

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

**No.**

**BETWEEN**

**STRATHBOSS KIWIFRUIT LIMITED** a duly incorporated company having its registered office at 126 Jellicoe Street, Te Puke, Te Puke 3119, New Zealand and carrying on business as a kiwifruit grower, as a representative plaintiff pursuant to rule 4.24 of the High Court Rules

**First Plaintiff**

**AND**

**SEEKA KIWIFRUIT INDUSTRIES LIMITED** a duly incorporated company having its registered office at 6 Queen Street, Te Puke, New Zealand and carrying on business as a kiwifruit post-harvest operator, as a representative plaintiff pursuant to rule 4.24 of the High Court rules.

**Second Plaintiff**

**AND**

**THE ATTORNEY-GENERAL** sued on behalf of the Ministry for Primary Industries (formerly the Ministry of Agriculture and Forestry)

**Defendant**

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**STATEMENT OF CLAIM**

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Dated: 28 November 2014

**Parker  
& Associates**  
Barristers & Solicitors

**Address:**  
Level 14, Vodafone on the Quay  
157 Lambton Quay  
PO Box 23270, Wellington, 6140  
New Zealand

**Counsel:**  
M N Dunning QC  
09 358 2212  
matthew@dunningQC.co.nz

**Solicitor:**  
D J S Parker  
04 494 9050  
dan.parker@parkerandassociates.co.nz

**T:** 04 499 0390  
**F:** 04 499 0391  
**W:** [www.parkerandassociates.co.nz](http://www.parkerandassociates.co.nz)  
**E:** [enquiries@parkerandassociates.co.nz](mailto:enquiries@parkerandassociates.co.nz)

**Contact Person:**  
A V Williamson  
04 494 9062  
[amy.williamson@parkerandassociates.co.nz](mailto:amy.williamson@parkerandassociates.co.nz)

## STATEMENT OF CLAIM

Dated 28 November 2014

The plaintiffs by their solicitor say:

### Parties

1. The first plaintiff:

- (a) Is a duly incorporated company having its registered office at 126 Jellicoe Street, Te Puke, Te Puke 3119, New Zealand as set out in Schedule 1 to this claim and carries on business as a kiwifruit grower;
- (b) Owns and operates a kiwifruit orchard at the locations set out in Schedule 1;
- (c) Suffered significant losses following an outbreak in New Zealand of a virulent strain of *Pseudomonas syringae* pv. *actinidae* (**Psa-V**), a bacterial kiwifruit vine disease, onto gold and/or green kiwifruit grown on its land (as set out in Schedule 2).

2. The first plaintiff is a representative plaintiff under High Court Rule 4.24 and brings this claim on behalf of itself and a group of other kiwifruit growers with the same interests in the subject matter of this proceeding being those parties who are of the class identified in Schedule 3 and have either provided their consent to this proceeding being brought on their behalf as summarised in Schedule 3 to this claim and/or who may in future provide their consent to this proceeding being brought on their behalf (the **grower plaintiffs**).

3. The second plaintiff:

- (a) Is a duly incorporated company having its registered office at 6 Queen Street, Te Puke, New Zealand as set out in Schedule 1 to this claim and carries on business as a kiwifruit grower and post-harvest operator, including as to packing, storing and despatching of kiwifruit for sale;
- (b) Is dependent on the availability and supply of kiwifruit for its business as a post-harvest operator;
- (c) Suffered significant losses as a result of the outbreak of Psa-V in New Zealand (as set out in Schedule 2);

4. The second plaintiff is a representative plaintiff under High Court Rule 4.24 and brings this claim on its behalf and on behalf of a group of other kiwifruit post-harvest operators with the same interest in the subject matter of this proceeding being those parties who are of the class identified in Schedule 4 and who may in future provide their consent to this proceeding being brought on their behalf (the **post-harvest operator plaintiffs**).
5. The Ministry of Agriculture and Fisheries (**MAF**), now the Ministry for Primary Industries (**MPI**), was a department of the state sector by virtue of the State Sector Act 1988.
6. MAF was responsible for administration of the Biosecurity Act 1993, and, in performing or exercising functions, duties or powers under the Biosecurity Act, its officers, employees and agents were servants and agents of the Crown.
7. The defendant is the Attorney General sued pursuant to section 6 of the Crown Proceedings Act 1950 in respect of negligent acts or omissions on the part of servants and agents of the Crown being officers, agents and/or employees of MAF, now MPI resulting in the Psa-V outbreak in New Zealand from October 2010 and the losses suffered as pleaded below. All references to MAF include as applicable reference to the relevant officers, agents and/or employees of MAF who undertook or were responsible for the various acts or omissions pleaded herein.

## **Background**

### ***Psa***

8. Psa is a pathogenic bacterium of the Actinidia (Kiwifruit) species, which can result in leaf spotting, flower wilting, cane/leader dieback and the death of kiwifruit vines.
9. On the basis of their pathogenicity, Psa strains have been described as Psa-LV (less virulent or low virulence) and Psa-V (virulent).
10. The low virulence Psa-LV is believed to have been present in New Zealand for a number of years but causes only relatively benign symptoms.
11. This claim concerns the virulent Psa-V and references in this statement of claim to Psa or Psa-V are, unless otherwise noted, to the virulent Psa-V.

### ***Psa-V outbreaks causing bacterial canker in Italy and elsewhere***

12. Virulent Psa-V strains:

- (a) Were first isolated and described in Japan in 1989 as the causal agent of bacterial canker of kiwifruit.
  - (b) Were described in 1989 in the Sichuan Province in China, and subsequently in the Chinese provinces of Anhui and Shaanxi.
  - (c) Have been reported in Korea.
  - (d) Were first reported in Italy in 1992 and a second, more virulent Psa-V outbreak occurred in Italy in 2007/2008.
  - (e) Have since spread across other countries in Europe including Spain, France, Switzerland and Portugal.
  - (f) Were found in Chile in late 2010.
13. In 2007/2008 a new, more virulent outbreak of Psa-V was identified in the Lazio region of Italy and began to spread to other regions of Italy (**the Italian Psa-V outbreak**).
  14. By February 2009 the Italian Psa-V outbreak was becoming more widespread in Italy and the Italian kiwifruit industry was being affected by Psa-V in a manner different to anything previously experienced there or elsewhere.
  15. On 1 November 2009 the European and Mediterranean Plant Protection Organisation (**EPPO**) issued an alert to its member states regarding the Italian Psa-V outbreak (**the 2009 EPPO alert**), a copy of which MAF received soon after.
  16. The 2009 EPPO alert noted that the impact of the Italian Psa-V outbreak was particularly severe on gold kiwifruit orchards and that in some instances the destruction of orchards was required.
  17. Between March 2010 and June 2010 the Italian Psa-V outbreak progressed even more aggressively.
  18. In April 2010 a journalist employed by the New Zealand Press Association, Kent Anderson, sent an email to MAF enquiring about what steps MAF was taking to manage any risks to New Zealand from Psa.
  19. In July 2010 under the title "Pathogen of the Month" the Australasian Plant Pathology Website (**APP**) published a one page profile on Psa noting that the bacteria was present in Japan, Korea and Italy, stating "Its economic impact can be significant, as is the case with the current outbreak in Latina (Italy)".

20. A further EPPO update on 1 August 2010 (a copy of which MAF received soon after) noted the continued spread of Psa throughout Italy and confirmed that the Italian Psa-V outbreak was a different strain of Psa-V to that previously confirmed in Italy, Japan and Korea.
21. By September 2010 the new strain of Psa-V had also been found in Portugal and France.
22. In October 2010, Psa-V symptoms were first noticed in New Zealand, on kiwifruit trees at neighbouring orchards in Te Puke referred to in the Sapere Report as RP1 and RP2.
23. The characteristics of the infection, including extreme virulence and rapidity of spread, indicate that this was a recently introduced infection that had not previously occurred in New Zealand.

#### ***The economic impact of Psa in New Zealand***

24. As at 27 June 2012, 1,226 New Zealand kiwifruit orchards were identified as being infected with Psa-V, comprising 37% of kiwifruit orchards in New Zealand and representing 46% of the total kiwifruit hectares.
25. The economic impact of Psa has been significant, particularly with respect to Hort16A Gold Kiwifruit Orchards. 600 hectares of gold kiwifruit have been taken out of the ground leading to significant losses, from a complete loss of income to significantly reduced orchard gate returns from lower yields, with orchardists also facing higher cost structures from efforts to manage the Psa-V outbreak, substantial decrease in the value of kiwifruit orchards and related financial effects.

#### ***The Sapere Report***

26. In 2012, the Minister for Primary Industries requested that the Director-General of the Ministry of Agriculture and Forestry undertake an independent review of the Import Health Standards and border clearance processes in New Zealand in light of the introduction of Psa-V into New Zealand.
27. The Sapere Research Group was engaged and completed a report entitled 'A Review of Import Requirements and Border Processes in Light of the Entry of Psa into New Zealand', dated 29 June 2012 (**the Sapere Report**).

#### ***The biosecurity regime and relevant legislative framework in New Zealand***

28. New Zealand is heavily reliant on the export of agricultural and horticultural produce, which forms a critical part of the New Zealand economy.

29. MAF was the lead organisation for developing and implementing biosecurity policy in New Zealand and protecting New Zealand from biological risk.
30. MAF had various functions, duties and powers under the Biosecurity Act 1993 (**the Act**) in respect of biosecurity in New Zealand.
31. The Act granted MAF authority to control the importation of "risk goods".
32. Risk goods are defined in section 2 of the Act as:
 

*"Any organism, organic material, or other thing, or substance, that (by reason of its nature, origin or other relevant factors) it is reasonable to suspect constitutes, harbours or contains an organism that may-*

  - (a) Cause unwanted harm to natural and physical resources or human health in New Zealand; or*
  - (b) Interfere with the diagnosis, management, or treatment, in New Zealand, of pests or unwanted organisms."*
33. MAF had power under section 22(1) of the Act to issue an import health standard (**IHS**) specifying the requirements to be met for the effective management of risks associated with the importation of risk goods before those risk goods may be imported, moved from a biosecurity control area or transitional facility or given biosecurity clearance and may amend or revoke any IHS so issued.
34. A risk good can only be given biosecurity clearance into New Zealand if there is an IHS in place for that good and the imported good complies with all conditions outlined in the IHS (section 27 of the Act).
35. An IHS can apply to risk goods of a certain kind or description and can apply to all countries, specified countries, countries of particular description or a particular location.
36. The IHS can also require an import permit to be obtained before the goods can be imported, moved from a biosecurity control area or transitional facility or given a biosecurity clearance (section 22(2) of the Act). An import permit may impose additional requirements.
37. Under section 25(5) of the Act, prior to issuing, amending or revoking an IHS the Chief Technical Officer at MAF must have regard to:
  - (a) The likelihood that goods of the kind or description to be specified in the IHS may bring organisms into New Zealand;

- (b) The nature and possible effect on people, the New Zealand environment, and the New Zealand economy of any organisms that goods of the kind or description specified in IHS may bring into New Zealand;
  - (c) New Zealand's international obligations; and
  - (d) Such other matters as the Chief Technical Officer considers relevant to the purposes of that part of the Act.
38. An IHS cannot be issued or amended without interested parties first being consulted, unless the Chief Technical Officer considers the matter to be urgent or minor (section 22(6) of the Act).
39. The import requirements developed by MAF must also be consistent with New Zealand's obligations as a signatory to the World Trade Organisation Agreement on the Application of Sanitary and Phytosanitary Measures.
40. MAF is required to undertake a risk analysis for the category of good in question in order to meet the requirements for issuing an IHS (section 22(5) of the Act).
41. MAF developed internal procedures for risk analysis such as Biosecurity New Zealand 'Risk Analysis Procedures' Version 1, 12 April 2006, page 12.
42. MAF developed an internal checklist "*IHS Process: Events and Trigger Criteria Checklist*", which identified various events that might prompt MAF staff members to initiate a review of an IHS including:
- "New knowledge about a change in the risk profile of a known hazard, or newly emerging hazard";
  - "Information received that there has been a change in the health status of the exporting country in relation to a pest or disease of biosecurity concern";
  - "A project (such as to identify top priority/diseases) is completed".
- (As referred to in the Sapere Report at paragraph 38)
43. Within MAF at the relevant times were groups with an interest in and tasked with collecting and filtering information relating to emerging risks, through active surveillance relating to pests and pathways and passive surveillance, including through the following MAF teams:

- (a) *The Biosecurity and Risk Assessment Group* – tasked with monitoring emerging risk information from literature sources, internet sources, media monitoring, membership of specialist groups and industry contacts;
- (b) *The Plant Imports and Exports Group* – which had responsibility for the IHS and relevant import permits and took an active interest in monitoring whether the import requirements remain appropriate. This included examining pest notifications from exporting countries, receiving information on border detection of pests and through relationships developed with industry stakeholders and overseas authorities;
- (c) *The Plant Health and Environment Laboratory* – this scientific group captured information from online sources, publications from overseas biosecurity authorities, published journals and contacts with local and overseas experts.

44. In or around 2009 MAF established:

- (a) *The Emerging Risks and Opportunities Committee (EROC)* which was established to undertake global/national scanning to identify new and emerging biosecurity risks and opportunities and to assign those issues to the correct part of MAF for any further work required;
- (b) *Informal Cross-Directorate Groups*, which were formed for sectors of interest (for example plants, forestry and marine) to facilitate the sharing of information across the organisation.

### ***Import permits***

- 45. As well as specifying the conditions that must be met before a risk good may be imported into New Zealand, an IHS may also require an importer to have an import permit in which case the importer must apply to MAF for such an import permit.
- 46. Import permits may provide consignment specific guidance to an importer on how to comply with an IHS and may include specific entry requirements to be met by the importer, including for example:
  - Details of the importer and the exporter;
  - Commodity description and quantity;
  - Requirements to be met prior to export, on arrival in New Zealand, and while in post-entry quarantine; and



- The length of time and/or the number of consignments the importer can bring into the country.

### ***Border processes***

47. Imported risk goods will typically enter New Zealand through the following major entry pathways:
  - International mail, cargo (unaccompanied consignments entering by sea and air) - unaccompanied risk goods entering New Zealand may be detected by border staff through inspections but usually will be identified through the specific tariff code used when the consignment was shipped. If the tariff on the imported consignment identifies the product as a "risk good" the consignment will automatically be stopped at the border and held pending processing, or
  - Accompanying passengers entering the country - risk goods that accompany a passenger will be identified through their Customs Declaration.
48. Once a risk good had been identified, officers, agents and/or employees of MAF must only give biosecurity clearance if satisfied pursuant to section 27 of the Act:
  - (a) That the good complies with the requirements specified in an IHS in force for the goods; and
  - (b) That there are no discrepancies in the documentation accompanying the goods or between that documentation and the goods that suggest it may be unwise to rely on the documentation; and
  - (c) That the goods display no signs or symptoms that may be a consequence of harbouring unwanted organisms or that it may be harbouring unwanted organisms; and
  - (d) There has been no recent change in circumstances, or in the state of knowledge, that makes it unwise to issue a clearance.
49. Further, officers, agents and/or employees of MAF will determine whether the product in question is the subject of an IHS and whether the importer has any necessary import permit and Phytosanitary Certificate. A Phytosanitary Certificate is a document issued by the National Plant Protection Organisation (**NPPO**) in the exporting country that states

whether specific conditions have been met prior to the goods leaving the country.

50. If the documentation is in order then the goods will be subject to a physical inspection (this is a requirement for all nursery stock, pollen and fruit). If no pests are identified on inspection, the goods will then be cleared for release, unless it is a condition of the IHS or import permit that the goods be quarantined.

***The import requirements for Kiwifruit Nursery Stock and Pollen***

51. The importation of nursery stock generally (including kiwifruit) is the subject of IHS155.02.06 "*Importation of Nursery Stock*" (**the nursery stock IHS**), promulgated in 1993.
52. The nursery stock IHS contained obligations governing the import of a range of plant material (not kiwifruit-specific) including bud wood, tissue culture and pollen.
53. As a result of a review in 2003 of the nursery stock IHS with respect to kiwifruit, officers, agents and/or employees of MAF recognised Psa as a possible biosecurity risk that needed to be managed through IHS and targeted border processes, and viewed the risks associated with Psa as follows (according to MAF's CAT file - being spreadsheets which summarised assessment information for import risk analysis for plant pests - and a 2004 MAF consultation document) (as referred to in the Sapere Report at paragraph 64):
  - (a) Psa is "a significant pest as it can cause severe damage and production loss in kiwifruit";
  - (b) Psa is listed as being present in Japan and Italy;
  - (c) Potential entry pathways are identified as tissue cultures and cuttings;
  - (d) "The pathogen may exist as a resident on the surface of mature fruit but it is improbable that cells would survive to infect seed or seedlings";
  - (e) The potential economic consequences on exports were assessed by MAF as "some impact".
54. On 28 May 2004, MAF amended the Actinidia (kiwifruit) schedule for nursery stock imports in the nursery stock IHS imposing the following requirements on imports of dormant cuttings and plants in tissue culture:

- (a) An import permit was required;
  - (b) A Phytosanitary Certificate was required with the NPPO of the exporting country issuing the certificate to be satisfied of various matters such as the nursery stock had been inspected and was free of visually detectable regulated pests, etc.;
  - (c) All imports must go into a level 3 PEQ facility (quarantine) where they will be grown for a minimum of 6 months, with regular inspections, testing and treatment for regulated pests as specified in the document "Inspection, Testing and Treatment Requirements for Actinidia".
55. MAF also added Psa as a regulated pest for kiwifruit nursery stock and required that, as well as visual inspection in PEQ, each plant must be observed under transmission electron microscopy and tested for Psa using two Polymerase Chain Reaction (**PCR**) tests.
56. In or about August 2006 MAF amended the Actinidia schedule to remove one of the two options for testing plants for Psa having identified that one of the PCR testing methods did not reliably detect Psa. This meant reliance was now placed on the ability of the remaining tester method (PCR using PAV1/P 22 primers) to detect Psa prior to release from quarantine, in conjunction with visual inspections.
57. The import requirements for pollen generally in the nursery stock IHS at 2.2.3 provided:
- "A prior permit to import must be obtained from the Permit Officer"*
58. From 1 October 2009, the wording of the pollen import requirements in the nursery stock IHS at 2.2.3 changed to:
- "An import permit must be obtained prior to import of pollen" and*
- "Prior to issuing the permit to import MAF will assess on a case by case basis the requirements that must be met to import the pollen. All requirements will be detailed on the permit to import."*
59. There was no IHS in place for the importation of kiwifruit plant material other than as set out above, and kiwifruit plant material other than as set out in the IHS could not validly be imported.

### **Pollen Imports**

60. The first request to MAF for an import permit for kiwifruit pollen was in November 2006 by Kiwi Pollen NZ Limited (**Kiwi Pollen**), which operated a facility located at 427 Te Matai Road, Te Puke.
61. Officers, agents and/or employees of MAF decided to allow the importation of kiwifruit pollen into New Zealand, and grant Kiwi Pollen's request for an import permit.
62. Officers, agents and/or employees of MAF issued 8 kiwifruit pollen import permits to Kiwi Pollen as a result, the first being issued on 16 April 2007 and the last on 9 June 2010.
63. Officers, agents and/or employees of MAF also issued 3 permits to Plant & Food Research (**Plant & Food**), a New Zealand government owned Crown Research Institute, between 5 March 2010 and 12 May 2011.
64. The main details of each import permit for kiwifruit pollen as presently available (as referred to in Appendix 5 to the Sapere Report) are set out in Schedule 5.
65. Kiwi Pollen's imports for the first two import permits for kiwifruit pollen were subject to the following requirements:
 

*"Only hand collected, unopened male flower buds may be collected, milled and imported. Consignments must be accompanied by a government issued phytosanitary certificate stating that the male flower buds were hand collected and unopened."*
66. The import permits issued to Plant & Food imposed very stringent conditions by comparison to those imposed for Kiwi Pollen including a requirement that pollen must not leave the transitional facility into which it was taken, the record must be kept of the status of all imported pollen and that any pollen remaining after analysis must be destroyed.

### **The Card Paper**

67. Officers, agents and/or employees of MAF indicated to the writers of the Sapere Report that the decision to allow the importation of kiwifruit pollen into New Zealand, and grant the request for an import permit, was made on the basis of a paper ultimately published in 2007 titled "*Plant Pathogens Transmitted by Pollen*" by S Card (of MAF), M Pearson (of Auckland University) and G Glover (of MAF) (**the Card Paper**) (as referred to in paragraph 93 of the Sapere Report).

68. The Card Paper was initiated by MAF's Investigation and Diagnostic Centre in or about 2006 with the stated purpose being "to assist the risk analysis process by identifying the pest and diseases transmitted by pollen" (generally, as opposed to kiwifruit pollen specifically) (as referred to in the Sapere Report at paragraph 95).
69. The Card Paper was not intended to provide a comprehensive examination of the risks associated with pollen (let alone with kiwifruit pollen specifically) but was rather a literature review intended to serve as an input into a more formal risk analysis.
70. The Card Paper was focussed on virus and viroids, and only one sentence in the Card Paper covered the risk of pollen transmission of bacteria. That sentence read "There are no pollen transmitted bacteria" (amended from the initial draft which read "There are no known bacteria or mollicutes that are pollen transmitted") (as referred to in the Sapere Report at paragraph 97).
71. The statement expressed in the Card Paper that pollen could not transmit bacteria:
  - (a) Was incorrect;
  - (b) Was not supported by scientific evidence available at the time;
  - (c) Was unnecessarily definitive in light of the available evidence;
  - (d) Inaccurately stated that pollen could not transmit bacterial pests.
72. On or about 13 October 2006, the Risks Analysis Team within MAF expressed reservations on the content of the Card Paper, including questioning whether the report was just a review of viruses and noting it was a summary of information rather than an analysis (as referred to in the Sapere Report at paragraph 100).
73. Academic scientific articles published prior to the Card Paper called into question the issue of whether pollen could potentially transmit bacteria, including for example a 1990 paper titled "The Role of Seed and Pollen in the Spread of Plant Pathogens Particularly Viruses", which noted "there is a real danger of host pollen contamination of practically any bacterial pathogen which may have infected the host before or at the time of pollen formation/maturation." (as referred to in the Sapere Report at paragraph 101).
74. The assessment of the risks posed by imports of kiwifruit pollen by officers, agents and/or employees of MAF failed adequately to reflect the fact that pollen imports could also be contaminated by other plant material

recognised to present a Psa risk pathway, since all imports of pollen, hand-harvested or not, will inevitably contain some extraneous plant material.

75. By requiring, since 2004, plant material in the nature of bud wood and tissue culture to be tested for Psa, officers, agents and/or employees of MAF had already recognised imports of plant material as a prime pathway for Psa transmission.
76. In the circumstances officers, agents and/or employees of MAF should have undertaken a formal risk analysis for imports of kiwifruit pollen at the time of the applications for import permits for pollen (and subsequently), given:
  - (a) Provision 2.2.3 of the nursery stock IHS required a permit to be obtained prior to import of pollen;
  - (b) Kiwifruit pollen had not previously been imported into New Zealand, with the consequence that a failure to identify and manage risks with the import could have significant and irreversible consequences;
  - (c) The pollen was to be used for artificial propagation, meaning that any associated pest incursion would be unlikely to be localised and would be dispersed widely;
  - (d) Officers, agents and/or employees of MAF did not and could not consider there to be zero risk from pollen – as apparent from the initial MAF import permit requirement for imported pollen to be sourced from hand-harvested, unopened flower buds;
  - (e) There was uncertainty amongst officers, agents and/or employees of MAF regarding precisely how the pollen would be sourced and milled and the level of biosecurity risk this might create (including as set out in emails at the time, including an email from MAF staff to Kiwi Pollen dated 8 December 2006 at 11.54am – as referred to in the Sapere Report at paragraph 104);
  - (f) The economic significance of the kiwifruit industry justified a thorough assessment of the risks from pollen imports;
  - (g) Officers, agents and/or employees of MAF had no reasonable cause to rely on the Card Paper as pleaded in paragraphs 67 to 73 above); and
  - (h) The issues raised by the Risk Analysis Team within MAF in 2007 over uncertainty of the science around pollen as a vector for transmission of Psa.

77. If an appropriate formal risk analysis had been carried out officers, agents and/or employees of MAF would have (or alternatively, should have) been able to identify the risk of transmission of Psa-V through importation of pollen and the serious consequences for the kiwifruit industry, and then considered the extent to which pest risk management steps were required properly to mitigate any risks or what additional measures were required to manage the risks such as testing, border control and disallowing imports.
78. Further, in the circumstances, officers, agents and/or employees of MAF should have consulted with relevant industry groups including the kiwifruit industry prior to allowing imports of pollen to take place:
- (a) MAF had issued a public commitment to consult in a wide range of circumstances in a document titled "MAF Biosecurity Authority Policy Statement on Consultation" signed 29 February 2000 (which MAF reconfirmed on 31 October 2006 that it was committed to following – as referred to in the Sapere Report at footnote 78);
  - (b) The consultation provisions of the Act and the terms of the IHS regarding pollen and all surrounding circumstances meant that consultation with relevant industry and other agencies was appropriate and necessary;
  - (c) Consultation prior to allowing the importation of pollen would have been prudent given MAF was about to allow the import of new biological material for the first time and given the factors pleaded above; and
  - (d) Consultation would have prompted relevant agencies such as Plant & Food and the kiwifruit industry to raise questions about the risk assessment and safeguards that had been or should have been undertaken.
79. The lack of consultation by officers, agents and/or employees of MAF before issuing the import permits for pollen meant that industry and other relevant organisations such as Plant & Food were not aware of the imports of pollen that had been authorised by MAF until after the outbreak of Psa-V into New Zealand.
80. The import requirements for kiwifruit pollen were inadequate.

**MAF's knowledge of and inadequate response to the Italian Psa-V outbreak**

81. As pleaded in paragraphs 13 to 20 above the Italian Psa-V outbreak was identified in Italy in 2007/2008, was well advanced by February 2009 and was known (or should have been known) to officers, agents and/or employees of MAF from in or around those periods, due to:
  - (a) Publicity and notifications from in or about late 2008 to early 2009 and after that;
  - (b) Officers, agents and/or employees of MAF received copies of the EPPO alerts on Psa issued on 1 November 2009 and 1 August 2010; and
  - (c) Internal MAF documents in April 2010, which make reference to the Italian Psa outbreak in reaction to a media enquiry.
82. Despite the Italian Psa-V outbreak officers, agents and/or employees of MAF did not revisit relevant import requirements for kiwifruit or pollen.
83. Officers, agents and/or employees of MAF should have initiated a pest risk assessment when news of the Italian Psa-V outbreak was available. Under MAF's official policy "Biosecurity New Zealand Risk Analysis Procedures" Version 1, 12 April 2006, page 33 a pest risk assessment should be initiated when "an established infestation or an outbreak of a new organism or diseases is discovered within an exporting country or area" or when "an organism or disease is reported to be more damaging in an area than in its area of origin" (as referred to in the Sapere Report at paragraph 198).
84. In the circumstances, officers, agents and/or employees of MAF should have identified from early 2009 that there had been a significant change in the profile of Psa which was spreading rapidly throughout Italy and elsewhere, having a devastating impact on infected kiwifruit orchards and primarily affecting gold kiwifruit.
85. The Italian Psa-V outbreak meant that the New Zealand kiwifruit industry was facing a biosecurity threat.
86. Accordingly officers, agents and/or employees of MAF should have:
  - (a) Recognised the potential implications of the Italian Psa-V outbreak;
  - (b) Undertaken a pest risk assessment of Psa-V;



- (c) Where appropriate revised the import requirements for certain risk goods and halted imports if necessary;
  - (d) Consulted the kiwifruit industry and other relevant agencies.
- 87. A formal pest risk assessment of Psa never took place prior to discovery of the outbreak in New Zealand of Psa-V in October 2010.
- 88. By contrast in May 2010 Biosecurity Australia initiated a review of all relevant import conditions in direct response to the Italian Psa-V outbreak and spread. By 2010 Australia was only permitting imports of kiwifruit pollen with New Zealand origin and all such imports had to be tested and certified as being free from Psa (as referred to in paragraphs 259 and 260 of the Sapere Report).
- 89. EROC, the MAF Committee set up to undertake environmental scanning for emerging biosecurity risks, never discussed the Italian Psa-V outbreak or potential threats posed to the kiwifruit industry despite meeting six times from the date of the EPPO alert in November 2009 through to the detection in New Zealand of Psa in October 2010.
- 90. Members of the Risk Analysis Team within MAF were aware of the Italian Psa-V outbreak prior to the detection of Psa in New Zealand but did not undertake a formal risk assessment.
- 91. On several occasions officers, agents and/or employees of MAF recognised that a closer examination of the risks posed by Psa might be appropriate but no further action was taken, including for example (as referred to in the Sapere Report at paragraph 204):
  - (a) On 8 April 2010 at 4:31pm, in response to the enquiry from the journalist referred to at paragraph 18 above as to what evaluation had been done of the risks posed by Psa, a MAF staff member (Manager, Fresh Produce) emailed internally that "we require a risk assessment for this". The suggested risk assessment never occurred;
  - (b) A member of the Risk Analysis Team noted there was no risk analysis supporting any of the import standards and was uncertain whether they remained appropriate in light of Psa (as apparent from an internal email from a member of Risk Analysis Team dated 8 April 2010, 10:55pm). These concerns were never followed up;
  - (c) A staff member suggested that Psa should be discussed at EROC (as noted in an internal email from MAF staff member

dated 16 April 2010, 12:05pm), but this matter was never followed up.

92. A pest risk assessment if properly undertaken would have identified all possible pathways for Psa, and assessed the risks of Psa exposure and establishment and its consequences.
93. Officers, agents and/or employees of MAF failed to examine the possible pathways for Psa, the economic consequences should risks not be managed appropriately, the scientific evidence available or whether more rigorous import or border controls were necessary.
94. Officers, agents and/or employees of MAF continued to rely on existing import requirements.
95. Concerns were expressed to and within MAF about whether the import requirements remained appropriate, including for example (as referred to in the Sapere Report at paragraph 210-216):
  - (a) On 17 May 2010 a senior scientist at Plant & Food emailed the MAF plant imports team questioning whether the import risk assessment should be re-examined;
  - (b) MAF responded on 25 June 2010 noting that the lack of evidence in current literature meant MAF would not be imposing further measures at that point and that an additional review would be an option if further literature became available;
  - (c) On 20 August 2010 the Chief Executive Officer of Plant & Food wrote to the Director General at MAF noting concern about the possible introduction of Psa into New Zealand, the potential impact this could have on New Zealand's kiwifruit industry and research initiated by Plant & Food;
  - (d) Plant & Food in an email forwarded to MAF on or about 29 or 30 September 2010 advised MAF that their research showed that pollen from infected orchards carries live cells of Psa and should not be imported into New Zealand for pollination purposes and that graft wood and fruit also posed a biosecurity risk.
96. Therefore by 30 September 2010 officers, agents and/or employees of MAF were in receipt of a scientific opinion stating a "definitive position" that pollen and nursery stock from areas infected with Psa should not be imported into New Zealand (as referred to in the Sapere Report at paragraph 217).

97. The response by officers, agents and/or employees of MAF to concerns regarding pollen imports was inadequate. Specifically officers, agents and/or employees of MAF failed to respond adequately to a number of warnings and warning signs in 2010 that should have prompted both a halt to pollen imports and processes for location of imports, retrieval (if possible) or monitoring and containment.
98. Information was available that if collated would have been sufficient to halt kiwifruit pollen imports into New Zealand from early 2009.
99. Officers, agents and/or employees of MAF failed to take adequate action or to revisit pollen import requirements that would have prevented the outbreak of Psa-V in October 2010 into New Zealand or, alternatively, limited the incursion brought about by the import of anthers by Kiwi Pollen in June 2009 (as to which see paragraphs 110 to 121 below), or any other imports of Psa infected pollen or other material.
100. By May 2010 Plant & Food knew live Psa could be detected in pollen from infected orchards.
101. By May 2010 officers, agents and/or employees of MAF knew (as referred to in the Sapere Report at paragraph 264):
  - (a) That Psa was present in China (and other countries);
  - (b) That pollen imports from China (and other countries) were taking place for the purposes of artificially pollinating orchards.
102. Officers, agents and/or employees of MAF should have halted all pollen imports and put processes in place to identify where any imported pollen had been used, and for monitoring and containment.
103. At least four senior staff members within MAF were aware of the Plant & Food preliminary findings regarding pollen by no later than 1 October 2010 including the manager of teams responsible for the nursery stock IHS and approving applications for import permits for pollen as well as the author of the Card Paper that had stated "There are no pollen transmitted bacteria".
104. The recipients of material referred to in paragraphs 81, 101 and 103 above were the relevant staff members within MAF to receive and process this information and to take appropriate action.
105. None of the MAF recipients referred to in paragraphs 81, 101 or 103 above reacted to the significance of the finding regarding pollen or took appropriate action to address that information and the risks of Psa entering into New Zealand.

106. The recognition of and response to the Italian Psa-V outbreak by officers, agents and/or employees of MAF was inadequate.

#### **Import permits and change to the wording**

107. The first two Kiwi Pollen import permits approved by MAF on 16 April 2007 and 7 December 2007 respectively included special conditions that "Only hand collected, unopened male flower buds may be collected, milled and imported", which reflected that the harvested flower buds would be milled offshore prior to the importation of pollen (but neither permit was used) (see Schedule 5).
108. For no apparent reason, subsequent Kiwi Pollen import permits beginning with number 2008035594, applied for and approved on 3 November 2008, changed the special condition by stating that "*The pollen may be milled prior to import*" (emphasis added) (as referred to in Schedule 5).
109. No requirement was added or even considered for proper disposal of any waste plant material associated with milling the pollen.

#### **The Import of Anthers**

110. On 30 June 2009 biosecurity clearance was given to a consignment of "anthers" from the Shaanxi Province in China.
111. An anther is "the part of a stamen that produces and contains pollen and is usually borne on a stalk" (as referred to in the Sapere Report at paragraph 323).
112. The production of kiwifruit pollen involves:
- (a) Picking the (unopened) male flower buds;
  - (b) Allowing the buds to open;
  - (c) Crude milling to separate (to some extent) the anthers from the other milled parts of the flower, including the petals, sepals and flower stalk;
  - (d) Splitting the anthers to allow release of the pollen; and then
  - (e) Separation of the pollen from the burst stamens.
113. "Anthers" are plant material and not "pollen", and constitute "risk goods".
114. There was no IHS in place for anthers (which was a requirement for importation of such risk goods).

115. The import of the anthers did not meet the terms of any import permit.
116. Accordingly, the import of the anthers was not permitted into New Zealand and the import of the anthers should not have been given biosecurity clearance.
117. At the time officers, agents and/or employees of MAF were aware that plant material was a likely vector for Psa and were also aware that Psa could be detected on flower buds.
118. The anthers consignment was subsequently processed in New Zealand at Kiwi Pollen's premises, and the first Psa symptoms were noticed in October 2010 on orchards neighbouring each other and in close proximity to Kiwi Pollen's premises (being locations RP1 and RP2 as referred to in paragraph 22 above).
119. Of the eight import permits granted to Kiwi Pollen, as set out in Schedule 5, some permits were not used, some were in respect of pollen to be imported from Chile and only the 30 June 2009 import was in respect of the import of pollen from China and was issued and used within the operative causative period for Psa-V to be manifest in October 2010.
120. A DNA study conducted by a group of Otago University scientists, with results published on 27 February 2013 and further disclosed in November 2013 at the First International Symposium on Bacterial Canker of Kiwifruit (Psa), has confirmed that the strain of Psa which infected RP1 and RP2 and then spread throughout the region and other regions of New Zealand, originated in the Shaanxi Province, China, from where the anthers were imported in June 2009.
121. The "MAF Psa-Pathway tracing report" dated 5 December 2011 suggested that the disease arose from a single point of introduction and the genetic analysis carried out by the Otago University scientists indicates that all Psa-V in New Zealand is derived from a recent single incursion event originating in the Shaanxi Province in China.

## **FIRST CAUSE OF ACTION – NEGLIGENCE**

The first and second plaintiffs repeat paragraphs 1 to 121 and say:

### ***Duty***

122. At all material times, officers, agents and/or employees of MAF owed the plaintiffs a duty to exercise reasonable care and skill when undertaking their functions and responsibilities in relation to biosecurity in New Zealand including their functions under the Biosecurity Act 1993 or otherwise.

123. As part of (but not limiting) the duty pleaded in paragraph 122 above, officers, agents and/or employees of MAF owed the plaintiffs a duty to exercise reasonable care and skill in any one or more of the following respects:
- (a) When managing and controlling the importation of "risk goods";
  - (b) When issuing, amending or revoking an IHS;
  - (c) When processing, considering and approving import permits and determining the content and requirements of import permits;
  - (d) When undertaking their functions and responsibilities under the Act;
  - (e) When undertaking functions covered by any internal policies of MAF;
  - (f) When monitoring, assessing and responding to emerging risks and new information;
  - (g) When responding to emerging potential biosecurity threats;
  - (h) When setting and implementing border processes for imports of risk goods;
  - (i) When undertaking all of their functions, duties, responsibilities or other acts relating to management and control of biosecurity in New Zealand.
124. The duty pleaded at paragraphs 122 to 123 above arises by reason of the proximity of the relationship between the plaintiffs and officers, agents and/or employees of MAF, the foreseeability of harm and policy factors going to the fairness and justice of the pleaded duty of care (including a lack of any policy factors that count against a duty being owed by officers, agents and/or employees of MAF to the plaintiffs in these circumstances) including (but not limited to) the following:
- (a) The Act created a relationship of sufficient proximity between officers, agents and employees of MAF and the plaintiffs to give rise to a duty of care.

**Particulars**

- (i) The purpose of Part 3 of the Act (importation of risk goods) is *"to provide for the effective management of risks*

*associated with the importation of risk goods"* (section 16 of the Act).

(ii) The Act sets out MAF's functions, powers and duties in relation to biosecurity in New Zealand, including (but not limited to):

- Power to issue, amend or revoke an IHS (section 22(1) of the Act).
- Power to issue a permit for the import of goods if one is required under the relevant IHS (section 22(2) of the Act).
- Duty to consider the likelihood that goods may bring organisms into New Zealand in considering whether to issue, amend or revoke an IHS (section 22(5)(a) of the Act).
- Duty to consider the nature and possible effect on people, the New Zealand environment and the New Zealand economy of any organisms that goods may bring into New Zealand in considering whether to issue, amend or revoke an IHS (section 22(5)(b) of the Act).
- Duty to consult with persons representative of the classes of persons having an interest in an IHS in considering whether to issue, amend or revoke as IHS (section 22(6) of the Act).
- Duty not to clear any risk goods unless the goods comply with the relevant IHS requirements, there are no documentary discrepancies, the goods display no symptoms of unwanted organisms, and there has been no recent change in circumstances or in the state of knowledge that make it unwise to issue a clearance (section 27 of the Act).
- Power to inspect, examine, test, sample, seize, hold and dispose of or destroy goods (sections 27, 28A, 116, 121, 125 and 127 of the Act).

(b) MAF acts through its officers, agents and employees, who undertake all of MAF's relevant functions and responsibilities. Therefore all relevant functions, duties, acts and omissions of

MAF were undertaken by or were under the control of and the responsibility of relevant officers, agents and employees of MAF.

- (c) The Act contemplates civil liability (sections 163-164 of the Act).
- (d) Officers, agents and/or employees of MAF had sole responsibility and control in respect of their functions and responsibilities in relation to biosecurity in New Zealand. No other entity, and in particular no industry group including the plaintiffs, could themselves undertake the functions of officers, agents and/or employees of MAF in relation to biosecurity in New Zealand, and in particular those functions set out at paragraph 124(a)(ii).
- (e) Officers, agents and/or employees of MAF, in issuing and varying the wording of import permits for pollen (without consultation with the industry or other institutions such as Plant & Food) assumed responsibility and control over permitting the importation of pollen and the consequences of importation of pollen and any accompanying plant material.
- (f) At all material times officers, agents and/or employees of MAF were aware that failure to exercise reasonable care and skill in respect to the grant of import permits and the monitoring of performance of and compliance with those permits in respect to kiwifruit pollen and anthers risked serious damage to persons in the category of the first and second plaintiffs.
- (g) The losses suffered by the plaintiffs were a foreseeable consequence of officers, agents and/or employees of MAF failing to exercise reasonable care and skill in the discharge of its duty as set out at paragraphs 122 to 123 in the exercise of their biosecurity functions.
- (h) Officers, agents and/or employees of MAF could have reasonably foreseen that the plaintiffs, and members of the plaintiff classes were particularly vulnerable to serious consequences if officers, agents and/or employees of MAF failed in their biosecurity responsibilities.
- (i) Officers, agents and/or employees of MAF knew, or ought to have known that the plaintiffs and members of the plaintiff groups relied on them to take reasonable care and skill in undertaking their functions and responsibilities in relation to biosecurity in New Zealand.



- (j) MAF (acting through its officers, agents and/or employees) assumed a leadership role in respect of the management of biosecurity in New Zealand.
- (k) In all the circumstances, and considering all relevant policy factors, it is fair and just, in the public interest and in the interests of justice that the pleaded duty be recognised, including but not limited to the following factors:
  - (i) The functions and responsibilities of MAF acting by and through its officers, agents and/or employees under the Act;
  - (ii) Officers, agents and/or employees of MAF had control over and responsibility for the offending conduct in question;
  - (iii) The plaintiffs were extremely vulnerable and unable to protect themselves from the serious but foreseeable consequences of negligence on the part of officers, agents and/or employees of MAF;
  - (iv) Officers, agents and/or employees of MAF had or should have had knowledge of the risks in question;
  - (v) The general policy of the law is to provide redress in these circumstances; and
  - (vi) The Crown is not immune from an action in negligence in these circumstances.
- (l) There are no policy reasons which may make it inappropriate to recognise the pleaded duty of care in the circumstances.

***Breach of duty***

125. Officers, agents and/or employees of MAF failed to exercise reasonable care and skill when undertaking their functions and responsibilities in relation to biosecurity in New Zealand whether under the Act or otherwise in breach of the duties pleaded at paragraphs 122 and 123 above in any one or more of the following respects:
- (a) By failing to exercise reasonable care and skill when deciding to allow importation of kiwifruit pollen, by granting import permits for importation of kiwifruit pollen and by not putting in place adequate import restrictions or requirements for kiwifruit pollen, in any one or more of the following respects:

- (i) As pleaded in paragraphs 51 to 80 inclusive above;
- (ii) By not adequately recognising and responding to the risks associated with the importation of kiwifruit pollen, by way of appropriate amendments to the Nursery Stock IHS or otherwise, until after the outbreak of Psa-V was detected in New Zealand;
- (iii) By failing to undertake a formal risk analysis of pollen imports and failing to consult the kiwifruit industry or other relevant agencies prior to issuing the first pollen import permit or any subsequent pollen import permits issued;
- (iv) The Nursery Stock IHS at 2.2.3 provided for the importation of pollen and required that *"A prior permit to import must be obtained from the Permit Officer"*;
- (v) By deciding to allow importation of kiwifruit pollen and issuing the pollen import permits without exercising reasonable skill or care and failing to assess (or adequately assess) the requirements that should have been met to allow importation of kiwifruit pollen. The first import permit application for kiwifruit pollen from Kiwi Pollen was approved within 18 days (and was never used). All subsequent import permit applications by Kiwi Pollen were approved either on the same day as the permit application, or the day after the permit application, except for an import permit application made on 3 November 2009 (two days after the 2009 EPPO alert) which was approved by MAF on 9 November 2009 (see Schedule 5);
- (vi) By relaxing the importation requirements for importation of pollen even further by approving a change in Kiwi Pollen import permits beginning with number 2008035594, applied for and approved on 3 November 2008, which stated *"The pollen may be milled prior to import"* (emphasis added) (as referred to in Schedule 5 and paragraphs 107 to 109 above). This increased the risk of Psa infected plant material entering New Zealand;
- (vii) By failing to consult with the kiwifruit industry or agencies such as Plant & Food or to advise them that pollen import permits had been issued or that pollen had been imported;

- (viii) The Card Paper co-authored by MAF and Auckland University staff was insufficient, incorrect and mis-stated the risk of pollen transmission of bacteria;
- (ix) Officers, agents and/or employees of MAF did not have reasonable cause to rely on the Card Paper to conclude that pollen would not transmit Psa (as pleaded in paragraphs 67 to 73 inclusive above);
- (x) As a result officers, agents and/or employees of MAF failed to properly assess the risk of pollen as a risk pathway;
- (xi) Officers, agents and/or employees of MAF failed to properly assess the risk of pollen as a risk pathway even when further evidence emerged that undermined the incorrect initial assessment of the risks of pollen (such as for example scientific advice provided to MAF by Plant & Food on 30 September 2010 showing that pollen from infected orchards could carry Psa and should not be imported into New Zealand);
- (xii) By failing to take account of the fact that the process for milling pollen prior to import would mean that the consignments of pollen would inevitably include other plant material (which other plant material had long been recognised by MAF as a vector for Psa);
- (xiii) A risk analysis for pollen imports should have been undertaken prior to allowing importation, which would (or should) have identified the risks from accompanying plant material and possible measures to mitigate such risks (such as testing consignments for Psa). Officers, agents and/or employees of MAF failed to undertake any (or any adequate) risk analysis for pollen imports;
- (xiv) The kiwifruit industry and relevant agencies such as Plant & Food should have been consulted prior to allowing the first consignment of kiwifruit pollen to enter the country (consistent with the consultation obligations in relation to establishing an IHS and internal MAF consultation policy document "MAF Biosecurity Authority Policy Statement on Consultation" signed 29 February 2000 (as pleaded in paragraph 78 above).

- (b) From late 2008 to early 2009 and onwards the Italian PsA-V outbreak was an observable event which was known to (or should have been known to) relevant officers, agents and/or employees of MAF, it marked a significant development in the risk posed by PsA to the New Zealand kiwifruit industry and the reaction by officers, agents and/or employees of MAF to the Italian PsA-V outbreak was inadequate in any one or more of the following respects:
- (i) As pleaded in paragraphs 81 to 106.
  - (ii) By failing to recognise from early 2009 or through 2010 that PsA-V now represented a biosecurity threat that had significantly increased from the time when the nursery stock IHS and pollen import permits were first released;
  - (iii) PsA was never identified by MAF's Risk Detection Committees such as EROC as an emerging risk of concern prior to the outbreak of PsA in New Zealand in October 2010;
  - (iv) Given the noticeable changes in the risk profile of PsA and in line with MAF's internal guidelines, officers, agents and/or employees of MAF should have undertaken a pest risk assessment of PsA. This should have included examining all possible pathways for the pest, considering the economic consequences of PsA entering New Zealand, revisiting existing import requirements and tailoring border processes accordingly;
  - (v) The response by officers, agents and/or employees of MAF to the threat PsA posed to the New Zealand kiwifruit industry was inadequate, too slow, fragmented and lacked coordination or engagement with the kiwifruit industry and other relevant agencies. Officers, agents and/or employees of MAF failed to exercise leadership or make any concerted effort to address the emerging threat PsA presented;
  - (vi) The response of officers, agents and/or employees of MAF to concerns about kiwifruit pollen imports was inadequate in any one or more of the following respects:
    - (i) Prior to the outbreak of PsA in New Zealand MAF did not recognise (or treat) pollen as a possible vector for PsA-V;

- (ii) Officers, agents and/or employees of MAF were informed of the Italian Psa-V outbreak at the latest through the 2009 EPPO alert on or about 1 November 2009;
- (iii) Officers, agents and/or employees of MAF should have been aware of the Italian Psa-V outbreak by early 2009 by which time the Italian Psa-V outbreak was well advanced and was seriously affecting gold kiwifruit and the Italian kiwifruit industry;
- (iv) MAF's Risk Analysis Team tasked with monitoring emerging risks was unaware in 2010 that imports of kiwifruit pollen were even taking place;
- (v) Officers, agents and/or employees of MAF were informed on 30 September 2010 and again on 11 October 2010 by Plant & Food that Psa could be detected on pollen samples from infected orchards in Italy but did not take any adequate action;
- (vi) Despite receiving information from Plant & Food that Psa could be detected on kiwifruit pollen samples officers, agents and/or employees of MAF failed to take action to halt all pollen imports or trigger a response plan to track imported consignments of pollen;
- (vii) Plant & Food was aware in May 2010 that live Psa could be detected on kiwifruit pollen from infected orchards but did not inform officers, agents and/or employees of MAF as it was unaware commercial pollen imports might be taking place. Well before this date officers, agents and/or employees of MAF should have made Plant & Food aware that commercial pollen imports had been taking place. Such pollen imports likely included plant material known by MAF to be a possible vector for Psa;
- (viii) Officers, agents and/or employees of MAF were also aware that Psa was present in China and that pollen imports from China were taking place for the purposes of artificial pollination of New Zealand orchards. Despite this in June 2010 a further consignment of pollen from China was given biosecurity clearance. This consignment

subsequently tested positive for Psa but was never used;

- (ix) Officers, agents and/or employees of MAF were unaware that the Australian quarantine and inspection service reacted to the Italian Psa-V outbreak by requiring all pollen imports to be tested for Psa. No such testing was put in place in New Zealand. It appears officers, agents and/or employees of MAF did not communicate with their Australian counterparts to consider appropriate response to the Italian Psa-V outbreak.

### ***Causation and loss***

- 126. As a result of the breaches of duty pleaded in paragraph 125 above, Psa-V was introduced into New Zealand (as pleaded in paragraphs 110 to 121 inclusive or otherwise) and spread as a result, whereby the first and second plaintiffs have suffered loss as set out in Schedule 2.

### ***Vicarious Liability***

- 127. The breaches of duty by officers, agents and/or employees of MAF, as pleaded in paragraph 125 above, were acts or omissions for which the defendant (on behalf of the Crown) is vicariously liable pursuant to section 6 of the Crown Proceedings Act 1950.

### **WHEREFORE THE PLAINTIFFS CLAIM:**

- A. Damages in an amount to be particularised before hearing.
- B. Interest pursuant to the Judicature Act 1908.
- C. Costs.

### **SECOND CAUSE OF ACTION – NEGLIGENCE**

The first and second plaintiffs repeat paragraphs 1 to 121 and say:

#### ***Duty***

- 128. As part of (but not limiting) the duty pleaded in paragraphs 122 to 123 (as amplified in paragraph 124) above, officers, agents and/or employees of MAF owed the plaintiffs a duty to exercise reasonable care and skill when exercising functions in respect of the border processes for pollen imports, in any one or more of the following respects:

- (a) When managing and controlling the importation of “risk goods”;
- (b) When processing, considering and approving import permits and determining the content and requirements of import permits; and
- (c) When undertaking functions covered by any internal policies of MAF.

***Breach of duty***

129. Officers, agents and/or employees of MAF failed to exercise reasonable care and skill when exercising their functions in respect of the border processes for pollen imports, which were inadequately carried out in any one or more of the following respects:

- (a) MAF border staff should not have given biosecurity clearance to the consignment of “anthers” that were imported under a “pollen” import permit from China in June 2009 (as pleaded in paragraphs 110 to 116 above) because:
  - (i) Anthers are not pollen;
  - (ii) There was no import permit for anthers;
  - (iii) The nursery stock IHS did not apply to anthers, and they were not permitted into New Zealand;
  - (iv) Clearance was not permitted under section 27 of the Biosecurity Act 1993.
- (b) Officers, agents and/or employees of MAF should not have changed or allowed the wording of the import permit applications by Kiwi Pollen making it optional to mill offshore and creating a greater risk of plant material being imported unless checked and rejected at entry (as pleaded in paragraphs 107 to 109 above).

***Causation and loss***

130. As a result of these breaches of duty, PsA-V was introduced into New Zealand and spread, whereby the first and second plaintiffs have suffered loss as set out in Schedule 2.

***Vicarious Liability***

131. The breaches of duty by officers, agents and/or employees of MAF employees, as pleaded in paragraph 129 above, were acts or omissions

for which the defendant (on behalf of the Crown) is vicariously liable pursuant to section 6 of the Crown Proceedings Act 1950.

**WHEREFORE THE PLAINTIFF CLAIMS:**

- A. Damages in an amount to be particularised before hearing.
- B. Interest pursuant to the Judicature Act 1908.
- C. Costs.

This Statement of Claim is filed by **DANIEL JAMES STAVERS PARKER**, solicitor for the plaintiffs. The address for service on the plaintiffs is the office of Parker & Associates, Barristers and Solicitors, Level 14, 157 Lambton Quay, Wellington.

Documents for service on the plaintiffs may be left at that address for service or may be:

- (a) Posted to the solicitor at PO Box 23270, Wellington; or
- (b) Transmitted to the solicitor by facsimile to (04) 499 0391.



### Schedule 1 - First and Second Plaintiffs' details

#### First plaintiff

Name	Registered Office	Occupation	Orchard location	KPIN	Area farmed
Strathboss Kiwifruit Limited	126 Jellicoe Street, Te Puke, Te Puke 3119, New Zealand	Kiwifruit grower	275 Benner Road, Te Puke	4571	17ha gold 49.11ha green (Hayward)

#### Second plaintiff

Name	Registered Office	Occupation	Post-harvest operator ("PHO") location	Description of PHO functions
Seeka Kiwifruit Industries Limited	6 Queen Street, Te Puke, New Zealand	Kiwifruit grower and post-harvest operator	Head office: 6 Queen Street, Te Puke	Packing, coolstorage, inventory management and loadout coordination predominantly of kiwifruit

## Schedule 2 - First and Second Plaintiffs' losses

### (a) First Plaintiff – Strathboss Kiwifruit Limited

1. Strathboss incurred costs of \$301,700 for removal and disposal of the 17 hectares of gold kiwifruit and grafting a replacement G3 variety kiwifruit as follows:

(a) Plant removal/disposal	\$102,000
(b) Grafting to G3 variety	\$63,756
(c) Purchase of G3 licence	<u>\$136,000</u>
<b>Total</b>	<b>\$301,700</b>

2. Strathboss has suffered and continues to suffer significant loss of revenue as a result of the Psa-V outbreak. While calculation of these losses is still ongoing and subject to review they are in summary as follows:

#### 2012

##### ***Gold kiwifruit***

Based on previous years' production, the orchard should have produced 15,000 trays of gold kiwifruit per hectare (a total of 255,000 trays over the 17 hectares planted with gold kiwifruit) (total potential trays). Instead, due to Psa-V a total of only 145,000 trays were produced (actual number of trays), being 8,529 trays per hectare.

Each tray represents a profit to Strathboss of \$8. Therefore, the difference between the total potential trays and the actual number of trays meant a loss of \$880,000, as follows:

Total potential trays (15,000 trays/ha)	255,000
Actual number of trays	145,000
Difference between potential and actual trays	110,000
<b>Total loss (\$8/tray, so 8x110,000)</b>	<b>\$880,000</b>

**Green kiwifruit**

Based on previous years' production, the orchard should have produced 10,000 trays of green Hayward variety (HW) kiwifruit per hectare (a total of 491,100 trays over the 49.11 hectares planted with green HW kiwifruit) (total potential trays). Instead, due to Psa-V, a total of only 316,882 trays were produced (actual number of trays), being 6,452.5 trays per hectare.

Each tray represents a profit to Strathboss of \$6. Therefore, the difference between the total potential trays and the actual number of trays meant a loss of \$880,000, as follows:

Total potential trays (10,000 trays/ha)	491,100
Actual number of trays	316,882
Difference between potential and actual trays	174,218
<b>Total loss (\$6/tray, so 6x174,218)</b>	<b>\$1,045,308</b>

The same calculation can be carried out for each subsequent year, as follows:

**2013****Gold kiwifruit**

Total potential trays (15,000 trays/ha)	255,000
Actual number of trays	0
Difference between potential and actual trays	255,000
<b>Total loss (\$8/tray, so 8x255,000)</b>	<b>\$2,040,000</b>

**Green kiwifruit**

Total potential trays (10,000 trays/ha)	491,100
Actual number of trays	194,000
Difference between potential and actual trays	297,100
<b>Total loss (\$6/tray, so 6x297,100)</b>	<b>\$1,782,600</b>

**2014****Gold kiwifruit**

Total potential trays (15,000 trays/ha)	255,000
Actual number of trays	0
Difference between potential and actual trays	255,000
<b>Total loss (\$8/tray, so 8x255,000)</b>	<b>\$2,040,000</b>

**Green kiwifruit**

Total potential trays (10,000 trays/ha)	491,100
Actual number of trays	314,000
Difference between potential and actual trays	177,100
<b>Total loss (\$6/tray, so 6x177,100)</b>	<b>\$1,062,600</b>

3. In addition to the significant and ongoing loss of revenue Strathboss is suffering as a result of the Psa-V outbreak, it has also incurred the following additional and ongoing costs as a result of the Psa-V outbreak:
  - (a) Spraying costs – estimated \$1,200/ha increase in spraying costs across the entire 66.11 ha orchard each year since 2011, totalling a cost to date over four years of \$317,328.
  - (b) Purchase of extra Sprayer Unit at a cost of \$85,000
  - (c) Additional interest costs were incurred at an annual rate of 7% for the overall orchard in relation to extra borrowing that was required. Details of the additional borrowing and interest costs are being calculated.

**(b) Second Plaintiff – Seeka Kiwifruit Industries Limited**

1. Seeka has suffered and continues to suffer significant loss of revenue as a result of the Psa-V outbreak. While calculation of these losses is still ongoing and subject to review, they are forecast to total approximately \$53 million and are mostly comprised of losses associated with the reduction in supply of kiwifruit due to the Psa-V outbreak in New Zealand in 2010 plus other consequential losses and costs.

**Schedule 3 – Identity of class and summary of grower plaintiff members at time of filing**

**Grower plaintiffs**

Those growers of kiwifruit, green or gold, who have also suffered losses of the kind referred to in Schedule 2 (a) as a result of the outbreak of Psa-V in New Zealand allegedly caused by the negligence as pleaded in the Statement of Claim.

***Grower plaintiffs at time of filing Statement of Claim***

<b>Total number of growers signed</b>	41
<b>Total hectares of green kiwifruit</b>	790.30
<b>Total hectares of gold kiwifruit</b>	445.32
<b>Total hectares unspecified</b>	7.014

**Schedule 4 – Identity of class and summary of post-harvest operator plaintiff members at time of filing**

**Post-harvest operator plaintiffs**

Those kiwifruit post-harvest operators who have also suffered losses of the kind referred to in Schedule 2 (b) as a result of the outbreak of Psa-V in New Zealand allegedly caused by the negligence as pleaded in the Statement of Claim.

**Schedule 5 - Imports of pollen into New Zealand from 2000 to 2011**

Permit Number	Importer	Date application submitted	Date application approved	New / Renewed Permit	Exported from	Permit Special Conditions	Consignment number
2007031028	Kiwi Pollen	29 March 2007	16 April 2007	New	Exporter name: Bexley Inc, China  Valid for 12 months, multiple consignments	Only hand collected, unopened male flower buds may be collected, milled and imported. Consignments must be accompanied by a government issued phytosanitary certificate stating that the male flower buds were hand collected and unopened.	Permit not used
2007033015	Kiwi Pollen	7 December 2007	7 December 2007	New	Exporter name: Chile  Valid for 12 months, multiple consignments	As above	Permit not used
2008034955	Kiwi Pollen	15 August 2008	15 August 2008	New	Exporter name: Kiwi Pollen	Pollen is to be inspected for visible signs of contamination.	c2008/261720



20080355594	Kiwi Pollen	3 November 2008	3 November 2008	New	Country of origin: Thailand Valid for 12 months, single entry Exporter name: Apicola Martinez SRL Country of origin: Chile Valid for 12 months, multiple consignments	Unopened male flower buds must be hand collected. The pollen may be milled prior to import. All consignments must be accompanied by a phytosanitary certificate issued by the National Plant Protection Organisation of the exporting country with the following Additional Declaration: "The male flower buds were hand collected and unopened".	1 unit of NZ-origin pollen ex Thailand returned for germination and quality testing  c2008/352699 Arrived 15/12/2008 2.5kg of pollen  c2009/67312 Arrived 28/3/2009 26kg of pollen
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2009036858	Kiwi Pollen	29 April 2009	30 April 2009	Renewal (replaces 20080355594) <sup>1</sup>	Exporter name: Bexley Inc Country of origin: China Valid for 12 months, multiple consignments	As above	c2009/140782 Arrived 24/6/2009 4.5kg of anthers
2009036865	Kiwi Pollen	29 April 2009	30 April 2009	New	Exporter name: Apicola Martinez SRL Country of origin: Chile Valid for 12 months, multiple consignments	As above	Permit not used

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<sup>1</sup> This permit for the import of Chinese pollen was recorded as a renewal of a permit for Chilean pollen. MAF advise that this was due to the way the approving officer chose to approve the permit in their database system and it would not have any impact on whether the permit should have been approved. Each permit (regardless of whether a new permit or a renewal) is subsequently peer reviewed before going to a third person for delegated approval.

2010040083	Kiwi Pollen	3 November 2009	9 November 2009 <sup>2</sup>	Renewal (replaces 20090368 58)	<p>Exporter name: Bexley Inc</p> <p>Country of origin: China</p> <p>Valid for 12 months, multiple consignments (revoked on 12 November 2010)</p>	<p>Arrived 6/6/2010</p> <p>1kg of pollen</p>
2010039375	Plant & Food	Unknown	5 March 2010	New	<p>Exporter name: 'various' from Italy, Japan, Korea, China</p> <p>Valid for 12 months, multiple consignments</p>	<p>C2010/272317</p> <p>4 vials of Kiwifruit pollen samples arrived from Italy on 19/9/2010</p> <p>1. Must be labelled</p> <p>2. Must be consigned in secure packaging</p> <p>3. Must be stored and used at transitional facility in accordance with their procedures</p>

<sup>2</sup> This import permit wrongly recorded that the permit was approved on 9 October 2009, which was confirmed by MAF as a mistake. The error was not reflected on the database used at the border for clearing imported goods.

2010039663	Plant & Food	15 April 2010	15 April 2010	New	of 1gm pollen samples	4. Not to be removed without consent of inspector 5. Material remaining after analysis must be incinerated/autoclaved 6. Importer must keep record of all samples and their current status 7. If conditions cannot be met material may be reshipped or destroyed	C2010/114074 39 bags of pollen samples from Italy arrived on 1/6/2010
2011042606	Plant & Food	Unknown	12 May 2011	Renewal (replaces permit 2010039375)	Exporter name: 'various' from Italy, Korea, China Valid for 12 months, 36 consignments of 5gm pollen samples	Same as above	C2011/156137 1 package of kiwifruit pollen from Italy arrived 13/6/2011

