APPLE AND PEAR INDUSTRY RESTRUCTURING BILL

AS REPORTED FROM THE COMMITTEE ON THE BILLS

COMMENTARY

Recommendation

The Committee on the Bills has examined the Apple and Pear Industry Restructuring Bill and recommends by majority that it be passed with the amendments shown in the bill.

Conduct of the examination

The Apple and Pear Industry Restructuring Bill was referred to the Committee on the Bills on 20 July 1999. The closing date for submissions was 13 August 1999. We received and considered 54 submissions from interested groups and individuals. We heard 29 submissions orally. Hearing evidence took four hours and 30 minutes and consideration took four hours.

We received advice from the Producer Board Project Team, the Ministries of Agriculture and Forestry and Commerce, Treasury and the Inland Revenue Department. Advice was also received from the New Zealand Apple and Pear Marketing Board (the Board) and Pipfruit Growers New Zealand Incorporated (PGNZI). The Regulations Review Committee reported to the committee on the powers contained in clause 25 of the bill.

This commentary sets out the details of our consideration of the bill and the major issues we addressed.

Purpose

Part 1 provides for the restructuring of the Board into a company called ENZA Limited (ENZA). This company is to be responsible for the commercial activities of the Board. A new board is to be established by regulations made under Part 2. The new board will be responsible for monitoring and enforcing ENZA's compliance with certain regulations to be made under Part 2. The new board will also be responsible for appointing a new independent export permits committee.

Part 2 contains regulation-making powers. These provide for, among other things:

Price Code: J

- the establishment of and other matters relating to the new board
- control of regulation of exports of apples and pears
- requirements in respect of the corporate form, governance and operation of ENZA
- information disclosure requirements.

Background

The international marketing of New Zealand apples and pears has been carried out by the Board since 1948. It is a statutory body, governed by the Apple and Pear Marketing Act 1971.

The Board's principal functions are to acquire, export and market, outside New Zealand, apples and pears. The Board is required to accept all apples and pears that meet the relevant standards for export. The Board is responsible for the export consents regime and commissioning research. In addition, the Board undertakes certain activities in relation to other horticultural products, as approved by the relevant Minister.

Following discussions between the Board and the Government, an agreement was reached in June 1999 on a reform package, which has the features in the bill.

Process for implementation

Under the bill, the Board must prepare a restructuring plan. In the restructuring plan, the Board is to become a company registered under the Companies Act 1993, and the shares in the company are to be tradeable, at least among growers (but not linked to supply). This restructuring plan is then given to the responsible Minister for approval. Following Ministerial approval, a referendum is held on the restructuring plan, in which growers of apples and pears can vote. Seventy-five percent of those who vote need to support the plan. If such support is attained, the restructuring plan is then confirmed by the Minister. If this level of support is not reached, the Minister must specify a share allocation plan and a constitution for the company that are consistent with the Act and the regulations.

The export control regime

Part 2 provides for regulations to be made that will authorise ENZA to be the main exporter of apples and pears.

Support for the export control regime is divided. While some growers and grower organisations support the regime, a number of submitters, including some growers and grower associations, want export controls removed immediately or subject to a sunset provision. Submitters opposing export controls say such controls shield the Board from competition and stifle innovation. If the industry is deregulated, ENZA would continue to be the dominant exporter of apples and pears, subject to good performance. Other submitters propose growers should vote in a referendum on the removal of export controls, and that certain categories of fruit, such as organic fruit, should be exempt from the regime.

The proposed export control regime reflects the agreement between the Board and the Government. Control of exports is a public policy issue, and the effect on the economy as a whole needs to be taken into account. It is not appropriate in this context, for decisions to be made by grower referendum. We also believe that creating certain classes of pipfruit, such as organic fruit, that are exempt from the export control regime would undermine the regime as a whole, and do not support such an exemption.

The export permit process

The new board is to appoint an independent committee to approve export permits for growers who wish to export apples and pears outside the ENZA framework. The bill provides for regulations to be made providing for the terms and conditions that may or may not be imposed as part of the permit.

Currently, export consents are granted on the basis of being complementary to the Board's marketing activities. While there is support for the retention of the "complementarity" principle, some submitters want export permits to be assessed on their own merits, even if they are not complementary to ENZA's activities.

Grocorp submits that, if full deregulation does not occur, there must be a mechanism whereby growers who satisfy specified volume thresholds are able to obtain an export consent.

Horticultural exporters and some growers express their frustration with the current export consents process and feel this process is difficult and unfair, particularly as export consents currently last for only one year. Because of the resources required to establish and develop a new export opportunity, they want consents to be granted for longer periods, if not in perpetuity.

A further issue concerns the amount of time taken to grant consents. There is a need for sufficient time for successful export consent applications to be efficiently implemented. Therefore, the timetable for the consideration and granting of consents needs to be reviewed.

The aim of the export consents process is to encourage innovation, while preserving ENZA's position as the main marketer of apples and pears. The application must not undermine ENZA's marketing activities. In addition, applications must not be likely to result in any adverse effect on ENZA's reputation in the relevant market or markets.

The export permits committee will be empowered to grant export permits for any period of time. The export permits committee will also be under an obligation to consider applications in a timely fashion. We consider these aspects of the permits regime will address some of the concerns about the current consents process.

Membership of the export permits committee

Some submitters want the members of the export permits committee to be independent, particularly of the new board, and impartial. They believe the members of the export permits committee should be elected directly by growers, or alternatively that the Government should play a role in the appointment process. Other suggestions include a proposal that the chairperson of the committee have a legal background, or be a senior lawyer or retired judge.

The draft regulations provide that members of the export permits committee are to be appointed by the new board. The members of the export permits committee must be independent of both the board and ENZA. An express conflict of interest provision has been included. Both aspects aims to address concerns about player/referee issues. We believe that not having the Government involved in the appointment process provides clear accountability and means that the industry is directly responsible for appointments to the committee. We consider that precise criteria such as regional representation or specific skills is

unnecessarily prescriptive, and prefer to allow the new board the freedom to appoint an appropriate mix of people.

Structure of ENZA

Under the bill, the Board is to become a company called ENZA. Shares in ENZA are to be allocated to growers as provided in the share allocation plan, which will be included in the restructuring plan prepared under clause 5.

Corporate versus co-operative structure

Most submissions support the corporate structure proposed. This structure represents the agreement reached between the Board and the Government. In the Government's view, there are limitations associated with a co-operative company form when combined with a single buyer (monopsony), including lack of effective shareholder control of management, more limited access to capital, poorer price signals to shareholders and suppliers, less responsiveness to changing market conditions, and a less flexible commercial structure. In an ordinary environment, any limitations associated with the co-operative form may be freely accepted by shareholders. However, the circumstances of a monopsony producer board are not ordinary, as shareholder and supplier choice is very limited. In this context, the limitations associated with a co-operative form raise significant public policy concerns.

Allocation of shares

The bill provides that shares in ENZA are to be allocated to growers as provided in the share allocation plan. A number of submissions comment on how the shares should be allocated and, in particular, there is strong support for the grower ownership of ENZA through the issue of shares.

The Wakatu Incorporation and Ngati Rarua Atiawa Iwi Trust express concern about the definition of "grower" in clause 2. This definition means that, where lessees of land are growers of apples or pears, shares are allocated to lessees of land, rather than the landowners. The Wakatu Incorporation and Ngati Rarua Atiawa Iwi Trust submit that shares should be allocated to landowners, who may assign them to lessees if appropriate. This concern arises especially from the operation of statutory leases under the Maori Reserved Land Amendment Act 1997. Their concern is that the unbundling of asset returns and asset values for on-orchard and off-orchard activities may result in a corresponding decrease in land values as more shares are issued. The asset owned by Maori reserved landowners is the unimproved value portion of the land value, and the reduction in land value largely affects the unimproved value portion of the land.

The bill makes it clear that shares in ENZA are to go to persons carrying on business as growers of apples and pears for sale. This reflects section 10 of the Apple and Pear Marketing Amendment Act 1988, which provides that the Board's assets belong ultimately to growers.

The Valuer-General advises that an increase in the value of shares, with a corresponding reduction in realty value, is likely to have an effect on land value. However, the reduction in value of unimproved land is affected by the extent to which the off-orchard asset values have been capitalised into the unimproved value component of the land value. If such capitalisation has occurred, the Valuer-General states, it can be argued that lessors have previously benefited from a higher return than may otherwise have been possible due to such capitalisation.

From an economic perspective, we consider it is more efficient for the value of future returns from ENZA to be reflected in share values rather than land values.

This means that land values will then reflect true market value. To the extent that the land values currently reflect expected future returns in the Board or ENZA, that value properly belongs to the supplier of the fruit. If this supplier is a lessee, the value belongs to the lessee, not the landowners. Rents in Maori reserved land are negotiated every seven years, which will allow Maori reserved landowners to renegotiate land rentals. We have been informed that the Government has met with Maori interest groups to discuss their concerns on these issues in relation to the Dairy Industry Restructuring Bill. In addition, the Board has been invited by Government to ensure that Maori interest groups' concerns are taken into account when finalising the reform proposal. We consider it is more appropriate to deal with this issue through these processes.

Tradeability of shares in ENZA

Clause 7 (1) (b) states that the shares in ENZA are to be fully tradeable, at least among growers. The bill allows the class of eligible shareholders to be extended by ENZA. This allows flexibility to accommodate possible future changes in the industry.

Submitters are divided whether shares in ENZA should be tradeable among growers only, or whether they should be fully tradeable. Submitters who support shares being fully tradeable consider the bill should enable growers to sell shares to the highest bidder, whether that bidder is a grower or not. This would allow shareholders the opportunity to extract full value from their shares if they leave the industry or wish to sell shares for any other reason. They maintain if growers support ENZA and do not want to lose control of their business, they have the choice of retaining their shares. Full tradeability of shares would work to ensure that ENZA performs efficiently.

We note that there is no regulatory impediment should ENZA and its shareholders wish to move to full tradeability of shares. The regulations allow the constitution of ENZA to include a share cap, provided the cap is limited to no less than 20 percent, and is simple and inexpensive to administer.

We recommend an amendment to clause 7 (2) to clarify that the board of directors of ENZA has the discretion to determine who is a "grower" for the purposes of tradeability.

Submission that shareholding should be linked to supply

One submitter expresses concern that share ownership of ENZA has no relationship with the supply of apples and pears. The bill does not provide an automatic right for new suppliers of apples and pears to have a vote or share in ENZA's affairs.

We note that linking shareholding to the supply of fruit would take away growers' choice whether to have capital invested in ENZA or not. It would also reduce the quality of pressures for performance and accountability. New growers entering the industry can purchase shares from other growers if they so wish.

The new board

The bill provides for the establishment of a new board, which is to have a regulatory function. Part 2 contains regulation-making powers that provide, among other things, for the establishment, functions, powers, membership and other matters relating to this new board.

Role of the new board

There is support in submissions for the monitoring and enforcement role of the new board, and the associated split of regulatory and commercial functions this represents. However, some submitters note that if export controls are removed, there is no need for a new board to be established. This would therefore eliminate extra costs.

The new board's main task is to monitor and enforce ENZA's compliance with the mitigation measures in the bill—information disclosure, non-discrimination, non-diversification, and arms length rules. The board is necessary to promote compliance with these measures, which are designed to counter the costs and risks associated with a monopsony.

Membership of the new board

The proposed membership structure of the new board is: two members appointed by PGNZI; two members elected directly by growers; and one member appointed by the other members. This is set out in the draft regulations.

Some submitters argue that all members of the new board should be directly elected by growers. The directors of all bodies created under the bill should be appointed by shareholders. The creation of different categories of directors, appointed by different methods, is opposed. In addition, other submitters oppose the appointment of directors by PGNZI.

The membership structure set out in the draft regulations reflects the agreement between the Board and the Government. We consider that removing the Government from the appointment process improves accountability and means that the industry is directly responsible for the appointment of members of the new board. Direct election of all members was not preferred by the industry when negotiating with the Government.

Removal of obligation to buy fruit

The bill provides for the removal of the current obligation on the Board to buy all fruit that meets the relevant export standard. Clause 25 (f) provides that regulations may be made restricting discrimination among suppliers to commercial grounds.

Some submitters believe that removing the obligation to buy fruit while still retaining export controls will result in ENZA not taking pipfruit from particular growers or particular regions. Regions producing smaller volumes of fruit may be rejected on commercial grounds. In addition, regional variations in harvest may restrict market opportunity for later harvesting regions such as Horowhenua if the company requirements are met by the larger and earlier harvesting regions.

The combination of the retention of single desk marketing and the removal of the obligation to buy fruit is opposed by a number of submitters. They suggest that if fruit is not bought by ENZA, the grower should automatically be granted an export permit.

We consider the security associated with the obligation to buy is overstated. Under the present regime, the Board's obligation to buy depends on a number of factors. The determination of whether fruit is of export quality is an issue over which the Board has a substantial degree of influence.

We consider there are measures in place to mitigate any concerns about the removal of the obligation to buy. Firstly, under the new regime, ENZA will

determine the type and quality of the fruit it wishes to purchase. These criteria must be notified to growers one month before coming into effect. ENZA will be obligated to publicly disclose its terms and conditions for the purchase of apples and pears, and the period for which the terms are applicable.

Secondly, the non-discrimination rule will only permit ENZA to discriminate between growers on commercial grounds. The draft regulations provide that a commercial ground includes, but is not limited to, matters relating to product features, quality, quantity, timing, location, risk, or potential returns. Acquisition by ENZA will be driven in response to market demand, not production. The main result of this will be that the cost of surplus fruit that is not bought by ENZA will be left with the supplier, not deducted from ENZA's revenues and averaged across growers. The new regime is intended to send clearer investment signals to growers, and make the industry more market-driven.

Concerns that fruit will not be bought from outlying regions may be overstated. We have been advised that growers in outlying regions already bear the transportation costs associated with bringing their fruit to market.

ENZA's onshore activities

Clause 25 (i) provides for regulations to be made requiring ENZA to operate its core business at arms length from its activities in contestable markets in New Zealand. Assets held by ENZA in post-harvest facilities will be transferred to a subsidiary company.

Some submitters believe ENZA should be required to divest its onshore interests in post-harvest activity. Others consider the company owning such onshore assets should be completely independent, with freely-tradeable shares. Submitters consider this would avoid any risk of cross-subsidisation or the use of captured capital for non-core activity.

Although the complete divestment of ENZA's interests in onshore activity would conclusively eliminate the risks identified above, we consider the proposed arms length regime will help address these policy concerns. To strengthen the arms length rules, we recommend that clause 25 be amended to provide that these rules prevail over any other rule or enactment. This is aimed particularly at directors' duties under the Companies Act, and aims to ensure that directors of ENZA and the subsidiaries that act at arms length are not exposed to a challenge that they may be acting in a manner inconsistent with ordinary director duties.

Acquisition of fruit free alongside ship

Currently, the Board takes ownership of fruit when it arrives at a coolstore approved by the Board. However, ENZA will be under an obligation to move to free alongside ship (FAS) acquisition of fruit no later than 1 October 2000, and earlier if practicable.

Some submitters consider the move to FAS acquisition of fruit should be made as soon as possible and, in particular, ensure it is in place for next season. Others, on the other hand, submit that ENZA should move to free on board stowed (FOBS) acquisition of fruit.

We have been advised that the Board does not support the move to FOBS, although there is no regulatory impediment to ENZA moving to FOBS acquisition in the future if it wishes to. We note that moving to FAS acquisition of fruit will promote contestability in post-harvest facilities.

Information disclosure

Clause 25 provides for regulations to be made relating to information disclosure by ENZA as well as in respect of holders of export permits.

The Institute of Chartered Accountants submits that these regulation-making powers are unnecessary and should be removed. It considers it would be more appropriate and efficient to use the financial reporting standards mechanism in the Financial Reporting Act 1993. The information disclosure requirements provided in the bill are either already required under the Financial Reporting Act, or could be dealt with through that Act by the development of an appropriate financial reporting standard. The Institute of Chartered Accountants submits that the changes it recommends would result in increased efficiency and lower compliance costs than industry-specific regulations.

The information disclosure requirements to be included in the regulations provide a key mitigation measure. Information disclosure will assist in enforcing other mitigation measures provided for in the bill, as well as enhance transparency in ENZA's activity. Furthermore, we note that the information disclosure regulations provided are specifically aimed at a monopsony situation, which has different requirements from a standard company registered under the Companies Act. Information disclosure is a standard competition policy tool.

Research and development

At present, the Board is the source of industry research and development funding. The allocation of funding is carried out by the Board in consultation with a subcommittee of PGNZI.

Some submitters are concerned that, unless specific provision is made to fund the research and development of fruit production technologies as well as exportable fruit and fruit varieties, a significant commercial advantage will be lost. PGNZI submits that while it is likely ENZA will continue to fund research that has a direct commercial benefit, this will leave more than 50 percent of the present research projects without certainty of funding. These are projects that benefit all producers rather than a specific company, and are projects where the commercial return is either difficult to measure or long-term. One submitter notes that the interests of ENZA as a marketer and the interests of growers may be in conflict. If insufficient funding is provided for research and development, the main thrust of research may be the development of new apple varieties, the intellectual property in which can be marketed overseas. This, it is argued, would be detrimental to the interests of the industry as a whole.

Submitters suggest that one of the functions of the new board should be the provision of funding for "industry good" research, and a statutory source of funding for this research should be provided. A production-based levy is suggested as a source of funding.

The new board has a limited role under the bill. If "industry good" research and development is considered desirable, this can be undertaken through other industry organisations, such as PGNZI. Funding for such research can be obtained by way of a levy under the Commodity Levies Act 1990. Research and development can be funded by ENZA, subject to the non-diversification rule. Therefore, we recommend no change in relation to this issue.

Intellectual property in plant variety rights

Some new apple varieties have been developed following agreements between the Board and the Horticulture and Food Research Institute of New Zealand (HortResearch), where the Board has contributed some but not all of the funding. In some cases, HortResearch has chosen to commercialise its plant variety rights by entering into an exclusive licence arrangement with the Board. Under the new regime, existing licence agreements between HortResearch and the Board will be continued by ENZA.

Some submitters consider plant variety rights should be owned by the industry body rather than ENZA, and current licence agreements between HortResearch and the Board should not be transferred to ENZA. Submitters believe growers have invested in research for the good of the whole industry, and ENZA should not have full rights over new varieties. These new varieties, they submit, should remain available to the industry as a whole. It is suggested that licence agreements should be transferred to an industry body, such as the new board, or be put into a trust.

HortResearch, on the other hand, argues it should retain ownership of the relevant plant variety rights, and contractual arrangements concerning the licensing of its property rights should not be interfered with by the industry reform package. Therefore, is strongly supports all current licence, breeding, and research and development agreements held by HortResearch with the Board being transferred to ENZA.

Submissions seeking to alter the existing contractual arrangements between HortResearch and the Board effectively ask for interference in how HortResearch deals with its property rights. We consider that the industry restructuring package should not affect existing contractual arrangements between Hort Research and the Board. We also note that, to the extent that licensing arrangements are valuable to ENZA, this will be captured in the price of shares issued in the company. In this way, the value of the research will be returned to grower shareholders.

Regulation-making powers

The Regulations Review Committee, as well as a number of submitters, argues that the regulation-making powers contained in Part 2 would be more appropriately dealt with by legislation. There is concern that significant matters are dealt with in regulations. In addition, alterations to the structure of the industry and changes to other important matters can also be made through regulation without parliamentary scrutiny or consultation with the industry.

The Regulations Review Committee reports that many of the regulation-making powers contained in clause 25 contain matters which, as a matter of principle, are more suited to an Act of Parliament than to regulations. Moreover, many of the matters which are to be governed by regulations are currently prescribed in primary legislation, such as the Apple and Pear Marketing Act. It is noted that regulations made under this Act are limited to matters of a minor nature. Therefore, the Regulations Review Committee recommends that the matters set out in clause 25 (1) (a) to (i) and (s) to (u) be specified in the Act itself, the regulation-making powers in clause 25 be redrafted to ensure the regulations are limited to matters of technicality and detail only, and the Minister be required to consult with persons likely to be affected by the regulations before they are made. Labour strongly supports these recommendations.

The use of delegated legislation to impose regulatory controls has a long-standing history. While the use of delegated legislation will be new for the pipfruit industry, the concept is not unusual or novel.

In addition, we have been advised that the proposal to use delegated legislation has been widely canvassed with the industry, and is accepted by both the Board and PGNZI. Submissions are mainly concerned about whether a future Government would revoke the regulations, rather than the question of principle whether regulations are the appropriate instrument to use to achieve the desired ends.

While the new board is set up under regulations, its principal function will be to monitor and enforce the mitigation measures applying to ENZA, which will operate primarily under generic company and commercial law. The regulations will add to this generic law by continuing the export control regime and imposing a set of mitigation measures to reduce the risk and costs of ENZA's monopsony. These measures have been developed by agreement with the Board, but the detail may need to be refined over time to reflect experience and practice. The use of regulations allows such changes to be made more readily than if primary legislation is used, and will allow a quicker reaction in a commercial environment. For the above reasons, the majority of us consider that the regulation-making powers in Part 2 are appropriate.

Taxation treatment of past rebates

Under the Income Tax Act 1994 statutory producer boards are entitled to claim a tax deduction for rebates paid to farmers and growers. The rebates paid are taxable in the hands of the recipient growers. Confusion has arisen as to the amount of the rebate that is deductible for tax purposes. This has the potential to result in double taxation if the boards are not able to claim a deduction for the rebates paid over and above their tax profits and the recipient farmers and growers continue to be taxed on the full amount of the rebates paid.

Officials consider this issue can be resolved by amending the Income Tax Act 1994 to ensure the boards can claim a tax deduction for all rebates paid to farmers and growers. Double taxation will be avoided as the recipients will be taxed on the rebates and the correct amount of tax will be collected. The cessation of the Board as a statutory producer board provides an appropriate means to resolve this issue. While we cannot recommend an amendment to the Income Tax Act 1994, we recommend amending clause 23 to provide that the Board can claim a tax deduction for all rebates paid from the period when the Board first became taxable (the 1988/89 income year) to the date it ceases to be a statutory producer board (1 April 2000).

Technical amendments

We recommend the following minor amendments for clarification and understanding:

- An amendment to clause 2 of the bill to clarify that apples and pears are the fruit of the identified species.
- Clause 8 should be amended to clarify that the application for registration is a part of the restructuring plan and not an independent or alternative route to secure incorporation.
- Clause 18 should be amended so that it is clear that the Minister is only under an obligation to confirm the plan if the requirements of the Act have been

complied with and the 75 percent threshold on the referendum is achieved. As presently written the clause could be interpreted to mean that the Minister is required to confirm the restructuring plan even where the 75 percent threshold has not been achieved.

- An amendment to clause 19 to make it clear that under the default position the documents specified by the Minister become the restructuring plan, and to clarify the mechanism by which the Registrar of Companies receives the documents necessary for the purposes of the Register following deemed registration.
- Clause 20 should be amended to clarify that the Board is not dissolved, but converted into ENZA. We also recommend amendments of this nature be made to the Schedule.
- An amendment to clause 22 to specify that sections 37A and 38 of the Apple and Pear Marketing Act are to apply to the content of the final report, notwithstanding the repeal of that statute.
- Amendments to clause 25 to clarify the scope of the regulation-making powers.
- An amendment to clause 27 to provide that the export consents committee is subject to the Official Information Act 1982.
- The insertion of a new clause 28 to enable regulations to be made to provide, in the transitional period before 1 April 2000, for a move to FAS acquisition of fruit for export, and for export permits to be granted by the new export permits committee, notwithstanding the provisions of the Apple and Pear Marketing Act.
- An amendment to the Schedule to clarify that normal audit requirements apply to the new board.

The length of time for considering the bill

The Labour, Alliance and New Zealand First parties are very concerned about the short amount of time and the haste being taken in considering the bill. They believe that we should make only an interim report to the House and recommend that the bill be returned to us to allow another round of consultation with stakeholders. They believe there is considerable disquiet amongst producers about the bill.

The majority of the committee consider that the timeframe has been appropriate and believe that the bill reflects the agreement reached on pipfruit industry reform.

Minority report

ACT New Zealand supports the stated intent of this bill to maximise economic welfare, facilitate the creation of wealth and provide for the efficient use of resources.

The bill fails to achieve these goals to the extent it should. ENZA will not be subject to competition and may leverage off its protected base with other products to the unfair detriment of other exporters. There is insufficient independence for the new board that controls the export permits procedure leaving the process open in the future to the trenchant criticism the select committee heard about the present system.

The submissions of larger growers favoured early deregulation or, at least, a fairer consents procedure. Smaller growers, many of whom are at risk financially, appear to be seeking an idealistic form of protection from market realities in the single desk rather than the best net orchard profit. It is obvious to ACT New Zealand that on a production basis the supporters of retaining the single desk privilege do not have the percentage vote required under accepted equity standards to demand compulsion.

ACT New Zealand believes that the evidence before the select committee on early deregulation and an improved consents process was robust and compelling. This was supported by a submitted report by a former Board director on deregulation in South Africa.

On balance ACT New Zealand agrees with the submissions to the select committee that suggested that the export permits committee should be more obviously independent, with a senior lawyer or retired judge as chairperson, and that the criteria should be changed to include the need for increasing overall net grower returns. ACT New Zealand also agrees with those submitters who wanted a sunset clause.

ACT New Zealand also believes that the whole industry would benefit from an immediate move to ENZA taking ownership at FOBS stage.

ACT New Zealand supports the report back of this bill as it represents progress towards a less regulated environment.

KEY TO SYMBOLS USED IN REPRINTED BILL

As Reported from a Select Committee

Symbol	Meaning
Struck Out (Majority) [Subject to this Act,]	Text struck out by a majority
New (Majority) [Subject to this Act,]	Text inserted by a majority
⟨*Subject to this Act,*⟩	Words struck out by a majority
⟨Subject to this Act,⟩	Words inserted by a majority

Hon John Luxton

APPLE AND PEAR INDUSTRY RESTRUCTURING

ANALYSIS

Title
1. Short Title and commencement
2. Interpretation
3. Act binds the Crown

PART 1

RESTRUCTURING OF BOARD

Restructuring Plan

4. Restructuring plan
5. Contents of restructuring plan
6. Share allocation plan
7. Corporate form
8. Application for registration of company

Minister to Approve Restructuring Plan

9. Board must give restructuring plan to Minister
10. Approval of restructuring plan
11. Variation of restructuring plan
12. Approval of revised restructuring plan

Grower Referendum on Restructuring Plan

13. Grower referendum on restructuring plan
14. Procedure for consulting with growers
15. Way in which referendum to be conducted
16. What level of support is needed
17. Result of referendum

Ministerial Confirmation of Restructuring Plan

18. Minister must confirm restructuring plan
19. Default position

Implementation of Restructuring Plan

20. Conversion of Board into ENZA Limited
21. Effect of registration as company
22. Final report of Board

Miscellaneous Provisions

23. Taxation
24. Cross-directorships

PART 2

REGULATION OF EXPORT OF APPLES AND PEARS

25. Regulations
26. Repeals
27. Amendments to other Acts
28. Transitional provisions

SCHEDULE

Provisions Relating to Restructuring of Board

A BILL INTITULED

An Act to provide for—

(a) The conversion of the New Zealand Apple and Pear Marketing Board into a company; and

5 **(b) Powers to regulate the export of apples and pears**

BE IT ENACTED by the Parliament of New Zealand as follows:

1. Short Title and commencement—(1) This Act may be cited as the Apple and Pear Industry Restructuring Act **1999**.

(2) **Sections 26 and 27 ⟨(1A) to (3)⟩** come into force on **1 April 2000.**

(3) The rest of this Act comes into force on the day after the date on which this Act receives the Royal assent.

2. Interpretation—In this Act, unless the context otherwise requires,—

"Apples and pears" means apples and pears of any kind other than pears that are ⟨the fruit of⟩—

(a) Plants of the species *Pyrus pyrifolia*:

(b) Plants that are a hybrid of the species *Pyrus pyrifolia* and the species *Pyrus ussuriensis*:

"Board" means the New Zealand Apple and Pear Marketing Board established by the Apple and Pear Marketing Act 1971:

"Company" means the company deemed to be registered under the Companies Act 1993 under the restructuring plan with the name 'ENZA Limited':

"Grower" means a person carrying on business in New Zealand as a grower of apples or pears for sale:

"Liabilities" means liabilities, debts, charges, duties, and obligations of every description (whether present or future, actual or contingent, and whether payable or to be observed or performed in New Zealand or elsewhere):

"Minister" means the Minister of the Crown who, under the authority of any warrant or with the authority of the Prime Minister, is for the time being responsible for the administration of this Act:

"New Board" means the board to be established by regulations made under this Act:

"Property" means property of every kind whether tangible or intangible, real or personal, corporeal or incorporeal and, without limiting the generality of the foregoing, includes—

(a) Choses in action and money:

(b) Goodwill:

(c) Any copyright, patent, registered design, trademark, know-how, service marks, ⟨*or other intellectual*⟩ ⟨trade secrets, or other intellectual or industrial⟩ property and any applications pending for patents, trademarks, copyright, and other intellectual ⟨or industrial⟩ property:

(d) Rights, interests, and claims of every kind in or to property, whether arising from, accruing under, created or evidenced by, or the subject of, an

instrument or otherwise and whether liquidated or unliquidated, actual, contingent, or prospective:

"Responsible chief executive", in relation to any function or matter, means the chief executive for the time being of a responsible Ministry who has, with the authority of the Prime Minister, assumed responsibility for that function or matter:

"Restructuring day" means **1 April 2000**:

"Rights" means all rights, powers, privileges, and immunities, whether actual, contingent, or prospective.

3. Act binds the Crown—This Act binds the Crown.

PART 1

RESTRUCTURING OF BOARD

Restructuring Plan

4. Restructuring plan—The Board must prepare a restructuring plan.

5. Contents of restructuring plan—The restructuring plan must—

(a) Contain a share allocation plan for the company; and

(b) Contain a constitution of the company that complies with the requirements of this Act and any regulations made under this Act; and

(c) Be accompanied by the proposed application for registration of a company under the Companies Act 1993; and

(d) Contain such other details as the Minister may from time to time require.

6. Share allocation plan—(1) The Board must ensure—

(a) That the share allocation plan provides for the allocation of the shares in the company, on the restructuring day, to persons who are growers as at **30 September 1999**; and

(b) That the basis on which shares in the company are to be allocated under the restructuring plan fairly reflects the ownership rights of growers, based on supply history, in the assets of the Board before the restructuring; and

(c) That the share allocation plan specifies clearly—

(i) The proposed basis of allocation; and

(ii) A register showing the full name and residential address of proposed shareholders and the class and number of shares to be issued to each shareholder.

(2) The Board must take all practicable steps to identify growers for the purpose of the share allocation plan.

7. Corporate form—(1) The Board must ensure that under the restructuring plan—

(a) The Board is to become a company registered only under the Companies Act 1993:

(b) The shares in the company are to be fully tradeable (not based on any supply criteria) at least among growers.

(2) In this section, "growers" means—

(a) Growers under the share allocation plan:

(b) Persons who become growers after **30 September 1999**:

(c) Any other person determined by the ⟨board of directors of the⟩ company to be a grower for the purpose of tradeability of shares.

8. Application for registration of company—The application for registration of a company under the Companies Act 1993 ⟨that is part of the restructuring plan⟩ must comply with section 12 of that Act, except that—

(a) The Board may be the applicant on behalf of the persons who are to receive initial shares in the company:

(b) The Board is not required to name or identify the persons individually in the application:

(c) 2 directors of the Board may sign the application and any other documents required to accompany it:

(d) Section 12 (1) (d) (i) does not apply to a person's shares in the company.

Minister to Approve Restructuring Plan

9. Board must give restructuring plan to Minister—(1) The Board must give the restructuring plan to the Minister no later than **1 December 1999**.

(2) The Board must also give the Minister a certificate signed by not less than 2 directors of the Board certifying that **section 6** (share allocation plan) and **section 7** (corporate form) have been complied with.

10. Approval of restructuring plan—(1) The Minister must decide whether to approve a restructuring plan as soon as practicable after receiving it.

(2) The Minister may decline to approve the plan only if the Minister is not satisfied that the requirements of this Act and any regulations made under this Act have been complied with.

11. Variation of restructuring plan—(1) If the Minister declines to approve the restructuring plan,—

(a) The Minister must indicate the grounds on which he or she declines to approve the plan; and

(b) The Minister must direct the Board to prepare and submit a revised plan; and

(c) The Board must submit a revised restructuring plan to the Minister not later than 3 weeks after the date on which that approval was declined or such later date as the Minister in any particular case may allow.

(2) The provisions of **section 9 (2)** apply in respect of a revised restructuring plan required to be submitted to the Minister under this section.

12. Approval of revised restructuring plan—(1) As soon as practicable after receiving a revised restructuring plan, the Minister must—

(a) Approve the plan by notice in writing to the Board; or

(b) If the Minister considers that the revised plan requires further amendment,—

(i) Make such amendments to the plan as the Minister considers necessary; and

(ii) Approve the plan (as amended) by notice in writing to the Board, which notice must be accompanied by a copy of the plan as approved.

(2) Before making any amendments to a restructuring plan under this section, the Minister must advise the Board of the Minister's intention to do so, and must give the Board a reasonable opportunity to make submissions on the matter.

Grower Referendum on Restructuring Plan

13. Grower referendum on restructuring plan—(1) The Board must hold a referendum on the restructuring plan.

(2) All growers under the share allocation plan are eligible to vote in the referendum.

(3) The Board must take all practicable steps to invite eligible growers to vote in the referendum.

14. Procedure for consulting with growers—The Board must ensure that, at least 2 weeks before the closing date for voting, each eligible grower is sent the following:

(a) Information that would be likely to assist a prudent but non-expert person to decide whether or not to subscribe for securities, as if the information were an investment statement under the Securities Act 1978; and 5

(b) An explanation of the restructuring plan, including the proposed basis of allocation and an indication of the class and proposed number of shares to be issued to the grower to whom the notice is sent; and

(c) An explanation of the proposed constitution of the company, dealing with the matters likely to have material significance to growers in their capacities as shareholders; and 10

(d) Information on how and when to vote; and

(e) Notification of the proposed basis for voting. 15

15. Way in which referendum to be conducted—(1) The Board may determine the way in which the referendum is to be conducted.

(2) The basis for voting must be the same as the basis for share allocation under the share allocation plan. 20

(3) The Board must ensure that the referendum is held in a way that ensures fairness and that a clear and accurate result can be ascertained and verified.

16. What level of support is needed—There is sufficient support for the restructuring plan if more than 75% of the votes cast in the referendum are in favour of the plan. 25

17. Result of referendum—(1) The Board must ensure that there is adequate scrutiny by an independent person of the election process and result.

(2) The Board must publicise the result of the referendum in such a way that few in the industry would not be aware of the result. 30

Ministerial Confirmation of Restructuring Plan

18. Minister must confirm restructuring plan—(1) As soon as practicable after the referendum result is known, the Board must give the restructuring plan to the Minister. 35

(2) The Board must also provide a certificate that the referendum complied with the requirements of this Act as to process and results, signed by the independent person who acted as scrutineer. 40

(3) The Minister must confirm the restructuring plan once ⟨*those documents are received*⟩ ⟨the Minister receives a certificate under **subsection (2)** that states that there is sufficient support in the grower referendum for the restructuring plan⟩.

19. Default position—(1) If there is insufficient support in the grower referendum for the restructuring plan, the Minister must specify—

(a) A share allocation plan that, in the opinion of the Minister, is consistent with **section 6 (1)**:

(b) A constitution for the company that, in the opinion of the Minister, is consistent with this Act and the regulations.

New (Majority)

(2) Any documents specified by the Minister are deemed to be part of the restructuring plan for the purpose of the registration of the company.

Implementation of Restructuring Plan

20. Conversion of Board into ENZA Limited—(1) On the restructuring day—

Struck Out (Majority)

(a) The Board is dissolved; and

(b) The Board is deemed to be a company registered under the Companies Act 1993 with the name "ENZA Limited"; and

(c) The Registrar of Companies must issue a certificate of registration for the company; and

(d) Shares are issued to growers in accordance with the share allocation plan.

(2) The certificate of registration is conclusive evidence that the company was, on the restructuring day, registered as a company under the Companies Act 1993.

21. Effect of registration as company—(1) The company so registered is the same body corporate as the Board.

(2) The deemed registration of the company does not—

(a) Create a new legal entity; or

(b) Prejudice or affect the identity of the body corporate constituted by the company or its continuity as a legal entity.

(3) The **Schedule** applies to the reconstitution of the company.

22. Final report of Board—(1) As soon as reasonably practicable after the restructuring day, the chairperson must arrange for a final report of the Board to be completed. 5

(2) The report must contain audited financial statements and an annual report for the 6-months period ending with **31 March 2000**. 10

New (Majority)

(2A) The report must comply with sections 37A and 38 of the Apple and Pear Marketing Act 1971 as if those sections were not repealed by this Act.

(3) The chairperson must, on request, send a copy of the report to a person who was a grower immediately before the restructuring day. 15

(4) The chairperson must give a copy of the report to the Minister.

(5) In this section, "chairperson" means the person who held office as the chairperson of the Board immediately before the restructuring day. 20

Miscellaneous Provisions

23. Taxation—(1) The issue by the company of shares on the restructuring day to a person who was a grower on **30 September 1999**— 25

(a) Is not a dutiable gift for the purposes of the Estate and Gift Duties Act 1968; and

(b) Is not a dividend derived by the person for the purposes of the Income Tax Act 1994; and 30

(c) Is not otherwise gross income of the person for the purposes of the Income Tax Act 1994.

(2) For the purposes of the Income Tax Act 1994, if the company issues shares on the restructuring day to a person who was a grower on **30 September 1999**, the person is deemed to have— 35

(a) Held those shares at all times prior to the restructuring day; and

(b) Subject to section OD 5 (5) of the Income Tax Act 1994, held any voting interest or market value interest 40

attributable to those shares at all times prior to the restructuring day.

(3) For the purposes of the definition of the term "available subscribed capital" in section OB 1 of the Income Tax Act 5 1994, the company—

(a) Is deemed to have received on the restructuring day an amount of $83,000,000 in respect of the issue of ordinary shares on the restructuring day to growers; and

10 (b) Is treated as not having received any other amount of consideration in respect of the issue of shares to growers on the restructuring day.

New (Majority)

(4) With respect to amounts paid by the Board before **1 April** 15 **2000**, paragraph (a) of the definition of the term "rebate" in each of section HF 1 (9) of the Income Tax Act 1994 and section 199 (1) of the Income Tax Act 1976 applies as if the words "of profits of" were replaced by the word "from".

(5) **Subsection (4)** applies with respect to the 1988/89 income 20 year and subsequent years.

(6) The company is not a "statutory producer board" for the purposes of the Income Tax Act 1994.

24. Cross-directorships—No person who is a member of the new Board may, from **1 April 2000**, be a director of ENZA 25 Limited.

PART 2

REGULATION OF EXPORT OF APPLES AND PEARS

25. Regulations—(1) The Governor-General may from time to time, by Order in Council made on the recommendation of 30 the Minister, make regulations—

New Board

(a) Providing for the establishment, functions, powers, membership, ⟨funding,⟩ and other matters relating to the new Board:

35 *Regulation of Export of Apples and Pears*

(b) Restricting the export of apples and pears:

(c) Providing for the new Board to grant to ENZA ⟨*Limited*⟩ an authorisation to export apples and pears:

(d) Providing for the new Board to appoint a separate independent body to permit other persons to export apples and pears⟨, and for the establishment, functions, powers, membership, funding, and other matters relating to that body, and for other matters relating to export permits⟩:

(e) Providing for the terms and conditions ⟨or other requirements⟩ that may or may not be ⟨*imposed as*⟩ part of the authorisation or a permit:

Mitigation Measures

(f) Restricting discrimination among suppliers to commercial grounds:

(g) Restricting certain diversification of business:

(h) Imposing requirements in respect of the corporate form and governance of ⟨*ENZA Limited*⟩ ⟨the company⟩ and the tradeability of its shares⟨, including any rules about maximum shareholding⟩:

(i) Requiring ENZA ⟨*Limited*⟩ to operate its core business at arms length from its activities in contestable markets in New Zealand:

Information Disclosure

(j) Requiring ENZA ⟨*Limited*⟩ to make publicly available prescribed financial statements that follow generally accepted accounting principles:

(k) Requiring ENZA ⟨*Limited*⟩ to publish in the prescribed manner information which ⟨*must*⟩ ⟨may⟩ include (without limitation)—

(i) Prices, terms, and conditions:

(ii) Pricing policies and methodologies:

(iii) Costs:

(iv) Cost allocation policies and methodologies:

(v) Performance measures, or information from which performance measures may be derived, or both:

(l) Prescribing the form and manner in which the financial statements are to be made available:

(m) Requiring, in respect of the statements or information so required,—

(i) The adoption, in the preparation or compilation of those statements or that information, of such methodology as is prescribed in the regulations or in any document published by or under the authority of the responsible chief executive and referred to in the regulations:

(ii) The disclosure, in the prescribed manner, of the methodology adopted in the preparation or compilation of those statements or that information:

(iii) The inclusion of any matters prescribed in the regulations or in any document published by or under the authority of the responsible chief executive and referred to in the regulations:

(n) Requiring that the statements or information so required, or information from which those statements or that information is derived (in whole or in part), be certified, in the prescribed form and manner, by persons belonging to any specified class of persons:

Struck Out (Majority)

(o) Setting rules about the timing of the disclosure of information:

New (Majority)

(o) Setting rules about when and for how long information must be disclosed:

Struck Out (Majority)

(p) Requiring persons other than ENZA Limited who are permitted to export apples and pears by the new Board, and the new Board, to disclose information relating to apples and pears so exported:

New (Majority)

(p) Requiring persons other than ENZA who are permitted to export apples and pears by the separate independent body appointed by the Board, and that separate independent body, to disclose information relating to apples and pears so exported:

(q) Exempting or providing for exemptions (including providing for the revocation of exemptions) from all or any of the disclosure requirements of any regulations made under **paragraphs (j) to (p)**:

General

(r) Providing for offences for a contravention of the regulations and for penalties—

(i) Of up to $50,000 in respect of a contravention of any restriction on exports:

(ii) Of up to $5,000 in respect of any other contravention of the regulations:

(s) Providing for the exclusion of Crown liability in relation to export authorisations and permits ⟨and the operation of ENZA and persons who are permitted to export apples and pears by the separate independent body appointed by the Board⟩:

(t) Providing for Ministerial directions to be given to the company in respect of international obligations ⟨of New Zealand⟩:

New (Majority)

(ta) Providing for the supply of information for the purpose of administration and enforcement of this Act and regulations made under this Act:

(u) Providing for the dissolution of the new Board and for all matters related to the dissolution:

(v) Providing for transitional provisions ⟨, including restricting certain diversification of business by the Board and requiring the Board to operate its core business at arms length from its activities in contestable markets in New Zealand⟩:

(w) Providing for such other matters as are contemplated by or are necessary for giving full effect to this Act and for its due administration.

New (Majority)

(1A) Any arms length rules made under this section apply notwithstanding any other enactment or rule of law relating to directors' duties.

(1B) In this section, "ENZA" means the company and its subsidiaries.

(2) For the avoidance of doubt, regulations made under **subsection (1)** may apply to transactions within any group of companies of which ENZA Limited is a member, or between

business activities within a specific ENZA Limited group company.

26. Repeals—The following Acts are repealed:
(a) The Apple and Pear Marketing Act 1971 (1971, No. 33):
(b) The Apple and Pear Marketing Amendment Act 1977 (1977, No. 73):
(c) The Apple and Pear Marketing Amendment Act (No. 2) 1980 (1980, No. 99):
(d) The Apple and Pear Marketing Amendment Act 1981 (1981, No. 24):
(e) The Apple and Pear Marketing Amendment Act (No. 2) 1981 (1981, No. 108):
(f) The Apple and Pear Marketing Amendment Act 1987 (1987, No. 21):
(g) The Apple and Pear Marketing Amendment Act 1988 (1988, No. 85):
(h) The Apple and Pear Marketing Amendment Act 1993 (1993, No. 153).

27. Amendments to other Acts—

Struck Out (Majority)

(1) The First Schedule of the Official Information Act 1982 is amended by omitting the items relating to the New Zealand Apple and Pear Marketing Board and to the Apple and Pear Prices Authority, and substituting the following item:
"The New Zealand Apple and Pear Board".

New (Majority)

(1) The First Schedule of the Official Information Act 1982 is amended by inserting, in their appropriate alphabetical order, the following items:
"The New Zealand Apple and Pear Board
"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".
(1A) The First Schedule of the Official Information Act 1982 is amended by omitting the items relating to the New Zealand

New (Majority)

Apple and Pear Marketing Board and to the Apple and Pear Prices Authority.

(2) The New Zealand Horticulture Export Authority Amendment Act 1992 is amended by repealing section 12. 5

(3) Schedule 15 of the Income Tax Act 1994 is amended by omitting the item relating to the New Zealand Apple and Pear Marketing Board.

New (Majority)

28. Transitional provisions—(1) Any regulations made 10 under this Act may require the point of acquisition of title to apples and pears purchased for export to be at FAS from such date as may be specified in the regulations notwithstanding the relevant provisions of the Apple and Pear Marketing Act 1971.

(2) Any regulations made under this Act may provide for the 15 separate independent body appointed by the new Board to grant export permits before **1 April 2000** in addition to or instead of the Board granting consents to export under the Apple and Pear Marketing Act 1971.

SCHEDULE

Section 21 (3)

PROVISIONS RELATING TO RESTRUCTURING OF BOARD

1. Consequential provisions on restructuring as company—Without limiting the generality of **section 21**, the following provisions have effect on and after the restructuring day:

(a) A reference (express or implied) to the Board in any instrument is to be read and construed as a reference to the company:

(b) All money payable to the Board becomes payable to the company:

(c) Proceedings that could have been commenced or continued by or against the Board before its ⟨*dissolution*⟩ ⟨conversion⟩ may be commenced or continued by or against the company:

(d) The deemed registration of the company does not affect rights, interests, liabilities, or obligations existing immediately before the ⟨*dissolution*⟩ ⟨conversion⟩ of the Board:

(e) All transactions entered into by, and acts of, the Board before the ⟨*dissolution*⟩ ⟨conversion⟩ of the Board are deemed to have been entered into by, or to be those of, the company and to have been entered into or performed by the company at the time when they were entered into or performed by the Board:

(f) All contracts, agreements, conveyances, deeds, leases, licences, and other instruments, undertakings, and notices (whether or not in writing), entered into by, made with, given to or by, or addressed to the Board (whether alone or with any other person) existing immediately before the restructuring day are, to the extent that they were previously binding on and enforceable by, against, or in favour of the Board, binding on and enforceable by, against, or in favour of the company as fully and effectually in every respect as if, instead of the Board, the company had been the person by whom they were entered into, with whom they were made, or to or by whom they were given or addressed, as the case may be.

2. Certain matters not affected by transfer to company—Nothing effected or authorised by this Act—

(a) Is to be regarded as placing the Board or the company, or any other person, in breach of contract or confidence or as otherwise making any of them guilty of a civil wrong; or

(b) Is to be regarded as giving rise to a right for any person to terminate or cancel any contract or arrangement or to accelerate the performance of any obligation; or

(c) Is to be regarded as placing the Board or the company, or any other person, in breach of any enactment or rule of law or contractual provision prohibiting, restricting, or regulating the assignment or transfer of any property or the disclosure of any information; or

(d) Releases any surety wholly or in part from any obligation; or

(e) Invalidates or discharges any contract.

3. Initial directors of company—The initial directors of the company must be the existing directors of the Board who consent to be the directors of the company until their term would have expired if the Board had continued.

4. Employees of Board—Notwithstanding any other provision of this Act,—

SCHEDULE—*continued*

PROVISIONS RELATING TO RESTRUCTURING OF BOARD—*continued*

(a) On the restructuring day each employee of the Board ceases to be an employee of the Board and becomes an employee of the company but, for the purposes of every enactment, law, award, determination, contract, and agreement relating to the employment of each such employee, his or her contract of employment is deemed to have been unbroken and the period of his or her service with the Board is deemed to have been a period of service with the company; and

(b) The terms and conditions of the employment of each transferred employee with the company on the restructuring day (and after that until varied) are identical with the terms and conditions of his or her employment with the Board immediately before the restructuring day and are capable of variation in the same manner; and

(c) A transferred employee is not entitled to receive any payment or other benefit by reason only of his or her ceasing by virtue of this Act to be an employee of the Board.

5. Additional provisions relating to land—(1) The provisions of this Act relating to the property or liabilities of the company have effect notwithstanding any enactment, rule of law, or agreement.

(2) The Registrar-General of Land is authorised and directed, on written request being made by or on behalf of the company and on payment of the prescribed fee, to make such entries in his or her register and do everything necessary to reflect the provisions of this Act in so far as they affect land or any estate or interest in land.

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