

KIWIFRUIT INDUSTRY RESTRUCTURING BILL

AS REPORTED FROM THE COMMITTEE ON THE BILLS

COMMENTARY

Recommendation

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

Conduct of the examination

The Kiwifruit 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 40 submissions from interested groups and individuals. We heard 21 submissions orally. Hearing evidence took six hours and 51 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 provided by the New Zealand Kiwifruit Marketing Board (the Board) and the New Zealand Kiwifruit Growers Incorporated (NZKGI) in their capacity as expert witnesses. The Regulations Review Committee reported to the committee on the regulation-making powers contained in clause 28.

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

Purpose

The bill provides for a new regulatory framework for the exporting of kiwifruit and the transition of the commercial business to generic governance laws. Part 1 of the bill concerns corporatisation. The Board is to be converted into a company, ZESPRI Group Limited (ZESPRI), with shares to be issued to producers and to be tradeable among producers. The share issue to producers will not be a taxable event.

Part 2 outlines the regulatory framework for the industry restructuring. Regulations will provide for ZESPRI to be the main exporter of New Zealand kiwifruit. Regulations will also impose a non-discrimination rule on ZESPRI so that it cannot discriminate among growers other than on commercial grounds. Other mitigation measures require ZESPRI:

- to obtain producers' consent before using their funds on activities outside its core business (non-diversification rule)
- to provide producers and the new regulatory board with detailed information to assess its performance and compliance with the mitigation measures.

Regulations will prevent any changes to ZESPRI's constitution which reduce certain shareholder rights provided by the Companies Act 1993. They will also establish a new board, the New Zealand Kiwifruit Board, to authorise the export of kiwifruit, to monitor and enforce ZESPRI's mitigation duties and to approve collaborative marketing applications.

Under the bill, the Board must prepare a restructuring plan under which the Board is to become a company registered under the Companies Act 1993. The restructuring plan is then given to the responsible Minister for approval and followed by a referendum of kiwifruit producers on the plan. Seventy-five percent support is required for that plan to proceed and, if attained, the restructuring plan is then confirmed by the Minister. If the threshold is not attained, then the Minister must specify a share allocation plan and constitution for the company that is consistent with the Act and regulations.

Background

The kiwifruit industry has sought to change the way it exports kiwifruit since 1995, following a producer referendum which confirmed the co-operative company model for the Board and endorsed the deregulation of onshore operations and introduction of collaborative marketing. The onshore operations were deregulated and collaborative marketing was introduced in 1998. The current marketing structure for exporting kiwifruit has a number of public policy problems associated with it, however. These include:

- costs and distortions from having a single exporter seller in a production driven acquisition regime
- a mix of commercial and regulatory functions making the Board both player and referee
- a lack of defined shareholder disciplines and rights and a risk to owners of captured capital
- a regime which is set by regulations rather than contracts.

In October 1998 the Government agreed in principle to corporatise the Board, subject to consistency with the Government's wider criteria and objectives. In June 1999, the Government and the Board agreed on a reform package, the key features of which are in the bill. The reform package was subsequently endorsed by producers in a series of meetings by a margin of 512 in favour to four against with ten abstentions.

Export control regime

The majority of submitters support the single desk export regime as provided for in Part 2 of the bill. The retention of the existing export control regime was strongly supported by producers and producer organisations. Calls for the

removal of export controls, either immediately or through a sunset provision, have come primarily from horticultural exporters.

The export control regime reflects the agreement reached between the Board and the Government. We do not consider the bill requires any amendment.

Collaborative marketing

Clause 28 provides for the new board to require ZESPRI to export kiwifruit in collaboration with other persons approved by the new board. The purpose of collaborative marketing is to maximise the total net export income for kiwifruit producers by complementing ZESPRI's marketing strategies and supply programmes. The collaborative marketing regime proposed under the bill differs from the current regime in that the decision to approve collaborative marketing proposals will be made by the new board, which will be independent of ZESPRI.

The Board and NZKGI support the proposed collaborative marketing regime while opposition to it has come from horticultural exporters. The Fresh Fruit Company of New Zealand Limited (Freshco), reflecting horticultural exporters' concerns, says that while the intent of collaborative marketing is good, the practical application of serious proposals is almost impossible to implement. This is because ZESPRI is charged with marketing the entire export crop and collaboration is contrary to its commercial imperatives. The horticultural exporters want the collaborative marketing regime changed to an export permit regime, similar to that proposed for apple and pears, with decisions made by an independent committee. Freshco further suggests that the Commerce Committee should review the progress of collaborative marketing in the latter half of 2000.

The Board has spent a considerable amount of time and resource developing the collaborative marketing regime, including actively seeking Maori involvement in collaborative marketing. It is a new development with only 560 000 trays marketed under the regime in the year ending 31 March 1999. We believe that the onus will be on the new board to ensure that collaborative marketing works. We recommend no change.

Corporatising the Board

A number of issues arose about the proposal to corporatise the Board.

Corporate form

The bill expressly requires ZESPRI to be a company registered only under the Companies Act 1993. The Board and the NZKGI have accepted the generic company model as part of the package agreed to by the Government and the Board. Producers have strongly endorsed the package even though industry consultations with producers had previously been on the basis of a co-operative company model. The Government considers that the circumstances of a single buyer (monopsony) producer board sufficient to justify a legislative restriction on using a traditional co-operative form of company. As this provision reflects the agreement reached between the Government and the Board, we do not recommend any amendments in this regard.

Initial allocation of shares

Clause 6 states that the Board must have a share allocation plan that provides for the allocation of ZESPRI shares to persons who are producers as at 31 March 2000. The initial allocation of shares is a concern to some submitters. One group of Maori kiwifruit producers wants shares restricted to the landowners rather than to lessees. Their worry is about land leased under the Maori Reserved Land

Amendment Act 1997 and the possible impact on land values of issuing shares with dividends. The assets owned by Maori reserved landowners are the unimproved value portion of the land value and they believe any reduction in land value largely affects the unimproved value portion of the land. They also state that consultation has been deficient.

We believe long-term lessees should be able to receive shares in ZESPRI as they have developed the orchard and supply the fruit. We are satisfied that there has been adequate consultation with Maori by both the Government and the Board.

We also consider that there will be a number of factors in determining whether or not the issuing of shares will have an impact on land values, including the methodology for splitting the fruit payment from the dividend payment, the relative proportions of each payment and the relative value of the shares. We consider that by separating ZESPRI returns from the fruit payment, land values will then reflect true market value.

Tradeability of shares

Clause 7 states that shares in ZESPRI are to be fully tradeable, at least among producers, and not based on any supply criteria. The bill also allows the class of eligible shareholders to be extended by ZESPRI. This allows flexibility to accommodate possible future changes in the industry. Some submitters contend that the shares should only ever be tradeable amongst producers, as defined in clause 2, while others, including the New Zealand Business Roundtable, believe that the shares should be fully tradeable so as to reflect their true value. Concern is also expressed by submitters about the need to limit the ability of any one person to acquire shares beyond a specified amount.

The proposed regulations allow ZESPRI's constitution to include a share cap, provided that the cap is limited to no less than 20 percent and is simple and inexpensive to administer.

We recommend an amendment, though, to clause 7 (2) in order to clarify that ZESPRI's board of directors has the discretion to determine who is a "producer" for the purposes of tradeability.

Mitigation measures

Paragraphs (g) to (r) of clause 28 (1) contain mitigation measures and information disclosure requirements to be included in regulations. Two submitters believe that export fruit ZESPRI refused to buy should be able to be exported independent of ZESPRI. Another submitter wants ZESPRI and any collaborative marketer to provide commercial information to the new board on a confidential basis and not subject to the Official Information Act 1982.

The new regime enables ZESPRI to focus its efforts on responding to market demands rather than being production driven. The main change of removing the regulatory obligation to buy will be that the costs of surplus fruit are more likely to be left with the supplier. However, if unpurchased kiwifruit were able to be exported as a matter of right, ZESPRI's role as the main marketer of export kiwifruit would be undermined. It would also create strong incentives on ZESPRI to buy all fruit, even if it did not have a buyer. This would effectively continue the current duty to buy all fruit.

The new regime will effectively replace the duty to buy with a non-discrimination rule enforced by the new board with the benefit of a detailed information disclosure regime. Information disclosure will assist enforcement of the mitigation

measures and is a common competition policy tool in relation to cost and performance. It will make transparent any unacceptable activity. The Board has accepted the proposed requirements as part of the agreement. We recommend no change.

Intellectual property

Several submitters raise the issue of kiwifruit plant varietal rights (PVRs), particularly in relation to Hort16A kiwifruit (ZESPRI gold). They believe that the current licence agreements between the Horticulture and Food Research Institute of New Zealand Limited (HortResearch) and the Board should not be transferred to ZESPRI. They want the licences transferred either to an industry body, such as the new board, or put into a trust so that any grower can use the PVRs. HortResearch submits that current contractual arrangements must be retained and strongly support the transfer of all current licence, breeding and research and development agreements to ZESPRI. The Board sees PVRs as a key component to its future strategy in having an integrated commercial approach to the market.

We do not believe we should interfere in how HortResearch chooses to operate its business. To the extent that the licence agreements form a future barrier to new entrants to the industry, then that can be addressed by generic competition law and section 21 of the Plant Variety Rights Act 1987, which provides for compulsory licensing.

Use of delegated legislation

The Regulations Review Committee has drawn our attention to its longstanding criticism of the use of regulations in establishing the Board and setting out its functions and powers. The committee considers such authority should be by statute rather than by regulation. The committee notes that Part 2 of the bill will continue the existing regime. It recommends that the new board, the regulation of the export of kiwifruit, mitigation measures, Crown liability in relation to exports, Ministerial directions and the ability to dissolve the new board should be specified in primary legislation instead of in regulations. The Labour Party strongly supports the committee's recommendations.

The committee further notes that the regulation-making power does not require the Minister to consult with any persons or organisations before making these regulations. It recommends that clause 28 be amended to include a requirement for consultation with persons having an interest in the proposed regulations prior to making any regulations.

While we acknowledge the Regulation Review Committee's concerns about the use of regulations for the kiwifruit industry, the continued use of delegated legislation is accepted by the Board and NZKGI. The regulations allow changes to be made more readily than if primary legislation is used and will allow a quicker reaction in a commercial environment. The new board will be more limited in its functions and powers than the existing one. Its principal function will be to monitor and enforce the mitigation measures applying to ZESPRI, which will operate primarily under generic company and commercial law. For the above reasons, a majority of us consider that the regulation-making powers in Part 2 are appropriate.

We do recommend, however, the following minor amendments to clause 28:

- The provision providing for the establishment, functions, powers, membership and other matters relating to the new board should include a reference to its funding.

- References to ZESPRI should be taken as including the group of companies where appropriate.
- The provision imposing requirements in respect of the corporate form and governance of ZESPRI and the tradeability of its shares should include a reference to maximum shareholding rules.
- The provisions relating to information disclosure should be consistent with the regulations.
- The provision relating to the limitation of Crown liability should be widened to include the operations of ZESPRI and collaborative marketers.

Payments

Clause 23 concerns taxation. The Board has submitted that the final payments for the 1999/2000 season should be covered by the rebate tax provisions in the Income Tax Act 1994 as they apply to statutory producer boards. It states that the conversion of the Board into ZESPRI on 1 April 2000 makes the tax treatment of any of the rebates paid after that date uncertain and potentially non-deductible. We disagree that this is an issue that needs amendment. The Board's regulations currently do not allow for the payment of a rebate, which is a bundled payment. They provide for the 1999/2000 payments to be paid as either fruit price to suppliers or seasonal profits to producers. Consequentially, rebate tax treatment is not relevant.

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 farmers and growers. Confusion has arisen as to the amount of the rebates 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 to producers with respect to the 1988/89 income year (when the Board first became taxable) to the date it ceases to be a statutory producer board (1 April 2000).

Technical amendments

The Producer Board Project Team has proposed a number of minor technical amendments for clarification and understanding:

- 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.

- Clause 19 should be amended to make it clear that under the default position the documents specified by the Minister become the restructuring plan.

We concur and recommend them accordingly.

The length of time for considering the bill

The Labour, Alliance and New Zealand First parties are very concerned about the short timeframe 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 us consider that the timeframe has been appropriate and believe that the bill reflects the agreement reached on kiwifruit 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. ZESPRI will not be subjected to competition and may leverage off its protected base with other products to the unfair detriment of other exporters. ACT agrees with those submitters who find that collaborative marketing is a flawed concept commercially and is unlikely to work in practise or achieve the aims of the bill.

The submissions of larger growers favoured early deregulation or, at least, a change to the collaboration process. Some smaller growers 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 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 a change to an independent consents process was robust and compelling. ACT suggests that the consent committee should be independent with a senior lawyer or retired judge as chairman and that the criteria should include the need for increasing overall net grower returns. ACT also agrees with those submitters who wanted a sunset clause.

With regard to plant variety rights issues more consultation is required.

ACT supports the report back as progress toward a less regulated environment.

KEY TO SYMBOLS USED IN REPRINTED BILL

AS REPORTED FROM A SELECT COMMITTEE

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

KIWIFRUIT INDUSTRY RESTRUCTURING

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A BILL INTITULED

An Act to provide for—

- 5 (a) The conversion of the New Zealand Kiwifruit Marketing Board into a company; and
(b) Powers to regulate the export of kiwifruit

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

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

(2) ~~Sections 26 and 27~~ Sections 29, 30 (2), and 31 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,— 5

“Board” means the New Zealand Kiwifruit Marketing Board established by the Kiwifruit Marketing Regulations 1977:

“Company” means the company deemed to be registered under the Companies Act 1993 under the restructuring plan with the name ‘Zespri Group Limited’: 10

“Kiwifruit” means the fruit of a kiwifruit vine:

“Kiwifruit vine” means a plant of the genus *Actinidia*: 15

“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): 20

“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: 25

“Producer”, in relation to Part 1 (other than section 7), means—

(a) The owners of land in New Zealand on which kiwifruit is produced for export sale; ~~and~~ or 30

(b) Such other persons determined by the Board to be producers of such kiwifruit:

“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— 35

(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: 40

5 (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:

10 “Restructuring day” means **1 April 2000**:

“Rights” means all rights, powers, privileges, and immunities, whether actual, contingent, or prospective:

15 *Struck Out (Majority)*

“Supplier” means a person from whom Zespri Group Limited or any company within the Zespri Group Limited group of companies (where that term has the meaning set out in section 2 of the Financial Reporting Act 1993) acquires the property in kiwifruit grown in New Zealand:

“Zespri International Limited” means the company incorporated under the Companies Act 1993 with the name ‘Zespri International Limited’.

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

PART 1

RESTRUCTURING OF BOARD

Restructuring Plan

30 **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
- 35 (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 producers as at **31 March 2000**; and 5
- (b) That the basis on which shares in the company are to be allocated under the restructuring plan fairly reflects the ownership rights of producers, based on supply history <of the land on which the kiwifruit is produced>, in the assets of the Board before the restructuring; and 10
- (c) That the share allocation plan specifies the proposed basis of allocation. 15

(2) The Board must take all practicable steps to identify producers 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: 20
- (b) The shares in the company are to be fully tradeable (not based on any supply criteria) at least among producers.

(2) In this section, “producers” means— 25

- (a) Producers under the share allocation plan;
- (b) Persons who become producers after **31 March 2000**;
- (c) Lessees under a lease of at least 1 year’s duration of the land on which kiwifruit is produced;
- (d) Any other person determined by the <board of directors of the> company to be a producer for the purpose of tradeability of shares. 30

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— 35

- (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: 40
- (c) 2 members 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—

5 (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 members of the Board certifying that **section 6** (share allocation plan) and **section 7** (corporate form) have been
10 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.

15 (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,—

20 (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
25 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.

30 **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

35 (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
40 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.

Producer Referendum on Restructuring Plan

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13. Producer referendum on restructuring plan—

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

(2) All producers as at **30 September 1999** are eligible to vote in the referendum.

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

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

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(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

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(b) An explanation of the restructuring plan, including the proposed basis of allocation; and

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

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

(e) Notification of the proposed basis for voting.

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

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

(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.

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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.

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

5 (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.

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.

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

15 (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 producer referendum for the restructuring plan.

19. Default position—(1) If there is insufficient support in the producer 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)**;

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

New (Majority)

30 (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 Zespri Group Limited—
(1) On the restructuring day—

Struck Out (Majority)

35 (a) The Board is dissolved; and

- (b) The Board is deemed to be a company registered under the Companies Act 1993 with the name “Zespri Group Limited”; and
 - (c) The Registrar of Companies must issue a certificate of registration for the company; and 5
 - (d) Shares are issued to producers 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. 10

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. 15
- (3) The **Schedule** applies to the conversion 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. 20

(2) The report must contain audited financial statements and an annual report for the financial year ending with **31 March 2000**.

New (Majority)

(2A) The report must comply with sections 11 and 12 of the Primary Products Marketing Act 1953 as if those sections still applied. 25

(3) The chairperson must, on request, send a copy of the report to a person who was a producer immediately before the restructuring day. 30

(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. 35

Miscellaneous Provisions

23. Taxation—(1) The issue by the company of shares on the restructuring day to a person who was a producer on **31 March 2000**—

- (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
- 5 (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 producer on **31 March 2000**, the person is deemed to
- 10 have—
- (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
- 15 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 1994, the company—
- 20 (a) Is deemed to have received on the restructuring day an amount of \$2,600,000 in respect of the issue of ordinary shares on the restructuring day to producers; and
- (b) Is treated as not having received any other amount of
- 25 consideration in respect of the issue of shares to producers on the restructuring day.

New (Majority)

- (4) With respect to amounts paid by the Board before **1 April 2000**, paragraph (a) of the definition of the term “rebate” in
- 30 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 year and subsequent years.
- 35 (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 November 2000**, be a director of Zespri Group Limited.

25. Decisions in transitional period—(1) This section applies to any decision of the Board in respect of any contract or arrangement or any other business decision proposed to be taken that could have a material effect on the company after **1 April 2000**.

5

(2) All such decisions proposed to be taken by the Board after the enactment of this Act must be made by the board of Zespri International Limited.

Struck Out (Majority)

26. Payments—(1) This section applies to—

10

(a) Decisions under regulation 13G of the Kiwifruit Marketing Regulations 1977; and

(b) Decisions under regulation 14A of those regulations as to the amount of distributions of trading profit,—
in respect of kiwifruit acquired by the Board in the year ending **31 March 2000**.

15

(2) Those decisions must be submitted by the company to the members of the Board for approval and must not be implemented unless a simple majority of those members approve those decisions.

20

(3) This section applies as if the members of the Board referred to in **subsection (2)** had continued to be members of the Board notwithstanding the restructuring of the Board.

27. Amendment to Official Information Act 1982—The First Schedule of the Official Information Act 1982 is amended by omitting the item relating to the New Zealand Kiwifruit Authority, and substituting the following item:

25

“The New Zealand Kiwifruit Board”.

PART 2

REGULATION OF EXPORT OF KIWIFRUIT

30

28. Regulations—(1) The Governor-General may from time to time, by Order in Council made on the recommendation of 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 Kiwifruit

- (b) Restricting the export of kiwifruit otherwise than for consumption in Australia:
- 5 (c) Providing for the new Board to grant to Zespri Group *⟨Limited⟩* an authorisation to export kiwifruit:
- (d) Providing for the new Board to permit other persons to export kiwifruit:
- (e) Providing for the new Board to require Zespri Group *⟨Limited⟩* to export kiwifruit in collaboration with
- 10 (f) Providing for the terms and conditions *⟨or other requirements⟩* that may or may not be *⟨imposed as⟩* part of the authorisation, permit, or collaborative marketing approval:

15 *Mitigation Measures*

- (g) Restricting discrimination among suppliers of kiwifruit for export to commercial grounds:
- (h) Restricting certain diversification of business:
- 20 (i) Imposing requirements in respect of the corporate form and governance of *⟨Zespri Group Limited⟩* *⟨the company⟩* and the tradeability of its shares, including any rules about maximum shareholding:

Information Disclosure

- 25 (j) Requiring Zespri Group *⟨Limited⟩* to make publicly available prescribed financial statements that follow generally accepted accounting principles:
- (k) Requiring Zespri Group *⟨Limited⟩* to publish in the prescribed manner information which *⟨must⟩* *⟨may⟩* include (without limitation)—
- 30 (i) Prices, terms, and conditions:
- (ii) Pricing policies and methodologies:
- (iii) Costs:
- (iv) Cost allocation policies and methodologies:
- (v) Performance measures, or information from
- 35 which performance measures may be derived, or both:
- (l) Prescribing the form and manner in which the financial statements are to be made available:
- 40 (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: 5

(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: 10

Struck Out (Majority) 15

(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: 20

(p) Requiring persons other than Zespri Group *<Limited>* who are permitted to export kiwifruit by the new Board, and the new Board, to disclose information relating to kiwifruit so exported:

(q) Requiring collaborative marketers and the new Board to disclose information relating to kiwifruit exported under any collaborative marketing arrangement: 25

(r) 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 (q)**: 30

General

(s) 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: 35

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

- (t) Providing for the exclusion of Crown liability in relation to export authorisations, permits, and collaborative marketing approvals <and the operation of Zespri Group and collaborative marketers>:
- 5 (u) Providing for Ministerial directions to be given to the company in respect of international obligations <of New Zealand>:

New (Majority)

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

- (v) Providing for the dissolution of the new Board and for all matters related to the dissolution:
- (w) Providing for transitional provisions:
- 15 (x) 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)

- 20 (1A) In this section, “Zespri Group” 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 Zespri Group Limited is a member, or between business activities within a specific Zespri Group Limited group company.
- 25

New (Majority)

- 29. Revocations**—The following regulations are revoked:
- (a) The Kiwifruit Marketing Regulations 1977 (S.R. 1977/281):
- 30 (b) The Kiwifruit Marketing Regulations 1977, Amendment No. 4 (S.R. 1988/227):
- (c) The Kiwifruit Marketing Regulations 1977, Amendment No. 5 (S.R. 1989/50):
- 35 (d) The Kiwifruit Marketing Regulations 1977, Amendment No. 6 (S.R. 1991/63):

New (Majority)

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|--|----|
| (e) The Kiwifruit Marketing Regulations 1977, Amendment No. 7 (S.R. 1991/147): | |
| (f) The Kiwifruit Marketing Regulations 1977, Amendment No. 8 (S.R. 1992/224): | 5 |
| (g) The Kiwifruit Marketing Regulations 1977, Amendment No. 9 (S.R. 1992/344): | |
| (h) The Kiwifruit Marketing Regulations 1977, Amendment No. 10 (S.R. 1993/22): | |
| (i) The Kiwifruit Marketing Amendment Regulations 1998 (S.R. 1998/48). | 10 |

30. Amendments to Official Information Act 1982—

(1) The First Schedule of the Official Information Act 1982 is amended by inserting the following item in its appropriate alphabetical order: 15

“The New Zealand Kiwifruit Board.”

(2) The First Schedule of the Official Information Act 1982 is amended by omitting the item relating to the New Zealand Kiwifruit Authority.

31. Saving—(1) Regulations 13G and 14A of the Kiwifruit Marketing Regulations 1977 continue to apply in respect of kiwifruit acquired by the Board in the year ending **31 March 2000**. 20

(2) Decisions under that regulation 13G, and decisions under that regulation 14A as to the amount of distributions of trading profit, in respect of kiwifruit acquired by the Board in that year must be submitted by the company to the members of the Board for approval and must not be implemented unless a simple majority of those members approve those decisions. 25

(3) This section applies as if the members of the Board referred to in **subsection (2)** had continued to be members of the Board notwithstanding the restructuring of the Board. 30

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—(1) The initial directors of the company must be the existing directors of Zespri International Limited, a subsidiary of the Board, who consent to be the directors of the company *<for a term expiring on 1 November 2000>*.

SCHEDULE—*continued*PROVISIONS RELATING TO RESTRUCTURING OF BOARD—*continued**New (Majority)*

- (2) The term of office of those initial directors expires—
- (a) In the case of half of the directors, on **1 November 2000**; and
- (b) In the case of the other half of the directors, on such later date as may be specified in regulations made under this Act and in any event no later than **1 May 2001**.

4. Initial members of new Board—The initial members of the new Board to be established under this Act must be the existing members of the Board who consent to be the members of the new Board, for a term expiring on **1 November 2000**.

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

- (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.

6. 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 registers 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.