

Apple and Pear Industry Restructuring Act Repeal Bill

Government Bill

As reported from the Primary Production Committee

Commentary

Recommendation

The Primary Production Committee has examined the Apple and Pear Industry Restructuring Act Repeal Bill (the Bill) and recommends that it be passed with the amendments shown.

Introduction

The purpose of the Bill is to deregulate the exporting of apples and European pears and enable growers to freely choose their exporter. The current legislation, comprising the Apple and Pear Industry Restructuring Act 1999 (the Act) and the Apple and Pear Export Regulations 1999 (the regulations), provides for ENZA Limited (ENZA) to be the main exporter of apples and European pears. This has limited growers from having a choice of exporters. The Bill revokes the regulations and repeals the Act, thereby removing ENZA's privileged export right and enabling other exporters to compete against ENZA without the current restrictions.¹

Of the 114 submissions that we received, three submissions opposed deregulation, while the remainder supported or accepted deregulation.

¹ Under the current regulations independent exporters must apply for an export permit from the Apple and Pear Export Permits Committee, which must be satisfied that any application does not undermine ENZA's marketing activities or reputation in relevant markets.

Residual enforcement of the New Zealand Apple and Pear Board's decisions

We recommend the Bill be amended to provide for the Director-General of Agriculture and Forestry (the Director-General) to undertake any enforcement of decisions made by the New Zealand Apple and Pear Board (the Board) that have not been enforced by 30 September 2001. This will ensure, in particular, that the Crown can enforce the remedy the Board has determined against ENZA as a result of its breach of the non-diversification rule.²

Transfer of assets and liabilities of the Apple and Pear Board and the Apple and Pear Export Permits Committee

Clause 5 relates to the transfer of assets and liabilities of the Board and the Apple and Pear Export Permits Committee (the Committee). Specifically, clause 5 provides for the transfer of:

- the assets of the Board to ENZA
- the assets of the Committee to persons who hold permits as a result of applications made between 1 October 2000 and 30 September 2001
- the liabilities of the Board and the Committee to the Crown.

We recommend no change to the Bill in relation to the liabilities of the Board or the Committee. We note there are potential contingent liabilities for the Crown associated with the Board's determination that ENZA has breached the non-diversification rule. However, we understand the Government will introduce a Supplementary Order Paper to address this issue at the committee of the whole House stage.

Definition of 'fees'

We recommend an amendment to the Bill to define 'fees' in clause 3 (Interpretation) as being 'permit fees levied by the Committee on the basis of volume of fruit approved'. This will ensure the Committee's

² In its decision of 14 August 2001, the Board found that certain foreign exchange transactions entered into by the New Zealand Apple and Pear Marketing Board in February 2000, and ENZA in July 2001, were in breach of regulation 11 (the non-diversification rule). As a result of its findings, the Board issued an order on 31 August 2001 to require ENZA to pay compensation and costs and to cease and desist from deducting losses from payments to 2001 suppliers.

net assets are distributed equitably upon its dissolution at 30 September 2001.

New provisions

We recommend the Bill be amended to insert new clauses 5A and 5B. New clause 5A provides for:

- the transfer of certain powers and functions of the Board to the Director-General under the regulations
- the Director-General to commence, carry on, or complete any action against ENZA (including legal proceedings)
- the Director-General to carry on, complete, enforce or defend any legal proceedings that are pending by or against the Board
- any money that is payable to the Board to be recovered by the Director-General in the name of the Board
- the transfer of all records of the Board and the Committee to the Director-General.

This will ensure the Director-General is able to implement the Board's enforcement action(s) against ENZA from 1 October 2001, if required.

New clause 5B provides for members of the Board and the Committee to be protected from any claims made against them in respect of any liability of the Board or Committee, or any acts or omissions by the Board or Committee, where those acts or omissions were conducted in good faith.

Foreign exchange liabilities issue

The vast majority of submissions that we received were concerned with foreign exchange (forex) losses and costs relating to Omniport Napier Limited that ENZA is attempting to deduct from grower returns for the 2001 and 2002 seasons. This matter is outside the scope of the Bill, but is a major issue that is having a serious impact on the industry.

Background

From 1989 the then New Zealand Apple and Pear Marketing Board (NZAPMB) began to enter into forex transactions to optimise returns for growers while the New Zealand dollar was appreciating. Gains were made in the early 1990s but in 1997 the New Zealand

dollar stopped rising and the forex cover created losses on conversion.

In early 2000 the NZAPMB was confronted with significant losses as a result of forex contracts that were maturing. Rather than impose these losses on growers in one season, the NZAPMB decided to:

- offset approximately one third of the losses against part (around \$17 million) of the proceeds from the sale of Frucor Beverages Limited in 1999
- convert the remaining two thirds of the 2000 contracts into option contracts that would mature in June 2001 and June 2002.

This strategy enabled the liabilities that should have been borne in 2000 to be pushed out to 2001 and 2002. The assumption underlying this strategy was that the New Zealand dollar would strengthen later in 2000 and beyond, and grower losses on these contracts would abate. However, this did not occur. During the hearings of evidence, some submitters questioned the wisdom of this strategy.

When the NZAPMB was restructured on 1 April 2000 and became ENZA, the assets and liabilities of the NZAPMB were transferred to the new company. ENZA argues that the forex losses and gains were part of a 'grower account' under the NZAPMB and are, therefore, deductible from grower payments.³ ENZA also states that this was explicitly reflected in the 2000 and 2001 supply contracts with growers.

Grower submissions

Conversely, many growers in their submissions maintained that the forex losses, which now total approximately \$55 million, are the responsibility of ENZA and strenuously opposed the decision to deduct the losses from grower returns. Growers told us they were unaware of the extent of the forex losses faced by ENZA when they signed the contracts for the supply of fruit for the 2001 season. Further, many claimed that they signed the contracts under duress, believing they had little commercial alternative because of the timing of seasonal harvesting.

³ The term 'grower account' refers to the revenues and costs attributable to fruit payments to grower suppliers and is separate from the accounts of ENZA the company.

A large number of submitters suggested the Bill be amended to require ENZA shareholders to pay ENZA's forex liabilities, provide for an independent audit of deductions to supplier payments for 2001 and change ENZA's constitution.

Growers also expressed grave concerns at the commercial behaviour of ENZA towards them. We share those concerns, particularly in respect of the unilateral action taken by ENZA to close out the 2002 forex contracts and deduct all the losses from the 2001 suppliers.

Resolution of issue

We have been strongly encouraging the parties involved in the dispute—ENZA and Pipfruit Growers of New Zealand Incorporated (PGNZI) on behalf of growers—to work quickly towards procuring a full and final settlement. We have also been closely monitoring efforts by the industry to resolve the issue, including inviting public briefings from ENZA, PGNZI, the Board and the New Zealand Fruitgrowers Federation.

We note that ENZA and PGNZI have now reached a proposed agreement to settle the dispute and are awaiting a response from growers, due 7 September 2001, and confirmation of ENZA obtaining satisfactory bank financing, due 30 September 2001. Given these deadlines, we have questioned the timing of the passage of the Bill and express disappointment in the length of time required for ENZA to confirm its financial arrangements.

We hope the response from growers is conclusive and the industry is able to resolve the issue on its own terms. However, in the event that the response is inconclusive or the negotiations between the parties break down after the response is known, we recommend that the Government introduce a Supplementary Order Paper to provide a full and final settlement of the dispute through government intervention before 1 October 2001.

We consider our recommendation removes the need to amend the Bill to require ENZA shareholders to fund ENZA's forex debt. Also, we note that after 1 October 2001 the Crown has the ability to investigate and ensure the accuracy of any liabilities deductions made by ENZA. We consider this addresses submitters' request for an independent audit of deductions to 2001 supplier payments. Finally, we do not recommend the Bill be amended to change ENZA's constitution, as this is the responsibility of ENZA's shareholders.

Appendix

Committee process

The Apple and Pear Industry Restructuring Act Repeal Bill was referred to the committee on 26 June 2001. The closing date for submissions was 20 July 2001. We received and considered 114 submissions from interested groups and individuals. We heard 18 submissions. Hearing evidence took five hours and 46 minutes and consideration took three hours.

We received advice from the Ministry of Agriculture and Forestry.

Committee members

Damien O'Connor, Chairperson

Gavan Herlihy, Deputy Chairperson

Shane Ardern

Clayton Cosgrove

Ian Ewen-Street

Martin Gallagher

Phil Heatley

Mark Peck

Mita Ririnui

R Doug Woolerton

Leave was given for John Wright and Stephen Franks to serve as non-voting members of the committee. Hon Dr Nick Smith and Owen Jennings attended a number of meetings as replacement members.

Committee secretariat

Bob Bunch, Clerk of the Committee

April Bennett, Parliamentary Officer (Select Committees)

Key to symbols used in reprinted bill

As reported from a select committee

New (unanimous)

Subject to this Act,

Text inserted unanimously

Hon Jim Sutton

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4	Repeal of Apple and Pear Industry Restructuring Act 1999		

The Parliament of New Zealand enacts as follows:

1 Title

This Act is the Apple and Pear Industry Restructuring Act Repeal Act **2001**.

Part 1

Preliminary provisions

5

2 Commencement

This Act comes into force on **30 September 2001**.

3 Interpretation

In this Act, unless the context otherwise requires,—

Board means the New Zealand Apple and Pear Board established by regulation 25 of the Apple and Pear Export Regulations 1999 10

Committee means the Apple and Pear Export Permits Committee established by regulation 36 of the Apple and Pear Export Regulations 1999 15

New (unanimous)

Director-General means the chief executive of the Ministry of Agriculture and Forestry or any other Ministry that, with the authority of the Prime Minister, for the time being assumes responsibility for the administration of this Act

ENZA means the company incorporated under the Companies Act 1993 as at 1 April 2000 with the name ENZA Limited 5

New (unanimous)

fees means permit fees levied by the Committee on the basis of the volume of fruit approved to be exported under an export permit.

Part 2 10

Repeal and related matters

4 Repeal of Apple and Pear Industry Restructuring Act 1999

The Apple and Pear Industry Restructuring Act 1999 (1999 No 96) is repealed. 15

5 Dissolution of Board and Committee

(1) On the commencement of this Act,—
(a) the Board and the Committee are dissolved and the term of office of every member of the Board and the Committee ends: 20

(b) the assets—
(i) of the Board vest in ENZA:
(ii) of the Committee vest, in accordance with **subsection (2)**, in each person who holds a permit as a result of an application made during the period of 1 October 2000 to 30 September 2001: 25

(c) the liabilities of the Board and the Committee vest in the Crown.

(2) The assets vest in the same proportion as the amount of fees paid by each permit holder bears to the total fees paid for 30

export permits by all permit holders in the period of 1 October 2000 to 30 September 2001.

New (unanimous)

5A Transitional provision

- (1) On and from the commencement of this Act,—
- (a) the Director-General has, and may exercise in the name of the Board, the powers of the Board—
 - (i) to take action under any authorisation issued by the Board to ENZA under Part 2 of the Apple and Pear Export Regulations 1999: 5
 - (ii) to perform the functions of the Board under regulation 26(1)(b) of the Apple and Pear Export Regulations 1999: 10
 - (iii) to commence, carry on, or complete any action by the Board (including legal proceedings) in respect of ENZA under **subparagraphs (i) and (ii)**: 15
 - (iv) to carry on, complete, enforce, or defend any legal proceedings pending by or against the Board; and
 - (b) all money payable to the Board is payable to, and recoverable by, the Director-General in the name of the Board; and 20
 - (c) all records and other information held by the Board and the Committee must be transferred to the Director-General.
- (2) Anything done under **subsection (1)(a)** has the same effect as if the Board had not been dissolved and the Apple and Pear Export Regulations 1999 had not been revoked. 25

5B Liability of members of Board and Committee

- No person who was a member of the Board or Committee is personally liable— 30
- (a) for any liability of the Board or Committee; or
 - (b) for any act done or omitted to be done by the Board or Committee in good faith in the performance or intended performance of the functions, duties, or powers of the Board or Committee. 35

- 6 No compensation**
No compensation is payable by the Crown to any person for any loss or damage arising from the enactment or operation of this Act.
- 7 Revocation and consequential amendments** 5
- (1) The Apple and Pear Export Regulations 1999 (SR 1999/311) are revoked.
- (2) The First Schedule of the Official Information Act 1982 is amended by omitting the following items: 10
- (a) “The New Zealand Apple and Pear Board”; and
- (b) “The separate independent body appointed by the Board under the Apple and Pear Industry Restructuring Act 1999 to permit other persons to export apples and pears”.

Legislative history

19 June 2001	Introduction (Bill 140-1)
26 June 2001	First reading and referral to Primary Production Committee
