of the Minister of Trade and Industry, and that it would be improper for the Minister to comment on individual applications given the provisions of s.26 of the Act. It was further said that it was important for the Commission to be seen to be independent of the Government.
- 3.20 In the light of these submissions it is convenient to outline s.26 of the Act which provides as follows:

"(1) In the exercise of its powers under Part V of this Act, the Commission shall have regard to the economic policies of the Government as transmitted in writing from time to time to the Commission by the Minister.

(2) The Minister shall cause every statement of economic policy transmitted to the Commission under subsection (1) of this section to be published in the Gazette and laid before Parliament as soon as practicable after so transmitting it."

The scheme of the Act is for the Commission to advance the stated Government policy of promoting competition [as outlined in the preamble of the Act] but to allow, in matters within its jurisdiction, lessening of competition in circumstances where, on the facts of a particular case, some public benefit is judged by the Commission to have precedence. "Public benefit" could and is likely to involve some other valid and proper Government policy. By way of possible example only, such a policy could include the promotion of employment, the promotion of exports, the furtherance of CER, and so on. Sometimes Government policy may be more specific such as the protection of travellers from defaulting travel agents, the preservation of the integrity of the share and securities market by Stock Exchange regulation and so on. Such policies may be settled and announced or be, at the relevant time, in the process of being formulated. In such circumstances, having regard to the general policy discretion in the Act to promote competition s.26 may be used to advise the Commission of Government policy or policies or to be more specific in relation thereto. It is not to influence or determine the decisions which the Commission must make. Thus, fully preserving the discretions given to the Commission in the Act, the Commission is required only "to have regard to" such statements in reaching its decisions. The Oxford Dictionary defines the word "regard" as meaning "attention, heed and care". The criteria in the Act, e.g. "dominance", "substantial lessening of competition", "detriment" therefrom and "public benefit" must continue to be assessed and balanced by the Commission paying of course due attention, heed and care to any policy transmitted to the Commission by the Government.

- 3.21 Importantly, this underscores the principle that the Commission's decisions within the framework of the Act are its own and that it should take full responsibility for them. The words "have regard to" underscore that the Government is not responsible for the Commission's decisions, the Government having delegated the responsibility to the Commission. This important principle is in no way compromised by s.26 in providing a channel for the communication of policies. As indicated above, the Commission is required only to "have regard to" such policy statements in reaching its decision. The Commission is thus entirely responsible for its own decisions and the Government cannot be held to be responsible for them even when s.26 is used. The Commission for its part, in order to facilitate this policy of independence has developed principles to that end which are now more fully recorded here.
- 3.22 Government policy is relied on by the Commission in judgements as to competition analysis and "public benefit". The policy can be gleaned from other enactments, Ministerial statements etc, as well as from s.26 of the Act. In fact, s.26 has seldom been used and, in any event, does not exclude alternative means of communication. What is material is not the channel but whether the statement is clearly a relevant communication which is authorised by the Government. It is self evident that the

Commission, in determining "public benefit", should have regard to policies outlined in other Acts of Parliament for example. The weight or significance to be given to such benefit depends of course upon the facts of each case.

- 3.23 The Commission is not entitled to base its judgements upon unsupported statements of opinion by others, including those of Government Departments. To do so would be to abdicate its delegated role in terms of the Commerce Act and this might be reviewable in the Courts. Such a statement of opinion will not therefore be adopted - the Commission will make its own decision. Thus, the Government cannot be held accountable for the actions of the Commission - even though a Department may make submissions that a practice substantially lessens competition or a merger creates a dominant position or that, in its view, public benefit does not outweigh any lessening of competition and so on. If this occurred, and the Commission cannot remember any case in which it has, the statement has no greater or lesser status than any other statement of opinion expressed to the Commission.
- 3.24 In making the assessments required of it, the Commission will not speculate on Government policy. It will, however, rely upon authoritative Government statements as to the future [e.g. a Ministerial statement that tariffs on product X will cease on 1 January 1989] as a matter of probability. However, it would not take into account mere possible changes in Government policy since this would be speculative.
- 3.25 Of course, the Commission is concerned to have any information pertinent to the proceedings in order to assist it in discharging its function. In relation to pertinent information, it would be helpful to the Commission if Government departments were in fact to take the initiative to assist the Commission if they think it is warranted rather than merely responding to requests. The Commission is not always in a position to know whether or not it can be assisted. Departments should take the initiative in assisting the Commission if they have evidence which can assist the Commission. The Commission should not have to subpoena officials to elucidate material facts, and the existence of s.26 should not be construed as a barrier to such co-operation by Government departments with the Commission.
- 3.26 Further, it is possible that the Commission would also on occasions appreciate the support of departments to assist it to determine the nature and ambit of policies adopted by Government. In such cases, it is accepted that the Commission should take the initiative and it is important that the department should not be dissuaded from or feel inhibited in responding.

- 3.27 That co-operation by Government departments has existed in the past without detrimental effect and that it is not uncommon in competition matters is also clear. In fact, the Commission notes that in Australia recently the Trade Practices Commission commented in respect of a merger or takeover proposal, Fletcher Challenge Ltd/Australian Newsprint Mills Limited, as follows [at p.10-58]:

"The submissions received from the Department of Foreign Affairs and Trade, the Department of Industry, Technology and Commerce, and New Zealand High Commission raise the benefits an association between FCL and ANM gives in respect of the thrust of CER agreement, and in particular the benefits from any expanded exports from the region."

- 3.28 Having regard to the above principles, the Commission hopes that Government departments will not withhold information which might assist the Commission, especially having regard to the steps which the Act and the Commission takes to avoid imputation of the decisions of the Commission to Government.

IV COMPETITION ISSUES

The Market

- 4.1 The product function market in respect of which application is sought is the provision of primary coolstorage for kiwifruit while awaiting export. To a greater or lesser extent kiwifruit is produced throughout the country and permission is sought to have a national (i.e. New Zealand wide) agreement in relation to charges for primary coolstorage. In practice, coolstorage appears to be concentrated on a regional basis, Northland, Auckland, Bay of Plenty etc, each centred on a port of exit. In theory, though not in practice to any great extent, kiwifruit could in some cases be transported outside a region to coolstores in other regions. However, except perhaps in the Nelson region, there was little attempt at the conference to distinguish between regions in any way which appeared material to the arguments before the Commission. Accordingly, the Commission proposes to treat the geographic market as New Zealand wide and will not examine each region separately except where that appears warranted by the facts.

Extent of the Restriction and Adherence to the Practice

- 4.2 The authorisation sought relates to the entering into and the giving effect in each growing season to a scale of maximum load-out allowances charged by coolstore operators for kiwifruit held in coolstorage. The applicants claim that there is no restriction on individual coolstorers attracting custom by offering incentives to the grower. Such incentives include:

- quality of service
- free cartage to the coolstore facility
- cents per tray rebate
- free pallets

While the grower still reimburses the exporter for the charges averaged through the pool accounts which the latter has previously paid, the net cost to individual growers will be less if the coolstore operator provides a rebate or other incentive to the grower.

- 4.3 The applicants submit that a national rate for coolstorage simply serves as a benchmark from which such rebates could be offered. However, based on the evidence before it, the Commission is of the view that the benchmark so created is the norm. The rebates are relatively few and are a recent phenomenon. Evidence that rebates were discouraged came from many of the interest groups represented at the conference. There was quite widespread opposition to rebates because they detract from the equity of the pooling system.
- 4.4 The coolstore operator may also compete for crop procurement by the standard of service offered. Improved technology has meant some coolstore operators are investing in computers and can

provide bar-coding facilities, so that in the event of a particular grower's kiwifruit requiring repacking, such fruit may be identified more efficiently and at a reduced cost. The grower, who bears the cost of repacking, is therefore saved the added expense of the time involved in locating his fruit.

- 4.5 The parties to this application are all the exporters of kiwifruit as agents for the growers, and the members of the Coolstorers Association. Financial membership of the latter is 148 of 219 coolstore operators. 71 are non-members for various reasons, one being that several did not wish to participate in the 1986 collective agreement, and to achieve this end they left the Association. The Coolstorers Association submit that those operators who do not wish to be a party to an NCPA can withdraw their membership from the Association and individually negotiate.
- 4.6 However, if those members who do not wish to be a party to an NCPA must withdraw from the Association, then the other benefits obtained by virtue of membership of the group will be lost. These include discussions on industry related problems, as well as the acquisition of knowledge likely to be of interest or practical service to the members. History shows that in order for coolstore operators to dissociate from the agreement, they must leave the Association, as was the case with several Nelson members in 1986.
- 4.7 The seven exporter members have advised that they would adhere to an NCPA if the Commission authorised it. In the last year, exporters have indicated that the charge they stipulate is the maximum charge which will be levied on the pool. This means that a national rate is likely to be "forced" on those coolstore operators who do not wish to be a party to the practice unless they are able to recover the extra charge from the grower. However, evidence submitted at the conference suggested attempts by coolstore operators to obtain extra over and above the national rate have generally failed. Some exporters have also indicated that, should an NCPA be authorised and implemented, they would not individually negotiate with non-member coolstore operators. This suggests that the practice could impact upon many more participants in the market than the applicants above. In fact, in the view of the Commission, the agreement is likely to be observed for most coolstore charges.
- 4.8 There is some potential competition for kiwifruit coolstorers from the conversion of cold storage facilities and the conversion of under-utilised dairy company facilities. There would be conversion costs but these are moderate. However, in practice, factors such as siting of alternative facilities and special expertise in handling kiwifruit have meant that these alternative facilities have been little utilised for kiwifruit. They are potential substitutes given the right price and circumstances but in the view of the Commission, supported by the industry, these facilities do not at present provide a significant discipline upon kiwifruit coolstorers. There is insufficient evidence to show that they are likely to be potential substitutes in the foreseeable future.

- 4.9 Accordingly, the Commission concludes that were it to authorise this NCPA its operation would likely be widespread with there being little departure from the agreed price.

Likely Operation of the Agreement

- 4.10 As indicated, the applicants seek the right to negotiate an agreement without saying how they propose to calculate the price. In previous national agreements, there have been two components in calculating a charge for coolstorage:
- (a) Input charge (to cover establishment costs and overheads)
 - (b) Length of time the fruit is likely to be in coolstorage.

A copy of the basis for calculating payments and scale of load-out charges for 1986 is attached as Appendix 1.

- 4.11 Prior to 1987, a scale of charges was worked out in consultation with representatives from all concerned parties so that coolstorage rates reflected the overall cost of providing coolstorage and its utility. The formula used in pre-1987 agreements was structured so that it reflected the characteristics of coolstorage at different times of the year (variation in turnover) and the costs involved. Prices under these agreements also recognised services and facilities offered by each coolstore operator.
- 4.12 The most significant element from a coolstore operator's point of view in these circumstances is turnover. If, for example, a coolstore with a static capacity (the amount a coolstore can hold at full capacity) of 100,000 trays can turn over 150,000 trays in a season, the operator will receive a greater return than a coolstore operator with the same static capacity turning over 120,000 trays.
- 4.13 It appears to the Commission that a very similar agreement to that used in 1986 would be likely to be used in future. The concessions which appeared to be made by the parties at the conference (and the exporters in particular) were that they would better endeavour to take into account areas of dissatisfaction which had arisen. These were particularly in respect of coolstorers who provided a better service and in respect of regional variations for early load-out. This was a limited concession only. It was a commitment to consider the matter but not necessarily to do anything. There appeared not to be any enthusiasm to operate the agreement much differently from before.

Effect of Lessening of Competition

- 4.14 Given that the operation of the restrictions as to pricing in the agreement is likely to be comprehensive, it is necessary to examine the likely effect of the lessening of competition resulting therefrom. In this respect there was much made at the hearing of the different relative performance during 1982-86 and 1987-88 i.e. between the operation of an NCPA and

the years when there was no such agreement. The Commission listened carefully to these submissions in the hope that they would provide the key to distinguishing the differing effects of the practice on the one hand and competition on the other. However, the value of this comparative analysis was lessened by a number of factors. First, the components of the schedules of the individual exporters in 1987-88 were different from those of the previous season's NCPA. Secondly, the industry being unaccustomed to working in a self regulated environment tended to act co-operatively. Thus, the exporters in 1988 appeared to be about to enter into their own NCPA to effect a national rate, this being abandoned only when Wrightson refused at the last moment to join the consortium. Thirdly, the 1987 season was difficult in that there was a huge increase in volume (by 60%) and this created a position where coolstorage was in great demand. In these circumstances, naturally, a higher price might have been expected for the service. Accordingly, comparisons need to be made with some care and in the Commission's view, the comparative submissions made at the hearing were inconclusive.

Lower Prices Generally

- 4.15 A primary argument by the applicants was that the NCPA kept prices down. Indeed, there was some evidence that the proposed NCPA between the exporters in the 1988 season appeared to keep prices lower than they would otherwise have been for that season. Thus, when Wrightson withdrew from the negotiations it established a price considerably higher than had hitherto been proposed. All of the other exporters then came up to the price to match it.
- 4.16 In their comments on the relationship between coolstorage rates under the NCPA and in the absence of an NCPA, and the factors influencing those rates, the applicants said that: "each exporter has to pay a rate closer to the others to ensure that individual coolstorers will deal with it". They explained that exporters would bid up prices to meet the price leader, not because that would give them more fruit to export, but because it ensured that they had access to the fruit already committed to coolstorage and the total co-operation of the coolstorer concerned, at the critical time of transfer of fruit from coolstore to shipping. It was argued that the existence of the NCPA prevented this bidding-up process from occurring. The Commission considers that insufficient evidence was brought forward to demonstrate whether or not the exporters, by raising or lowering their prices, could influence the amount of their throughput. However, the Commission does otherwise accept that the NCPA has a tendency to keep prices of coolstorage lower than they would otherwise be.
- 4.17 In endeavouring to assess the quantum of price increases, the applicants submitted that under the NCPA prices rose by approximately 10 percent p.a., whereas in 1987 they rose by approximately 18 percent. Further, they indicated that relative inflation rates were higher in the former years. The Commission, however, for reasons already given does not accept

that this is a valid comparison as it is distorted by too many variables, not the least of which was the huge increase in demand in 1987. All the Commission could say on the evidence, is that it believes the agreement is likely to have effect as a maximum price agreement of keeping the "lid on" prices for coolstorage generally. Notwithstanding the NCPA, it appears that there has been considerable investment in the industry recently. Indeed the applicants have said that the NCPA has been responsible for that. Certainly there is no evidence to suggest that investment has been inhibited by unduly low prices.

- 4.18 The argument that the agreement allows rebating appeared to be countered by industry evidence that examples of rebating are few and that there is a clear antipathy on all sides to rebating. In fact, the NCPA appears likely to have a very strong leadership effect whereby it creates an actual price, for most practical purposes, rather than a maximum price from which rebating occurs. The price established under the agreement is likely to be the norm.

Facilities Offered by Coolstorers

- 4.19 The evidence before the Commission was that, although coolstorers are required to deliver fruit of uniformly excellent quality for export, the standard of services and facilities provided varied markedly from coolstore to coolstore. The general figure given was that some 50 percent were continually below the standard of the others in a variety of ways such as location, loading facilities, monitoring and technical facilities, information and accounting standards. The agreement was said to discourage excellence as the inferior stores received the same price as the others. In amelioration of this, there is an injection of bonus points built into the NCPA but Mr Crossman, whose evidence was uncontroverted, indicated that these did not adequately recognise the extra facilities by a factor of some 10 percent. The participants said that they would look at this in future. To date, it appears that the NCPA has not provided sufficient incentive to upgrade facilities and this has meant that some coolstore charges from a significant number of coolstores are higher than they should be.

Regional Variations

- 4.20 The Coolstorers Association has attempted to persuade several Nelson non-members to rejoin, advising them that if they do not wish to be a party to an NCPA (if authorised) then they may subsequently withdraw from the Association. Nelson fruit ripens early in the season and is mostly exported relatively soon after harvest, thereby requiring less time in coolstorage than most other areas in New Zealand. Because of the limited time this fruit is in coolstorage, the operator requires a higher rate of return to remain viable than operators in other areas who can capitalise on long term storage.

- 4.21 Because Nelson operators require a higher rate for coolstorage than those operators in, say the Bay of Plenty area, any agreed national rate which recognises the Nelson situation would have to take into consideration such regional anomalies. Therefore, such an agreed national rate would also apply to those operators whose circumstances did not require such a high rate, but who would be able to take advantage of it. This indicates that for many coolstore operators, the return for coolstorage under an NCPA would be greater than they would otherwise obtain in the absence of an agreement, given that such regional differences are taken into consideration.
- 4.22 If regional variations are not taken into consideration when setting a national rate, the Nelson operators would either have to accept the agreed rate or attempt to negotiate with individual exporters. Given that some exporters have already indicated that they will not individually negotiate if an NCPA is in effect, these regional coolstore operators may be disadvantaged by the NCPA, with consequential effects on service to growers and the free flow of fruit.
- 4.23 Nelson areas have, in this instance, been singled out as an example of the regional variation which exists within the industry. Nelson features smaller crop production, limited coolstorage throughout and short term storage. The Commission understands that there are other regions throughout New Zealand where similar circumstances prevail. Regional variations occur in such aspects of the industry as:
- (a) Local crop characteristics (growing climate, percentage of national crop produced, grower crop management);
 - (b) Harvesting variations;
 - (c) Coolstorage capacity available and throughput achieved;
 - (d) Certain elements of coolstorage costs (e.g. electricity).

These factors confirm the Commission's belief that any attempt to take regional variations such as those which exist in the Nelson area, into account when setting national rates, is likely to result in a greater return to coolstore operators in areas not possessing those distinctive regional differences. The net result will be a greater cost to some growers throughout New Zealand who pay for coolstorage on a national averaged basis under an NCPA. However, it was difficult to quantify the extent of such higher prices and the impact this would have on efficiency in the industry as a whole through lack of evidence.

- 4.24 The applicants claim that NCPA negotiations would allow for regional variations to be taken into account, in that the structure of rates agreed upon may be varied as circumstances dictate. The problem is that no great attempt appears to have been made to do this in the past - the idea of equity nationwide having been preferred.

- 4.25 The applicants further claim that in any event, the Nelson position is not so simple. They say that Nelson fruit is loaded out earlier because of its allegedly inferior keeping qualities and, in the second month especially, the Nelson fruit holds back other crops so that the Nelson crop may be discharged first. They say that the Nelson loss on storage charges is offset by the gain on distribution. The Commission did not have the technical or other independent advice or evidence before it to be able to evaluate these conflicting claims. What it feels able to say, however, is that there are regional variations; there is a clear reluctance to take these into account; and that regional distortions could occur which may provide misleading signals about the viability of investment in coolstorage facilities.
- 4.26 The Commission believes that, given the striking geographic differences which are a feature of the kiwifruit industry, the users (growers) would pay less for the coolstorage service provided if prices were free to vary not only by location, but also by size and standard of the facility, service provided and the efficiency of the operation. For example, if there is a shortage of coolstore capacity in a certain area, this will be reflected in the price and conversely any over-capacity will likewise be reflected in the price. If the industry is looking to cost reduction as a principal means of increasing returns to growers, then one of the ways this will be achieved is by the freeing of cost structures for coolstorage from the regional price-distorting effects of an NCPA.

Conclusion

- 4.27 The Commission has concluded that there is a significant lessening of competition caused by the NCPA. In relation to its effect, it has been noted that the NCPA appears to have provided a disincentive to upgrade facilities with the result that some coolstore charges (e.g. in relation to inferior premises and regional variations) have been higher than they should be. As against this, the agreement is likely to have a restraining influence on the prices for coolstorage generally. However, this restraining influence on prices has not been such as to hinder investment in the industry to date. The question of whether there were, on balance, net detriments or benefits arising from the lessening of competition flowing from the agreement is finely balanced. In this case the Commission is not able to conclude that the beneficial effects of the agreement in keeping prices lower than they would otherwise be outweigh the detrimental effects from the lessening of competition as outlined above.

V PUBLIC BENEFIT

Efficiency

- 5.1 It was argued before the Commission, as detailed more fully later, that the NCPA was a more efficient way of obtaining the appropriate price for coolstorage. In this respect, speaking generally, the Commission may assess, pursuant to applying the "public benefit" test, whether an agreement which lessens competition is more efficient than the competition which would or could occur if the agreement did not exist. If the collective agreement is judged to create efficiencies, then that is a public benefit which may outweigh the detrimental effects from the lessening of competition which results from that agreement. The Commission does not canvass the concept of efficiency in full or in detail here as the question was not fully argued before the Commission in this case. However, the issue has been raised and it appears desirable to bring the strands of previous cases together by way of summary to date.
- 5.2 In relation to economic efficiency generally and the role it plays in the Commission's deliberations, in a merger case, GFL/Wattie [No 212], the Commission said:

"The Act ... appears to rest on the premise that the interaction of competitive forces will yield the best allocation of New Zealand's economic resources, the lowest prices, the highest quality and the greatest material progress etc, unless it is shown, for example, that possession of a dominant position is better able to achieve economic efficiency."

Thus, it is clear that the Commission may authorise a merger which results in a dominant position where it can be shown that this would be more efficient than the competition which would exist if consent to the merger were declined.

The same principle must surely apply to restrictive trade practice authorisations - the practice may be authorised if it can be shown that it is better able to achieve economic efficiency than if it did not exist. This is not to say that efficiency is the only public benefit which can be taken into account. In fact, as the Commission has made clear, "public benefit" is a much wider concept encompassing other benefits as well. Parliament could easily have confined the Commission's deliberations to competition or efficiency considerations had it so intended. In fact, it adopted the words "public benefit" from the Australian Act where they have long had a wide meaning, thereby showing a clear Parliamentary intention in this respect.

- 5.3 It is argued in favour of economic efficiency that competition is not an end in itself but is a means to promote economic efficiency. In this respect if it can be shown that a restrictive trade practice [such as this collective pricing agreement] will best succeed in promoting economic efficiency then the presumption in favour of competition may be rebutted. In other words, efficiency [a public benefit] from the restrictive practice may be shown to outweigh the detriments from the loss of competition. Theory and experience justify a presumption that, in general, competition is highly desirable for its provision of various public benefits [efficiencies of various kinds, decentralisation of market power, and so on]. This, however, is a rebuttable presumption. If it can be proven that the restrictive trade practice is necessary for the attainment of efficiencies or other public benefits, and if it can be shown that these positive consequences outweigh the detriments of the restriction, then the presumption in favour of competition may be rebutted. It is thus not correct to say that the purpose of the Act is efficiency alone and that the Commission should dispense with considerations of competition and go directly to efficiency. The preamble of the Act says that it is an Act to promote competition, and competition [and the efficiencies it normally brings] must prevail unless the efficiencies or other public benefits of a restrictive trade practice or a dominant position are shown to exceed the detriments from the lessening of competition.
- 5.4 It should be especially noted that efficiency is not a one-sided concept, and the inefficiencies resulting from the lessening of competition must also be taken into account. In the air services industry, for example, it may be argued that a combination of Air New Zealand and Ansett New Zealand would be more efficient since it would avoid a wasteful duplication of resources, e.g. airplanes, ground facilities etc. On the other hand, any inefficiencies resulting from the absence of competition [such as the absence of covered walkways and lounges, lack of service and lack of price reductions etc] would also have to be considered in deciding whether to grant the application. The Commission assesses this by examining the likely effects of the agreement in practice and by balancing them to assess net effect. In such a process the Commission is endeavouring, as an aid to understanding the implications of the practice, by an examination of its likely effects, to assess whether or not the agreement, or competition in the absence of the agreement, is likely to be preferable. The Commission's assessment of likely effects is not for the purpose of re-distribution of income, but as a technique to assist in making the judgement as to whether the restrictive practice is likely to be, on balance, more efficient or inefficient. Of course, re-distribution of income may in appropriate cases be seen to produce some other "public benefit" in a wider sense, for example, where an increase in price to the monopolist or parties to the restrictive trade practice is likely to result in some benefit to the public.

- 5.5 The difficulty of establishing such likely effect was recognised by the Commission in Whakatu, and also the fact that it may not always be easy or possible to judge where cost-savings may fall does not necessarily debar a conclusion that efficiency gains may outweigh the detriment from any lessening of competition. This is especially so in circumstances, as in the Whakatu case, where competitive forces after the collective closure of the works would appropriately allocate cost-savings from efficiency gains. However, in Goodman Fielder/Wattie a merger case where a dominant position was established, in certain markets, there was by definition no alternative competitive discipline serving to allocate such savings, and this must necessarily weigh with the Commission in its deliberations if it is to have regard to the directive in the Act to promote competition and to the allocative role of competition. As indicated in Whakatu, efficiencies may be counted as a benefit to producers even when they do not result in benefit to consumers [i.e. they are merely production cost-savings] insofar as they represent a genuine resource saving and a gain to society [in that case, a reduction in costs of kill so as to assist the New Zealand meat industry to better compete overseas].
- 5.6 There are different kinds of efficiency. It is clear that efficiency includes allocative efficiency, i.e. a better allocation of resources overall. Further, productive efficiencies resulting from economies of scale [GFL/Wattie], management savings [FCL/Amcor], elimination of excess capacity [Whakatu/Advanced] have already been accepted by the Commission as efficiencies in past cases. Clearly, production efficiencies must be real. For example, the saving which results when the unit costs of output are reduced, or where more or a better product is produced per unit of input, are real efficiency gains. Mere money savings or pecuniary economies, for example input price reductions gained by bargaining power, are not of themselves an efficiency gain. Innovation efficiency (e.g. experimentation in new methods, processes etc) is another which might also be considered. Efficiency must be viewed overall and also over time so that it is not merely a static concept.
- 5.7 As previously indicated, efficiency gains must, of course, be considered against the detrimental effects of the lessening of competition in question. As demonstrated by the Air New Zealand/Ansett example above, consumer welfare is not necessarily the same as efficiency. Consumer welfare exists when there results a lower price for a given quality or quantity and/or higher quality or quantity for a given price or something new with net benefits to the consumer. Again, as indicated, where there is a conflict between the two then an evaluation needs to be made.
- 5.8 Although the matter has not yet been decided in New Zealand, it is accepted overseas that if such efficiency margins claimed can reasonably be expected to be attained by parties in a less restrictive fashion, then they will not be eligible for consideration. This reflects the view that a restrictive trade practice authorisation is a privilege which should be granted only when there is no other or no less harmful or restrictive way of achieving the result in question.

- 5.9 Obviously, such efficiency gains must be established, upon appropriate evidence, as a matter of probability. It remains to be seen whether a monopoly or a restrictive trade practice will, as a matter of fact, be found to promote efficiency better than a market in which they do not exist. United Kingdom and American experience to date suggests that this will not often be the case, and that competition is in general the best means of securing efficiency. In similar vein, it is pertinent to repeat that the Act places the onus on the applicants to show that the benefits flowing from the restrictive trade practice outweigh the detriments flowing from the lessening of competition. Based on the clear words of the statute, competition must be the primary premise of the Act.

Agreement More Efficient

- 5.10 Returning to the present case having enunciated the principles above, the efficiency which was particularly argued in this case was that the collective pricing agreement was, in the circumstances, a more efficient mechanism to arrive at a price than individual contracts between grower and coolstore operator, or between exporter and coolstore operator. For the reasons expressed above in the competition sections, the Commission is not able to conclude that the restrictive pricing agreement has in the past been the most effective mechanism for achieving lower coolstorage prices and, certainly, did not organise factors such as differences or facilities, region, season or storage of other goods. In many cases, however, the Commission will not be so fortunate as to have been able to assess the agreement in operation. In any event, the past is only a guide to the future and the applicants have said that they will do better. However the Commission, while accepting the genuineness of such an intent, is not persuaded that the operation of an agreement in the future is likely to be much superior to that in the past.
- 5.11 In this respect, it was argued that the collective agreement is a preferable mechanism for settling prices in this industry than would individual negotiations. It was said that the agreements provide an industry forum at which many varying interests are represented. That appears to be so, but exporters are negotiating on behalf of growers in circumstances where exporters may have interests other than merely for the growers - e.g. exporters in some cases may also have their own interests in coolstorage. Accordingly, the growers' interests are not directly and unequivocally represented by the exporters. Likewise, many growers have interests in coolstorage (90% of coolstorage is indirectly or individually grower owned) so that the NCPA has been said to take on "an incestuous appearance" as the exporters (for the growers) deal with the coolstorers (the coolstores being largely grower owned). Further, growers who have no interest in coolstorage (at first hand) may, especially in the light of exporter interests in coolstorage, find that their interests are not properly represented. Likewise, there are difficulties of ensuring that those coolstorers whose interests are adversely affected (especially the owners of better facilities and some regional operators), are adequately represented in negotiations on behalf of coolstorers generally.

- 5.12 Further, a bar to efficiency in the operation of the agreement is the inherent difficulty in the industry that whereas the contracts are between growers and coolstorers, the price negotiations are between exporters and coolstorers. The normal correlation between responsibility for performance (to the grower) on the one hand and reward (negotiated by the exporter) on the other appears to be weakened. Monitoring appears to be the exporter's responsibility rather than that of the grower who is the principal and payer.
- 5.13 The applicants further claim that the NCPA equalises bargaining power. It is said that the coolstorers have an advantage over the widely dispersed growers who number approximately 3,300. It was said too, that coolstorers have an advantage against the exporters. During 1987, because of the different prices offered by exporters, the evidence was that some coolstore operators withheld fruit until the exporter agreed to pay a rate laid down by the coolstore operator. Normally, of course, one might have expected the exporters (being fewer) to have considerable bargaining power over some 148 coolstorers. The Commission accepts that negotiations on behalf of growers by exporters strengthens the growers' position. However it does not accept that exact equality of bargaining power is necessarily required for better negotiations if there is, in fact, a reasonable parity of bargaining power as there appears to be between individual exporters and individual coolstorers. The Commission therefore cannot place much weight upon this argument.
- 5.14 Further, the agreement is not necessarily the best mechanism to achieve lower prices. It might be assumed that the exporters would pay a lower price for coolstorage if a lower price were offered, because of the monetary savings. However, exporters as agents for the growers receive their commission on the amount fetched by the kiwifruit on the overseas market and this commission is not relative to the cost of coolstorage. The exporters therefore do not have any pecuniary interest in the price that is charged for coolstorage other than as agents of the grower. A lower rate for coolstorage does not affect the exporters' commission and the latter would therefore not receive any benefits from, nor have any incentive to pay, a rate lower than that which is nationally agreed upon. Because of the derivation of the exporters' commission, exporters may well settle for any price in an NCPA and not necessarily a price that is in the growers' best interest.
- 5.15 The evidence of acrimony in the absence of an NCPA was argued as a reason for the NCPA being superior to individual bargaining. From the examples given to the Commission, it appears that there are considerable and understandable tensions in such a new and dynamic industry and that acrimony arising therefrom is nothing new to the industry. One of the principal problems, it seems, is that the fruit is accepted into coolstore prior to the agreement on the price. This appears to be the same whether or not an NCPA exists. The NCPA would not appear to remedy this problem, although there may be circumstances in which the collective agreement does promote harmony, e.g. in the facilitation of fruit flow.

- 5.16 It was also argued that the agreement was superior because it would save administrative costs. The administration costs to exporters are not deducted from the pools and paid for by growers but result in a reduction in the individual exporter's net profit. Administrative costs may be higher to exporters as a result of individual negotiations on coolstorage prices as opposed to national rate setting. The Commission can not accept this view as an argument supporting the authorisation of this application. Greater administration costs may result to the exporters but it is likely that even greater savings will be made by growers, the users of the service, by having coolstorage costs negotiated competitively. At best, the proposition was not supported by any evidence. This argument is, in effect, an argument in favour of "lazy shopping", i.e. of avoiding the necessity to negotiate each contract upon its individual merits.
- 5.17 After considering all of the issues discussed in the preceding sections, the Commission is not able to conclude that the NCPA (as distinct from individual negotiations) would be a better or more efficient or effective mechanism for setting prices so as to ensure greater efficiency. Accordingly, the Commission believes that the presumption in the Act must continue to apply, that is to say, competition rather than the existence of the NCPA is the best means of obtaining efficiency in the industry.

Equity

- 5.18 The applicants claim that the system is equitable. In this respect, it is true that the pooling system for the costs of growers may certainly be argued to create equity as it pools costs and shares them among growers equally. Without such a pooling system, there would be little doubt that growers whose crop was sold early would have a considerable advantage over those whose crop was sold late. But this equity could be obtained for the growers in respect of coolstorage cost whether prices were individually or collectively set. From the point of view of certain coolstorers (e.g. those which have the better facilities) it does not promote equity. Further, from the growers' viewpoint, the NCPA allows rebating to growers individually so that in that respect equity is not seen as a principle having universal merit.

Orderly Development of Industry

- 5.19 The applicants claim that the system has enabled the orderly development and expansion of the industry as a whole for the benefit of all participants. "Orderly development" is simply another way of stating the converse of competition and is not in itself a public benefit. There may, however, be ways in which orderly development might be beneficial and these are dealt with under specific headings below.

Steady Return

- 5.20 The applicants claim that by the assurance of a steady return (all other things being equal), coolstore operators promote efficiency in other aspects of storage to maximise their return. Many coolstorers are also packers, and efficiencies in packing are promoted to maximise total profit. However the Commission is of the view that the public is entitled (in the absence of persuasion to the contrary) to competition in all aspects of coolstorage, i.e. as to price as well as other factors such as service etc. A competitive environment should encourage operators to operate efficiently, in all respects, including price. In other words, those wishing to establish themselves as having a coolstore facility of repute amongst growers and exporters in order to attract business, will be continually looking at all ways of improving price, service and efficiency. Those who fall behind in price or standards etc. should find it difficult to survive in the industry. The Commission believes that the assurance of a steady return is likely in practice to discourage rather than encourage efficiency. For example, in the absence of an agreement one operator might offer a substantial discount to achieve high throughput which causes another operator to achieve less than 100% utilisation of his facility. The NCPA is likely to protect those operators who do not achieve high throughput in their facility and helps ensure that such relatively inefficient operators remain in business. In any event, there was little or no evidence to support this claim.

Administrative Savings

- 5.21 The applicants claim that an NCPA provides administrative and costing simplicity to an operator. The coolstorer only has to deal with one rate instead of the different rates of seven exporters, all with fruit in his coolstore, and this would reduce costs.

As indicated earlier this, for the reasons outlined in paragraph 5.17, is equally an argument for "lazy shopping". The administrative costs in this case have certainly not been demonstrated to be unusual or exceptional, so that no special case is warranted in the view of the Commission.

Financial Planning

- 5.22 The applicants claim that the agreement facilitates financial planning by all participants. From the evidence given at the conference it appears that under an NCPA participants in the industry feel better equipped to plan ahead financially, mainly because they know what the coolstorage load-out allowances will be before the fruit goes into coolstorage, or if the rate has not been settled they can obtain a rough indication of what it will be by looking at last year's figures. The applicants compared this to the last two seasons when rates had been individually negotiated. In 1987 the rates were much higher than in 1986, and in 1988 they were much lower than in 1987. This led to an uncertainty in the industry which had not existed under an NCPA.

- 5.23 The Commission accepts an NCPA is likely to assist financial planning by the participants. However, it appears factors exist which can disrupt financial planning whether or not an NCPA is in operation. For example, no matter how carefully exporters plan ahead, due to the fickleness of shipping, market demands, weather and a number of other reasons they cannot guarantee when fruit will have to be loaded out. Thus a coolstore operator cannot rely on the fact that there will be X amount of fruit in the store for X amount of time, and as a result estimates of returns from coolstorage for that season have to be revised.

Industry Harmony

- 5.24 The applicants claim that in the absence of an NCPA the industry has become fragmented. Acrimony has been created between participants in arguing over many different rates. This has diverted attention from the continued development of the industry. The converse, therefore, is that the agreement enables all participants to get on with their jobs, to the greater benefit of all.
- 5.25 Many participants in the kiwifruit industry have described 1987 as a difficult year. Instead of working with a fixed national rate of coolstorage they have had to negotiate coolstorage rates on an individual basis. It seems that many viewed 1987 as an interim year during which time they had to compete with each other, but with the attitude that from 1988 onwards they would have a national agreement again.
- 5.26 There was a 60% increase in crop from the 1986 harvest leading to a sudden demand for coolstorage facilities over and above that calculated. Returns for the fruit on the export market dropped from \$9.82 per tray to \$5.55 per tray (approximately). The decrease in value per tray could be attributed to the increased crop volume and the rising value of the New Zealand dollar and also performance, practices and strategies in overseas markets.
- 5.27 It therefore appears that difficulties experienced during 1987 are due to a combination of factors. The Commission appreciates harmony within the industry is desirable, but it cannot find anything to suggest the presence of a national agreement would have eliminated many of these problems which appear to have existed irrespective of the national agreement. The Commission will say more later concerning the role of industry harmony in the facilitation of fruit flow.

Industry Costs

- 5.28 The applicants claim that the NCPA enabled the orderly expansion of the industry, kept domestic costs down and avoided the pitfalls of other export-based industries where the local costs make their products uncompetitive.

- 5.29 Over the last decade, the demand for export kiwifruit has caused the industry to expand greatly. The number of trays of kiwifruit exported has risen from below 10 million to an estimated 47 million 1988. Information received by Commission staff during their enquiries into the industry and at the conference suggests that despite the applicants' claims of 'orderly expansion' there appear to be areas in New Zealand where there is a deficit of coolstorage. It was also claimed at the conference that despite the present situation, where in the northern region there is a downturn in crop, resulting in twice the capacity of coolstorage than available crop, it does not appear coolstorers are responding to the normal interaction of the competitive process, by lowering their rates. Furthermore the same rate is offered by the exporter to coolstores in areas where there is a deficit, which is a further example of the above.
- 5.30 This situation leads the Commission to conclude that if the industry had been able to develop in a market oriented environment, expansion would have occurred in response to supply and demand and services would have been priced accordingly. In this way therefore, it could equally be argued that domestic costs could have been lower in the absence of an NCPA. The true and actual costs of the service provided cannot be adequately ascertained by those who pay for the service (growers) and they therefore receive no indication as to whether they have received value for money.

Standard of Coolstorage Facilities

- 5.31 The applicants claim that the expansion of coolstorage facilities of high standard would not have occurred and will not continue to occur without the encouragement offered by an assured return to operators (all other things being equal); high standards cannot be required without offering something in return.
- 5.32 However the standards for coolstorage required to maintain the quality of kiwifruit are set by the Authority, which has the task of ensuring that the standard of operational procedures and performance reach the levels necessary for export kiwifruit. The applicants maintain that coolstores may also have other operational features, not necessarily appertaining to the quality of kiwifruit, which nevertheless enhance the efficiency of a coolstore. Through the bonus points offered under an NCPA for such features as, for example, completion of loading within 30 minutes, forced air cooling and railsidings, coolstore operators were encouraged to include such features in their facilities. At the conference it appeared that, in the absence of an NCPA, exporters were no longer individually offering the same amount of bonus points. The progress achieved under an NCPA, encouraging coolstore operators to provide better service, had been eroded.

- 5.33 At the conference, Mr Crossman contended an NCPA does not go far enough in encouraging the improvement of facilities. Features such as quality of access to the store, ease of truck and trailer turn-around were not accounted for. As mentioned earlier, it has been claimed the extra quality of service could justify a differential of approximately 25% in the price. The NCPA had some provision for this, but not as much as it could have had. The rewards for extra service were even less in 1987 and 1988. The parties have given some commitment to looking at the bonus system. A collective agreement fixing a price should not be required before industry participants can discuss new efficiencies, modernisations, additional technology etc which could be taken into consideration when exporters and coolstorers draw up their proposals. Those coolstorers who are offering a better service to growers and exporters alike should be able to voice their need for rewards in both collective or individual negotiations. In this way high standards would still be likely to be encouraged with or without an NCPA.

Continuing Investment

- 5.34 The applicants claim that the industry is still expanding, albeit at a slower rate than previously, and the agreement (including the scale of charges) is necessary to ensure continued investment and to facilitate the smooth marketing of kiwifruit.
- 5.35 The fact that, overall, there appeared to be a slight over supply of coolstorage in 1987 (borne out by the knowledge that the industry successfully stored a crop increase of around 60% over the previous year's crop), indicates to the Commission that coolstorage has, in the past, been a profitable and attractive investment pursuant to the NCPA. Given that an increase in the annual national export crop is expected to continue into the next decade, giving rise to a corresponding need for increased coolstore capacity, the Commission anticipates that future net investment relative to demand will continue.
- 5.36 Many coolstores are under-utilised because they are used exclusively for storage of kiwifruit. They are operating only in the kiwifruit season and remain idle for some months of the year. It is claimed that adherence to an NCPA, by assuring a predictable return, offers security to the coolstore operator whose facility is not fully utilised.
- 5.37 While the Commission appreciates that the availability of coolstorage which meets minimum industry standards is essential to the marketing of kiwifruit for export, it anticipates that in the absence of an NCPA future investors would be required to evaluate more closely whether committing capital expenditure to coolstorage for export kiwifruit would provide a profitable return on their investment, or a better return than an alternative investment. Factors such as conforming to high industry standards, single product storage requirements, location of coolstores, under-utilisations etc, would need to be taken into consideration.

- 5.38 Alternatively, the industry might be required to look at available coolstorage facilities which currently provide coolstorage for other products and which could be converted and/or upgraded to meet the standards required for storing kiwifruit for export. The Commission understands that such facilities with spare capacity during some months of the kiwifruit coolstorage season are available and that the owners of some of these facilities (e.g. dairy companies) have recently begun storing kiwifruit for export to maximise the utilisation of their idle capacity.
- 5.39 Investment or re-investment is a normal commercial risk. The view has been expressed to the Commission that capital investment in kiwifruit coolstorage has a higher return than investment in coolstorage for other commodities. It has also been suggested that some coolstores have been built not because they were needed, but because they were a good capital investment which could be recovered. The Commission does not consider it is necessary for there to be an NCPA in order to encourage the proper and rational development of coolstorage capacity in New Zealand.

Seasonal Fluctuations

- 5.40 The applicants submit that from all parties' points of view the NCPA smooths out seasonal fluctuations which would occur. A grower might in one year, if the system was open, scattered and individual, have the fruit exported and sold at the high price in June within one week of harvest. The next year the grower's fruit might be stored for six months, resulting in a lower price being received. The operator is assured of his return no matter what the vagaries of the kiwifruit price. If the price is down, the coolstore operator will still get paid the charges as agreed.
- 5.41 This submission appears to advance the view that the pool system is dependent on an NCPA in the kiwifruit industry. It is assumed, in the absence of evidence to the contrary, that the pool system will still exist whether or not there is an NCPA. Thus the coolstore charges form part of the cost to the national pool and the growers each pay the average charge for coolstorage regardless of how long their particular fruit is in storage. In 1987 and 1988, in the absence of an agreement, the pool system was in operation, and coolstorage costs were deducted from it.

Maximum Return to Growers

- 5.42 It is claimed that maximum returns to New Zealand are made possible by the ability to spread supply to overseas markets up to 6-8 months. These returns accrue to the industry as a whole by virtue of the pooling of returns and of costs. Average returns to growers are higher under this system than they would be under a first come, first served system where growers would try to get their produce exported during the month of May.

- 5.43 The pool system still operated in 1987 in the absence of an NCPA. The export of kiwifruit was spread out over a 6-8 month period, as it had been in previous years, in order to make it available to the overseas market for as long as possible. It appears that even if growers wanted to, they could not get all their fruit shipped out at the same time as this would not be physically possible. Therefore, whether or not an NCPA is in operation, fruit must be stored and exported over a considerable length of time.
- 5.44 The absence of an NCPA does not automatically cancel out the pool system, as is inferred in this submission, nor does it mean growers will be able to dictate when their fruit is released for export. It is the exporters who decide when the fruit will be released for export in response to market demands at the time.

Assists Exports

- 5.45 The applicants have submitted that the NCPA assists New Zealand exporters to be price makers rather than price takers. By having good coolstorage in New Zealand, control of marketing and distribution is much enhanced.
- 5.46 The Commission is of the view that the realities of the market place, and not an NCPA relating to coolstorage, determine whether or not New Zealand exporters are to be price makers rather than price takers. Whether or not an NCPA is in place, it will still be necessary to have quality coolstorage in New Zealand and a system which provides efficient marketing and distribution.

Development of Industry/Facilitation of Fruitflow

- 5.47 It is argued that the NCPA assists the efficient flow of fruit so as to assist the co-operative marketing effort overseas. In this respect, there is universal acquiescence within the industry (from exporters, coolstorers and growers alike) and from independent studies that unified marketing of New Zealand kiwifruit overseas best serves the industry and the country. That is because, by co-operation in selling overseas, the season can be extended; co-operative marketing efforts may be made; profits in selling can be maximised; and the wealth of the country can thereby be increased. "Fruitflow" - both overseas and in New Zealand - was described as being essential to the successful marketing of fruit overseas, and the Commission accepts that this can be a "public benefit" of some significance should the NCPA contribute to facilitating a better fruitflow.
- 5.48 The agreement assists the planned and efficient flow of fruit through the coolstores to match the overseas marketing effort, and as such does appear to facilitate a broader objective, namely facilitation at wider industry level of better "fruitflow". The agreement assists this as follows: by ensuring relatively specific costs of coolstorage; by the adoption of quality standards in relation to coolstorage and

handling; by the creation of greater certainty in relation to the release of the product; by the removal of conflicts which may hinder a national unified effort; by better planning in circumstances where time of delivery is important; and by generally creating a climate of co-operation and certainty which assists the overseas marketing effort and the co-ordination of that with coolstorage at home. Coolstorage is necessarily inter-linked with marketing overseas as it is a service provided towards the same "fruitflow" objective - to facilitate the collective and planned marketing of the fruit overseas - the benefit of such efforts to be later pooled and shared. Irrespective of how this marketing effort is supervised, it would be difficult to plan for the marketing of kiwifruit overseas without reasonable control over the terms of coolstorage at home and the length of coolstorage and the release of the fruit. This is facilitated by the NCPA negotiations and by the pricing and other arrangements which result therefrom.

- 5.49 Other factors such as co-ordination of the shipping arrangements also contribute to the national marketing effort so that coolstorage is but one of these factors only. Nevertheless, it is a very important one. The Commission accepts that the NCPA provides a real benefit to the public in that the NCPA aids this external marketing objective. Conversely, the absence of the NCPA is likely to result in a significant diminution of such public benefit. Obviously it is difficult for exporters to market the fruit overseas in a constructive way if their dealings with the coolstorers are less than unified and marked by many individual disputes over price, load-out times etc. The industry as a whole (i.e. exporters, coolstorers and growers) has a very real interest in promoting smooth coolstorage arrangements to supplement the overseas marketing effort. The national interest in effective marketing of export products is also real in that exports produce wealth for the domestic economy. Further, in view of the importance of the objective, the Commission concludes that significant weight must be given to this benefit.

General

- 5.50 The applicants submit that the public benefits they claim arise from an NCPA form part of and maintain a larger benefit to the public of New Zealand. They claim the maintenance of the practice of negotiating national coolstorage agreements is essential, for the reasons advanced, to the welfare of the kiwifruit industry. Prevention of the practice would impair that welfare and diminish returns. Any impairment to the industry would cause a corresponding diminution in the benefit to the New Zealand public (through overseas exchange and employment). Maintenance of the practice maintains those broader public benefits.
- 5.51 It has also been submitted that the "public" of New Zealand may extend beyond the participants to include those who have some connection with the industry, such as transporters, packaging merchants, horticultural suppliers, as well as those employed directly by the participants, (pickers, packers, coolstore and

exporter employees). The claim that these people will be affected by a downturn in the industry due to the absence of an agreement, appears to rest on the premise that it is the agreement which ensures the viability of the kiwifruit industry. As stated earlier in this decision 1987 has been a difficult year for those involved in the kiwifruit industry, and the many reasons given for the problems associated with the 1987 season must be taken into account when considering whether or not there are public benefits resulting from the practice which outweigh the lessening of competition. These problems of the industry do not appear to arise from the absence of an NCPA but from other factors such as the increase in crop, the value of the New Zealand dollar, adjustment to individual negotiations for coolstorage rates, uncertainty within the industry and so on.

5.52 Conclusion

The Commission finds that the majority of public benefits claimed either do not necessarily accrue directly from the proposed NCPA or that there is insufficient evidence to support them. However it does find that the NCPA assists the smooth operation of "fruit flow", and thus facilitates the development and maintenance of a unified marketing effort overseas, which is of great importance to the viability of the industry.

VI BALANCING

- 6.1 In particular the Commission has been persuaded that the agreement produces public benefit - in relation to the assistance it provides to the promotion, sale and flow of kiwifruit overseas and that the NCPA [while not necessarily essential to] assists or facilitates such objectives. Thus, in this case the Commission has found public benefit to exist - in keeping a ceiling on prices generally and in facilitation of fruit flow to assist the national marketing effort overseas. The Commission has also found detriments flowing from the agreement - lowering of incentives for efficiency of coolstorage and the inadequate recognition of regional variations. Further, the scales are fairly evenly balanced between such benefit and detriment.
- 6.2 This case has some unusual features. First, the agreement essentially enables growers to combine through the exporters and redress the lack of bargaining power which they have as against coolstorers. The agreement is, from the growers' perspective, a purchasing cartel and in practice it favours the growers in keeping a ceiling on the prices of coolstorage. Secondly, there are relatively few domestic implications in the agreement as it relates entirely to the cost of coolstorage of kiwifruit for export [95% of the kiwifruit is exported] - and supplements an export marketing cartel which is perfectly lawful in terms of the Act. Thirdly, kiwifruit is one of the most important horticultural exports for New Zealand and some weight should be given to any practice which is designed to foster such a significant industry, particularly in the current economic climate. Fourthly, the companies which might have been expected to react to the growers' cartel - the coolstorers - appear generally to accept the NCPA upon the basis that they can participate in it. In fact, all sectors of the industry are agreed upon the desirability of it - exporters, coolstorers and growers. Only some coolstorers are against it. Fifthly, in this case, the consumers or users are the growers, and the growers were a party to and supported the application. In other words, those whom the Act seeks to protect from the deemed detriments of the NCPA indicated that in fact they saw their interests as being best served by such an agreement. The Commission believes that it should be wary of imposing a solution on a group who have clearly indicated they do not see the need for such protection. The Commission should be equally cautious in telling growers that it knows better than they do what is best for them in their own industry. The Commission should give weight to these factors in its balancing process in this case, and decides that on balance the public benefit outweighs the lessening of competition in this case.
- 6.3 As indicated, the scales are fairly evenly balanced and the Commission has considered whether or not it should grant authorisation subject to conditions, the object being to preserve the benefits but to minimise the detrimental effects. The Commission may also impose conditions to ensure for example that the agreement in question, if authorised as having a predominance of public benefit, may nevertheless have

detriments reduced or ameliorated by imposition of the conditions. In this case, for reasons which follow, the Commission considers that certain conditions would minimise the perceived detrimental effects of the agreement.

- 6.4 Thus, the Commission considers that it should authorise the agreement upon the grounds that public benefit outweighs any detriment arising therefrom but in order to ameliorate the perceived detriments, it will impose the conditions outlined more specifically at the conclusion of this decision.

VII CONDITIONS

7.1 Conditions which come to mind, given the imperfections noted in respect of the NCPA, are:

- (a) That the negotiations be tripartite with grower, exporter and coolstorer interests all represented;
- (b) That the parties take into account factors such as early load out areas, other regional differences, and the quality and extent of services provided by coolstorers;
- (c) That the negotiations begin before fruit is delivered to the coolstore with a view to completion of the agreement before such delivery.

7.2 It should be recorded that, when these matters were canvassed with the applicants, it was indicated that these would be features of the operation of the agreement in future. The industry is rapidly developing and relatively new. Naturally, those in the industry are searching for the appropriate structure. This is also evidenced by a Coopers & Lybrand report which recommends grower control of the industry. It is too speculative for the Commission to say that there will be a new structure in the industry or the form that it will take, but it seems clear that some restructuring is already taking place. The changes in ownership of exporters, the formulation of marketing groups, the tendency to vertical integration, the tensions between growers and exporters etc are all likely to continue to exist irrespective of the NCPA. Authorisation of the NCPA should not be regarded as a substitute for the critical examination of the structure of this industry. Further, if substantial change takes place in future, the agreement may no longer be necessary. Accordingly, the Commission considers that any approval of the NCPA should be of limited duration. The Commission also notes that there is provision for it to vary the terms of the authorisation should that seem appropriate.

Power of the Commission to Impose Conditions

7.3 In making a determination to authorise a restrictive trade practice, the Commission is empowered to impose such conditions as it thinks fit. Section 61(2) of the Act states:-

"Any authorisation granted pursuant to s.58 of this Act may be granted subject to such conditions not inconsistent with this Act and for such period as the Commission thinks fit."

When Should Conditions Be Imposed

7.4 The Commission has not dealt with this very broad discretion before. The discretion given to the Commission appears to be wide, subject only to the important qualification of consistency with the Act. The Commission has turned its mind

to when it should or should not accept undertakings as to divestments etc in merger and takeover authorisations - see GFL/Wattie, decision 212A. There, the Commission considered that in accepting undertakings, it should be guided by the likely effect upon competition in particular. Applying that to restrictive trade practices, conditions designed to enhance competition, or to remove detriments flowing from an absence of competition, could be appropriate. Further, conditions designed to help ensure the continuation or effectiveness of public benefit found to exist in respect of any application could likewise be considered. Such conditions are in line with the objectives of the Act. Their enforceability is also important particularly if used to "tip the balance" in favour of authorisation. Obviously, the Commission will wish to take into account normal considerations, such as compliance costs for the parties, enforceability, precision, monitoring etc when imposing such conditions. The Commission notes that it could review this consent should the conditions imposed not be complied with.

Basis of Conditions

(a) The Parties

- 7.5 In submissions made prior to and during the conference emphasis has been placed by the applicants upon the fact that an NCPA will assist in the smooth working of the collective exporting of kiwifruit and indeed was central to it. If this agreement is so important to the successful functioning of the industry, then the Commission is of the view that the three interested groups associated with the agreement, each of whom is a significant contributor to the industry, ought to be parties to the negotiation of the agreement in their own right.
- 7.6 Examination of the 1986 Coolstorage Agreement shows that those involved in arriving at that agreement were: three representatives of the Coolstorers Association, representing approximately 150 coolstore member operators; and four representatives of the Exporters Association representing 7 licensed exporters. Representatives of the growers, through the New Zealand Fruitgrowers Federation Kiwifruit Sector Committee "observed the negotiations". These grower representatives, representing approximately 3,300 growers were not seen to be active participants in the agreement, yet it was the growers who were responsible for meeting the cost of the coolstorage arising from that agreement, through the growers pool.
- 7.7 The Commission believes that grower interests can be safeguarded and represented through entities such as the Kiwifruit Sector Committee of the New Zealand Fruitgrowers Federation, but does not determine the precise form of representation. That is for the growers themselves. However, it believes that growers should be full participants with coolstore operators and exporters in the negotiation of the NCPA.

(b) Content

- 7.8 In the early submissions, in the investigation, and during the conference, reference was made to a number of issues which have been the cause of disagreement between the parties and consequently have created problems within the industry. Generally these have centred around the fact that there were issues which, from the point of view of some industry participants, the NCPA did not address to their satisfaction. Amongst these were the recognition and suitable recompense for early load out areas, differential payments recognising the quality of service, and the interests of growers who did not have any financial interest in a coolstore. Whilst some of these have been dealt with in part by the NCPA during its existence, the claim was made by the exporters that without an NCPA a satisfactory solution was difficult, and unlikely, if or when dealt with individually by the licenced exporters.
- 7.9 Representatives of both the exporters and the Coolstorers Association assured the Commission at the conference that an NCPA was the vehicle through which these issues could be addressed and that a satisfactory solution to such problems as exist could be negotiated. Accordingly, the Commission expects that these matters be resolved in the course of an industry agreement. The Commission is also mindful of the interests of industry participants who are not members of industry associations and for the overall good of the industry recommends that these interests be taken into account when arriving at an agreement.

(c) The Period

- 7.10 Many of the practices operating within the industry have arisen as a result of expediencies of time and circumstance. What was appropriate in the past may not now be acceptable, and what today is acceptable may not be so in the future. This is recognised within the industry as evidenced by the review of the Kiwifruit Marketing Licensing Regulations 1977 currently taking place; the renewal of exporter's licences, the majority of which are due to expire in March 1989; several reports which have been recently commissioned to assist the appropriate authorities to chart the future course of the industry. The Commission notes the current proposals to reduce the number of exporters by amalgamation. As indicated, it is important that any authorisation not hinder or stand in the way of such re-consideration and re-organisation, and approval for a limited period will assist the Commission in assessing this and acting in the future should the NCPA appear to hinder reconstruction of the industry.
- 7.11 Further, the conclusions reached by the Commission in this case might not be drawn if there were significant changes within the industry structure. The Commission believes that industry structural changes are likely to take place as a result of current reviews, and that arrangements which have been made over the 1982-1988 period may not be appropriate or valid in a changed structure. The Commission recognises that such changes will take time, first to determine, then to implement, and accordingly has made use of the time factor provided by the Act

to limit this authorisation to two seasons. The Commission will monitor the operation of the agreement over this time with a view to ex post review of the claims of the participants at the conference.

(d) Commencement of Negotiations

- 7.12 Obviously it is desirable that the agreement should be completed in each season prior to the delivery of fruit to coolstore. However, the Commission does not expressly impose such a condition because of the difficulty of enforcement and because of the difficulty in placing a strict time limit upon the reaching of agreement - given the many variable circumstances in which negotiations may take place.

The Conditions

- 7.13 The Commission, accordingly, believes the following conditions to be appropriate:

1. That the parties to the negotiation of a national collective pricing agreement for the coolstorage of export kiwifruit be:-
 - (a) The Growers - represented by at least 2 members either nominated by the Kiwifruit Sector Committee of the New Zealand Fruitgrowers Federation or as the growers desire, such members to include at least one grower who does not have an interest in a coolstore operation;
 - (b) The Coolstorers - represented by at least 2 members nominated by the New Zealand Kiwifruit Coolstorers Association Inc.;
 - (c) The Exporters - represented by at least 2 members nominated by the New Zealand Kiwifruit Exporters Association Inc.;

and that each party participate as a principal.

2. That a national collective pricing agreement for the coolstorage of export kiwifruit must manifestly incorporate
 - (a) Differential payments for regional variations especially for early load-out areas;
 - (b) Differential payments reflecting the quality of service;or must demonstrate that such matters have been duly considered and why differential payments have been rejected.
3. That a copy of the NCPA so reached, be forwarded to the Commission within 14 days of its completion.
4. That an NCPA for the coolstorage of export kiwifruit be authorised for the 1989 and 1990 harvests only.

VIII CONCLUSION

- 8.1 The Commission accordingly determines to authorise, subject to the above conditions, the agreement which is the subject of this application.

Dated at Wellington this 15th day of September 1988

The seal of the Commerce Commission was
affixed hereto in the presence of



J G COLLINGE
Chairman



RECEIVED
2 NOV 1987
REGISTRAR

AGREEMENT
FOR THE COOLSTORAGE
OF EXPORT KIWIFRUIT
1986 SEASON

C O N T E N T S

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AGREEMENT FOR THE COOLSTORAGE
OF EXPORT KIWIFRUIT
1986 SEASON

This agreement will normally apply in all cases where kiwifruit is held in New Zealand awaiting export. However, there may be occasions when an operator and an exporter agree to some exceptions to the agreement.

Should these exceptions materially affect the operation of this agreement they will be notified to the NZ Kiwifruit Coolstorers Association (Inc.) and the KEA Operations Secretariat.

The specific figures for the basic rates for the input period and the subsequent weekly increments have been negotiated.

Those involved were:

- 1) Three representatives of the New Zealand Kiwifruit Coolstorers Association.
- 2) Four representatives of the licensed exporters.
- 3) Technical assistance from Mr & J Neveltsen, Chartered Accountant.
- 4) Representatives of growers who have observed the negotiations.

Accounts

In the event of a coolstore operator being unable to present a proper account to the exporter, the exporter shall have the right to recover from the coolstore operator a fair charge for the exporters work in assisting with the completion of the account.

Accreditation

Exporters are agreed to use only those coolstores which meet the minimum standards as set out in this agreement.

Dispute Resolution

The representatives of both Exporters and Coolstorers Association have agreed to meet whenever called upon to settle any disputes (relating to this agreement), which may arise between an Exporter and an Operator.

In the first instance these disputes will be addressed by exporter field personnel in the locality and representatives appointed by the Coolstorers Association. Where agreement is not forthcoming during these discussions the matter will be referred to the executive committees of the two associations for resolution.

This agreement has been prepared jointly by:-

NEW ZEALAND KIWIFRUIT COOLSTORERS ASSOCIATION (Inc)
P O Box 49
TE PUKE

NEW ZEALAND KIWIFRUIT EXPORTERS ASSOCIATION
P O Box 9248, AUCKLAND
Phone: (09) 393 603. Telex NZ60414 XIFEX

APPENDIX I

SCALE OF LOAD OUT CHARGES FOR 1986

The figures below are the basic charges to be made at load out. To these must be added the load out assessment bonus.

June 1 to 6 inclusive (See Note 1 below)	Week 22	4.4 cents per tray
June 7 to 13 inclusive	Week 23	9.5 cents per tray
June 14 to 20 inclusive	Week 24	14.6 cents per tray
June 21 to 27 inclusive	Week 25	19.7 cents per tray
June 28 to July 4 inclusive	Week 26	24.8 cents per tray
July 5 to 11 inclusive	Week 27	29.9 cents per tray
July 12 to 18 inclusive	Week 28	35.0 cents per tray
July 19 to 25 inclusive	Week 29	40.1 cents per tray
July 26 to August 1 inclusive	Week 30	45.2 cents per tray
August 2 to 8 inclusive	Week 31	50.3 cents per tray
August 9 to 15 inclusive	Week 32	55.4 cents per tray
August 16 to 22 inclusive	Week 33	60.5 cents per tray
August 23 to 29 inclusive	Week 34	65.6 cents per tray
August 30 to September 5 inclusive	Week 35	70.7 cents per tray
September 6 to 12 inclusive	Week 36	75.8 cents per tray
September 13 to 19 inclusive	Week 37	80.9 cents per tray
September 20 to 26 inclusive	Week 38	86.0 cents per tray
September 27 to October 3 inclusive	Week 39	91.1 cents per tray
October 4 to 10 inclusive	Week 40	96.2 cents per tray
October 11 to 17 inclusive	Week 41	101.3 cents per tray
October 18 to 24 inclusive	Week 42	106.4 cents per tray
October 25 to 31 inclusive	Week 43	111.5 cents per tray
November 1 to 7 inclusive	Week 44	116.6 cents per tray
November 8 to 14 inclusive	Week 45	121.7 cents per tray
November 15 to 21 inclusive	Week 46	126.8 cents per tray
November 22 to 28 inclusive	Week 47	131.9 cents per tray
November 29 to December 5 inclusive	Week 48	137.0 cents per tray
December 6 to 12 inclusive	Week 49	142.1 cents per tray
December 13 to 19 inclusive	Week 50	147.2 cents per tray
December 20 to 26 inclusive	Week 51	152.3 cents per tray
December 27 to January 2 inclusive	Week 52	157.4 cents per tray

Note 1

Persuant to paragraph 8, page 17 of this agreement a charge representing 6/7 of the weekly rate will be added to the input charge on fruit in coolstorage at June 1.

- c) Any major increase or change in electricity costs for coolstorage brought into effect after the rates have been fixed shall be worked out on a pro rata basis according to the time at which the increase/change comes into effect.
7. Payment for coolstorage charges shall normally be due on the 20th day of the month following that when the service was rendered. i.e. An invoice will be written on the first day of the month and payment shall normally be made by the 20th day. In cases of disputed invoices, it is agreed that only the portion of the charge in question may be withheld until resolution of the dispute. Interest will be payable on accounts not paid by the 28th day of the month provided the account was rendered 15 days previously.
8. Note regarding the annual negotiation of the input rate. Where the first Saturday of the month falls after the 1st day of June there will be a pro rata addition to the input charge, being the fraction of the week by which the first Saturday follows June 1st.
e.g. If the first Saturday in June is the 7th, the 6/7 of the standard weekly charge will be added to the input charge. In this instance the charge would be 4.4 cents. This calculation has already been taken into account in determining the 1986 rates.
9. On August 1st the operator will invoice the exporter at the rate of 2.88 cents for each tray remaining in his coolstore at the end of July. This account will be due 20th August.
- Please note this special payment will be for the service of condition checking which is required prior to the loadout of all fruit which remains in store after the end of July. Such condition checking will be performed to the standard required by industry agreements.
- All condition checking must be done prior to the transfer of fruit after 1st August and all documentation that records the results of the condition checking must accompany the fruit.
10. For the scale of load out charges, the week shall run from Saturday to Friday. No further payment shall be made for supplementary hours worked during the weekend.

5. Documentation.

- a) The coolstore operator will retain copies of packhouse advice notes for all packed fruit received into his coolstore.
- b) On the first day of the month following receipt of fruit the operator will write an invoice for the input charge. This will contain a summary of the fruit which has been received.
- c) Multi-copy load out books will be made available by each exporter.
- d) The operator must ensure a load out record is kept and that this is signed by the exporter or his agent. This load out record will show, amongst other things:
 - i) The date of the load out.
 - ii) The number of trays loaded out.
 - iii) Details of the load out assessment.
 - iv) The method by which the value of coolstorage is to be calculated on the fruit which has been loaded out.
- e) One supporting copy of each load out record will be attached to the invoice which follows the load out of fruit. This will verify the charge being made.

6. a) Stock transfers: From time to time a situation could arise where a coolstore operator requests fruit to be transferred or the exporter requires fruit to be transferred to meet specific shipping requirements. Notwithstanding the fact, that the receiving coolstore may wish to negotiate a rate with the exporter, the following guidelines are given:-

- i) The charge for the first week of coolstorage or part thereof shall be twice the weekly increment which includes the handling charge.
 - ii) The charge for all subsequent weeks or part thereof shall be equal to the weekly increment.
- b) Transit storage: By its situation in the transport chain a transit store will require the negotiation of specified departures from this agreement. In cases where fruit is being assembled prior to loading onto a ship there may be agreement between the exporter or N.Z. Kiwifruit Exporters Association and the coolstore operator for special rates and conditions to apply. These rates and conditions will address the requirements of the activities associated with the coolstores location.

THE BASIS FOR CALCULATING PAYMENTS

1. All exporters will pay for coolstorage at the agreed rate and charge this back against the pool or pools which they operate.
2. The system for calculating payments will be in two parts.
 - a) An input charge.
 - b) A charge made following load out of fruit.
3. The input charge.
 - a) This will be made on the first day of the month following that when packed fruit enters the coolstore.
 - b) This input charge will be based on the amount of fruit received into the coolstore during the preceding month.
 - c) The charge will include the basic rate per tray, plus any preassessed bonus.
 - d) The basic rate for the input charge in 1986 will be 29 cents per tray.
4. The charge made following load out of fruit.
 - a) This charge will be made on the first day of the month following that when the fruit is loaded out of coolstore.
 - b) The charge will be based on a weekly increment, commencing from the evening of the first Saturday of June.
 - c) The charge will be determined by the week in which the fruit is loaded out. This charge will not be affected by the date when the fruit enters the coolstore (with the exception of transferred fruit).
 - d) The scale of load out charges for 1986 is shown in Appendix I.
 - e) To this basic weekly increment must be added the value of the "load out assessment" bonus.
 - f) It can be seen that the load out invoice for fruit removed from coolstore prior to the evening of the first Saturday of June will contain only the "load out assessment" bonus.
 - g) Fruit in coolstorage prior to the evening of 25 April will attract the standard weekly charge of 5.1 cents for each week stored or part thereof.

11. **Rail Siding.** This bonus will be paid in cases where kiwifruit is loaded out of a coolstore directly into a container on a railway wagon. Loading must be attained in a manner which meets all other criteria as specified for container movements.

- i) It must be possible to load the container in 30 minutes.
- ii) There must be all-weather loading.

Additionally, all labour and transport costs associated with loading the fruit into the container at the siding must be borne by the coolstore if the rail siding bonus is to be achieved. It will be the responsibility of the coolstore operator to position the pallets in the container.

However, the responsibility for load out records, dunnaging, temperature thermographs, the sealing of containers and despatch will remain with the exporter unless otherwise arranged.

12. **Use of a temperature recorder.** To qualify for this bonus a multistation temperature monitor capable of recording time, date and temperature from probes located in all rooms should be installed. The recordings so taken should be available for review by industry personnel.

5. **Racking.** A bonus will be paid where each pallet is supported by racking or suitable stillages in such a way that none of its weight is borne by any pallet beneath it. Such racking must be of a type which does not impede the movement of pallets at any time when they are required by an exporter. Such racking must also be of a type which does not cause damage to the product.
6. **For the act of forced air cooling.** Equipment must be capable of cooling fruit down to 2 °c or less within 12 hours. It should be noted that the pulp temperature of all fruit on each pallet must be reduced to 2 °c or less and must also be performed in accordance with Point 11 of "Care of the Fruit".
7. **For using a separate forced air cooling room.** This bonus will be paid at the discretion of the exporter if the exporter is satisfied the facilities have been used for the correct forced air cooling of all the fruit being loaded out. A separate forced air cooling room is normally defined as one which is used solely for this purpose during the harvest period. Forced air cooling within a second room (which is at the same time used for storage) does not constitute a separate forced air cooling room. However, there may be special cases where absolute control of air is maintained and the bonus may apply to the room used for both forced air cooling and storage.
8. **For completion of loading within 30 minutes.** This bonus will be paid where a container (or 22 pallet units) are completely loaded within 30 minutes of its arrival at the coolstore. It may also be paid in such cases where it is not possible for this to occur, as a result of some occurrence outside the control of the operator, i.e. due to loading difficulties caused by the truck or container or due to its arrival at other than the appointed time.
9. **Volume loading per exporter.** This bonus will be paid in cases where 22 or more pallet units are loaded from one coolstore on one day. Such loadouts must be either for direct export or to a marshalling/transit store.
Please note:
To qualify for this bonus the 22 pallets must be available for uplift from the store. Subsequent to the specification being met additional pallets will qualify for the bonus. Truck and trailer access must be possible, i.e. a full turning circle of 20 metres diameter is necessary for the truck to be positioned. This may be achieved with a small amount of backing such as is necessary to position a container truck up to a ramp or coolstore door.
10. **Load out at short notice.** This bonus will only be paid where two (2) working days or less have been allowed and condition checking is a prerequisite for the movement of the fruit. In the spirit of this agreement, where possible 8 working hours of notice should be given on any other load outs.

DEFINITION OF CRITERIA RELATING TO THE GRADING SYSTEM

Each of the bonuses will be paid at the discretion of the exporter, where the exporter is satisfied the criteria have been met.

1. All weather loading of a container. To qualify for such a bonus it must be possible to load a container without the fruit or personnel getting wet.
2. Wet weather loading of a flat decked truck. This is where a six metre deck unit can be loaded or unloaded from both sides under cover. The minimum requirement to achieve this is considered to be a covered area of 12 metres x 9 metres. NB. This bonus will only be paid in such cases where the criteria is met at those doors where loadouts usually occur. Furthermore, the covered area (12 metres x 9 metres) must be clear at all times when loading takes place.
3. Within 25 kilometres of a railhead. This bonus will apply where the coolstore is within 25 kilometres of a gantry which might be used for the transport of its kiwifruit, or where the coolstore has its own rail siding.

This bonus will also apply where a coolstore is within 25 kilometres of a port of loading. Such ports will include:

- Auckland
- Tauranga
- Gisborne
- Napier
- Wellington
- Nelson

Please note this bonus does not apply where there is proximity to a port where significant shipping services for kiwifruit are currently not available.

4. Working capacity greater than either 100,000 or 200,000 trays. The store size is to be calculated by taking the number of trays which can be held in a forced air cooling room, plus the storage room(s) at any one time. For the purposes of this calculation, the aisle(s) in the holding room(s) are to be empty and the spaces between pallets are to be no less than those specified in Point 11 of "Minimum Performance Specifications of Coolstores".

The minimum acceptable width of aisle will vary from store to store, depending on the size of forklift used. However the aisle must be wide enough to allow access by the forklift to each row of pallets, for the purposes of both load in and load out.

Please note that a store with a capacity greater than 200,000 trays will receive the bonus points for both categories of capacities, i.e. 100,000 and 200,000.

THE GRADING SYSTEM

The system as set out below is designed to reward the operator according to the level of service provided.

There will be assessment of stores on two occasions:

1. A pre-assessment

The following points will be considered before the season.

- | | |
|---|----------|
| a) All weather loading of a container. | <u>1</u> |
| b) Wet weather loading of a flat decked truck. | <u>2</u> |
| c) Within 25 kilometres of a railhead. | <u>1</u> |
| d) Working capacity greater than 100,000 trays. | <u>1</u> |
| e) Working capacity greater than 200,000 trays. | <u>1</u> |
| f) Racking. | <u>2</u> |
| g) Use of a temperature monitor. | <u>1</u> |

Any bonus relating to the above pre-assessment will be added to the input charge.

2. A loadout assessment

The following points will be considered at the time of loading.

- | | |
|--|----------|
| a) For the act of forced air cooling. | <u>6</u> |
| b) For using a separate forced air cooling room. | <u>6</u> |
| c) For completion of loading within 30 minutes. | <u>2</u> |
| d) Volume Loading. | <u>4</u> |
| e) Load out at short notice. | <u>2</u> |
| f) Rail siding. | <u>7</u> |

Any bonus relating to the above load out assessment will be added to the payment made following loadout.

For the 1986 season, each bonus point listed above will be valued at 0.5 cents per tray. The way in which these are to be accounted is described in "The basis for calculating payments".

EXPORTER RESPONSIBILITIES

1. Exporters are required to give reasonable notice of intended load outs, and to co-ordinate their activities so as not to conflict with other outward movements of fruit. Normal notice of load out would be a minimum of eight working hours, or more in such cases if specifically requested by the operator.
2. Exporters have a responsibility to inform operators of changes to arranged times of load outs.
3. Kiwifruit will not be loaded for export where the flesh temperature of any of the fruit is above 2.0 degrees centigrade.

Note: Please refer to point 2 of page 3 which defines storage temperature requirements.

4. From 1st August, where re-checking or repacking is necessary, ten calendar days preparatory notice of load out will be required. Wherever possible the exporter should ensure that fruit is moved within two weeks of the act of checking.
5. That appropriate documentation relative to coolstore operators shall be supplied by exporters.
6. That notification be given prior to the season of any requirements to segregate fruit.
7. That each exporter shall own, or have access to ethylene testing equipment. Where requested, exporters shall offer at cost an appropriate ethylene testing service to operators.
8. That the exporter or his agent, shall not enter any coolstore or office of an operator, except with the consent of the operator; and that no documents or other materials shall be taken from any coolstore without the consent of the operator.
9. That upon the request of a coolstore operator, each exporter is obliged to make known the relevant details of the insurance cover which the exporter has taken over the fruit for which he is responsible.
10. That all exporters pay for coolstorage without exception at the rate agreed and in accordance with this agreement.

- b) All coolstores in operation prior to 1st January 1985 shall meet the following minimum criteria:

Each pallet (174 trays) shall be allowed a minimum space in the store of 1000mm x 1200mm. It is required that there be a gap of 100mm between pallets in the rows and between rows. All pallets shall be a minimum of 200mm from any walls.

- c) There shall be a minimum of 400mm between the tops of pallets and the ceiling of the coolstore.

- d) It is strongly recommended that new coolstores being built allow that racking may be required in the future and that a pallet height of up to 2.2 metres might sometimes be stored.

MINIMUM PERFORMANCE SPECIFICATIONS OF COOLSTORES

1. All stores must be constructed of materials which satisfy the requirements of any authority which has jurisdiction over export kiwifruit.
2. A basic store without forced air cooling must have the ability to reduce the pulp temperature of packed kiwifruit, down to one degree centigrade within eight days of receipt. The pulp temperature must be zero (plus or minus $\frac{1}{2}$ degree centigrade).
3. There must be all weather access for a truck carrying a container to be backed to the entrance of the coolstore.
4. An electric forklift must be used for all inwards and outwards movements of fruit. On no account are containers to be loaded by a forklift or tractor which has a combustion engine.
5. The conditions relating to load out should be such that it is possible to completely load a container in 30 minutes or less.
6. Basic facilities for condition checking and re-packing must be provided. i.e. With good light giving reasonable working conditions for the staff performing the task. Tables will be necessary.
7. Alarm systems. All coolstores must be fitted with an alarm system which is sensitive to both high and low temperature variations. There shall be a cutout on equipment operating in cases of low temperature variations. The alarm and shutdown circuits must be separate from the refrigeration control circuits. Thermostats should be positioned in the airstream, but not immediately in front of the evaporator(s). The alarm must be able to be heard by a responsible person at a permanently monitored source.
8. It is strongly recommended that each coolstore operates a permanent temperature recording device with multiple sensor points in each room.
9. Each coolstore must maintain in good condition, a hand held, direct reading precision thermometer for the purpose of making regular manual checks of air and flesh temperatures.
10. All working doors on coolstores must be fitted with plastic curtains or some other device to restrict temperature fluctuations during periods of stock movement.
11. Pallet Spacings
 - a) For coolstores commissioned from 1st January 1985:
Each pallet (174 trays) shall be allowed a minimum space in the store of 1000mm x 1250mm. It is required that there be a gap of 100mm between pallets in the rows and a gap of 150mm between rows. All pallets shall be a minimum of 200mm from any walls. The minimum allowed spacings specified above have been determined as a result of tests conducted by the D.S.I.R., Auckland.

8. Export kiwifruit shall not be held in a store with any other produce, including non-export kiwifruit unless approved by the exporter(s) concerned.

Note: Kiwifruit as prepared for export shall be stored in a room separate from reject or non-graded bin stored kiwifruit, or if this is not possible, then non-exportable fruit shall be adequately contained in permeable liners. Again, this is subject to exporter(s) approval.

9. It will not be acceptable for non-cooled fruit to be introduced into a room where this will affect the pulp temperature of other fruit being stored.

The daily loading of coolstore and/or precoolers is limited by many factors including the capabilities of the equipment installed. It is strongly recommended that each coolstore operator calculates the maximum optimal intake per day and does not exceed this figure.

10. All kiwifruit packed for export must be placed in the coolstore within 12 hours of receipt by the coolstore operator. This includes part pallets.
11. The act of forced air cooling of fruit, received as full pallets, must commence within 15 hours of receipt by the coolstore operator.
12. No loaded pallets are to be placed on top of palletised cardboard trays within a coolstore (excepting where racking is used).
13. No pallets containing any type of package shall be stacked three or more high without the use of racking.

CARE OF THE FRUIT

1. It is required that each operator maintains records of regular manual checks of flesh temperatures within his coolstore(s). i.e. Two to three times per week.
2. To be aware of all other conditions relating to the store and its contents. i.e. Ethylene concentrations and security.
3. To correct immediately any problems which might become apparent as a result of monitoring, and to notify the appropriate exporters of any significant problems should it not be possible to rectify them within 48 hours.
4. To conduct condition checking of lines of kiwifruit in accordance with procedures as specified by the industry. This will be part of the basic agreement.
5.
 - a) Subject to prior arrangement the operator will be obliged to provide access to his store to any accredited agent of NZKA, Ministry of Agriculture and Fisheries, or an exporter who requests permission to examine export produce or to monitor conditions.
 - b) **N.Z. KIWIFRUIT AUTHORITY PERSONNEL**
Where the practices of a coolstore operator or the operation of the equipment is considered to contravene the spirit or intent of this agreement or where the actions of the coolstore operator or his employees is prejudicial to the welfare of export kiwifruit in his care, the N.Z. Kiwifruit Authority Personnel will immediately contact the exporter(s) and the office of the Coolstorers Association, stating what the considered deficiencies are.

The exporter(s) and/or Coolstorers Association are required to investigate and ensure a solution is implemented.
6. In cases where there are NZKA audits or inspections for frost damage (or any other inspections requested by the industry), the operator will be required to present the pallets specified to the inspectors at an agreed point and time outside the coolstore. This will be part of the basic agreement.
7. To be willing and able to organise the repacking and/or presentation of samples of any fruit should this be required as a result of condition checking or any other inspection.

It is recommended that the rates and conditions of payment for this are to be mutually agree (before the season) between the exporter, coolstore operator, packer and/or the owner of the fruit. Forced air cooling will not be considered necessary following repacking, but operators will be encouraged to minimise the time the fruit is out of store.

Please note that the NZKA Specifications for Kiwifruit Packing and Packaging state, "All trays shall be palletised with only one count size per pallet. The cost of this is to be considered a normal packing expense".

- c) It should be noted that if the operator is prepared to accept pallets into his coolstore which are not in exportable condition, then he must either be prepared to absorb the costs of making these exportable, or to make some other arrangements whereby either the grower or the packer meets such expenses. "The storage and cost of repalletising part pallets for non-working days, i.e. weekends or statutory holidays or pending completion of a grower or exporter line shall be paid for by the packhouse".

- 6. In cases where stocks are transferred to a coolstore in preparation for load out, such transfers shall be made at least 12 hours prior to that load out. There may be a charge for this handling and brief storage by the operator.

PHYSICAL RESPONSIBILITIES

1. The operator must be prepared to receive fruit into his store as and when it is delivered. This may sometimes be outside normal working hours. Up until 9 pm on any evening might be considered a reasonable time for truck arrival.
2. The operator must also be prepared to load out fruit in co-operation with the exporter. To accommodate road transport, container availability and conventional shipping requirements, the notice of loading and the subsequent act of loading, may be required by the exporter at short notice. The exporter must use his best endeavours to advise the operator as early as practicable of the load out, extending common courtesy to the operator and his employees (see also notes regarding exporter responsibilities).
3. The coolstore operator must be able to locate (for checking, temperature monitoring, repacking or load out) any pallet or pallets as required by the exporter. Thus if an exporter wished to locate and/or remove all the fruit of a particular grower line, he can do so, providing reasonable time is allowed.
4. The operator shall place pallets of the various count sizes in his store in such a way as to facilitate easy load out. i.e. One count per row wherever possible.
5. The coolstore operator shall be responsible for presenting the pallets of kiwifruit to the exporter at the time of load out in a condition suitable for export. i.e. In compliance with the NZKA Specifications for Kiwifruit Packing and Packaging in regards to the external appearance of the palletization, packaging and labelling.

The following points should be noted:

- a) It will be understood that following receipt of pallets at his coolstore, an operator will accept responsibility for the condition of the packaging, unless he advises the packer and the exporter within 24 hours that the condition of the packages and the pallets are deficient.

He will also be obliged to specify the reason why the packaging is not acceptable. Following such notice, it will be deemed the responsibility of either the packer or the grower to correct the problem prior to the time of load out as required by the exporter.

- b) The operator will accept responsibility for assembling part pallets or mixed count pallets into full pallets of one count prior to the time of load out as required by the exporter. Where the operator receiving the fruit chooses not to perform this service, then he must make satisfactory arrangements, with the approval of the exporter, to have this activity completed.

DEFINITION OF BASIC OPERATOR RESPONSIBILITIES

As well as the physical attributes of any coolstore, there are certain management responsibilities which must be met.

THE AGREEMENT

1. The agreement for storage of kiwifruit (designated for export) shall be between the individual coolstore operator and the exporter. The latter will enter into such an arrangement on behalf of grower suppliers.
2. For the purposes of calculating coolstore payments, all loadouts of kiwifruit designated for export shall be accounted for to the exporter. i.e. For export, for domestic distribution, transfer to another store or to be dumped.
3. If the coolstore operator is, for any reason, unable to fulfil his responsibilities as defined in this document, then he shall be liable to pay any additional costs so incurred by the pool(s) of the exporter(s) whose kiwifruit he has stored.
4. Operators are strongly advised to take Bailees Liability Insurance cover. They are also advised to investigate and arrange appropriate cover on other aspects which may require insuring.

RECORDS

1. It shall be the responsibility of the operator to record the entry into, and the position of all pallets in his store.
2. The operator shall be responsible for retaining all such documents as required by the exporter.
3. The operator shall be responsible for maintaining signed load out records. The signature shall be from the exporter (or his agent) when removing fruit from the store.
4. In the case of transfers of export kiwifruit between coolstores, a copy of the load out record must accompany the fruit.
5. Records of rechecks and/or repacks shall be kept by the operator on forms (and in the manner prescribed by the industry). These shall be passed on to the exporter, and the grower (or owner) of the fruit.
6. Exporters will adopt a standard format of presentation for forms required in the industry, sequentially numbering the forms in all instances.