

APPLE AND PEAR INDUSTRY RESTRUCTURING BILL

EXPLANATORY NOTE

General Policy Statement

The Government's overall objective is to maximise the economic welfare of New Zealand. The Government's role is to provide the regulatory framework to facilitate the creation of wealth and efficient use of resources across the economy. The growth of an internationally competitive export sector, of which the apple and pear industry is a significant part, is a key component of the Government's policies.

The Bill provides for a new regulatory framework for the exporting of apples and pears and the transition of the commercial business to generic governance laws.

The key features of the reform package, including regulations intended to be made under the Bill, are—

- continuing controls over the export of New Zealand apples and pears for an indefinite period;
- separation of regulatory and commercial activities;
- direct grower ownership of ENZA;
- shares in the company holding those commercial assets being tradeable among growers;
- certain rules to mitigate the risks of export controls;
- simplification of the regulations relating to the acquisition of fruit.

The underlying objective is to enable the apple and pear industry to reposition itself so that it can respond positively to the challenges of the international market.

Clause by Clause Analysis

Clause 1 relates to the Short Title and commencement. Most of the Bill is to come into force on the day after the Bill receives the Royal assent. However, 1 April 2000 is the proposed day on which the Board will convert into a company and the existing Apple and Pear Marketing Act 1971 will be repealed.

Clause 2 relates to interpretation. The definition of apples and pears does not include nashi.

Clause 3 provides that the Act is to bind the Crown.

PART 1

RESTRUCTURING OF BOARD

Part 1 provides for the restructuring of the existing New Zealand Apple and Pear Marketing Board into a company called ENZA Limited.

The principal features of the restructuring are as follows:

- the Board is to prepare a restructuring plan which provides for the allocation of shares to growers of apples or pears as at **30 September 1999**, for the Board to become a new company registered only under the Companies Act 1993, and for the shares in the new company to be at least tradeable among growers:
- the Board must give the restructuring plan to the Minister for approval:
- the Board must hold a referendum on the restructuring plan:
- the growers of apples or pears as at **30 September 1999** are eligible to vote in the referendum:
- there is sufficient support for the restructuring plan if 75% of the votes cast in the referendum are in favour of the plan:
- the restructuring plan is then confirmed by the Minister:
- the Board is converted into a company on the restructuring day:
- the conversion does not create a new legal entity, and the Board's property and liabilities are unaffected:
- shares in the new company issued to growers on the restructuring are not to be treated for tax purposes as a dividend, dutiable gift, or otherwise as income:
- for tax purposes, \$83,000,000 is made available to the company by way of available subscribed capital.

PART 2

REGULATION OF EXPORT OF APPLES AND PEARS

Part 2 contains regulation-making powers. The principal powers are to—

- provide for the establishment, functions, powers, membership, and other matters relating to a new Board:
 - restrict the export of apples and pears:
 - provide for the new Board to grant to ENZA Limited an authorisation to export apples and pears:
 - provide for the new Board to appoint a separate independent body to permit other persons to export apples and pears:
 - provide for the terms and conditions that may or may not be imposed as part of the authorisation or a permit:
 - restrict discrimination among suppliers to commercial grounds:
 - restrict certain diversification of business:
 - require ENZA Limited to operate its core business at arms length from its activities in contestable markets in New Zealand:
 - impose requirements in respect of the corporate form and governance of ENZA Limited and the tradeability of its shares:
 - provide for information disclosure.
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Hon John Luxton

APPLE AND PEAR INDUSTRY RESTRUCTURING

ANALYSIS

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1. Short Title and commencement	<i>Ministerial Confirmation of Restructuring Plan</i>
2. Interpretation	18. Minister must confirm restructuring plan
3. Act binds the Crown	19. Default position
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5. Contents of restructuring plan	20. Conversion of Board into ENZA Limited
6. Share allocation plan	21. Effect of registration as company
7. Corporate form	22. Final report of Board
8. Application for registration of company	<i>Miscellaneous Provisions</i>
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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** 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—

(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 property and any applications pending for patents, trademarks, copyright, and other intellectual 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

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

5 “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**:

10 “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

15 *Restructuring Plan*

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

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

- 20 (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
25 (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—

- 30 (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
35 (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
40 (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. 5

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. 10

(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 company to be a grower for the purpose of tradeability of shares. 15

8. Application for registration of company—The application for registration of a company under the Companies Act 1993 must comply with section 12 of that Act, except that— 20

(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: 25

(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— 30
(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. 35

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.

5 **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

10 (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.

15 (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—

20 (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

25 (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.

30 (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.

35 (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.

40 **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.

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

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(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.

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Implementation of Restructuring Plan

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

(a) The Board is dissolved; and

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(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

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(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.

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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

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(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.

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

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

(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.

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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**—

(a) Is not a dutiable gift for the purposes of the Estate and Gift Duties Act 1968; and 10

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

(c) Is not otherwise gross income of the person for the purposes of the Income Tax Act 1994. 15

(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—

(a) Held those shares at all times prior to the restructuring day; and 20

(b) Subject to section OD 5 (5) of the Income Tax Act 1994, held any voting interest or market value interest attributable to those shares at all times prior to the restructuring day. 25

(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—

(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 30

(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. 35

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

PART 2

REGULATION OF EXPORT OF APPLES AND PEARS

5 **25. 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, and other matters relating to the new Board:

10 *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:

15 (d) Providing for the new Board to appoint a separate independent body to permit other persons to export apples and pears:

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

Mitigation Measures

20 (f) Restricting discrimination among suppliers to commercial grounds:

(g) Restricting certain diversification of business:

25 (h) Imposing requirements in respect of the corporate form and governance of ENZA Limited and the tradeability of its shares:

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

Information Disclosure

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

35 (k) Requiring ENZA Limited to publish in the prescribed manner information which must include (without limitation)—

(i) Prices, terms, and conditions:

(ii) Pricing policies and methodologies:

(iii) Costs:

40 (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:
- (o) Setting rules about the timing of the disclosure of information:
- (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:
- (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:
- (t) Providing for Ministerial directions to be given to the company in respect of international obligations:

- (u) Providing for the dissolution of the new Board and for all matters related to the dissolution:
 - (v) Providing for transitional provisions:
 - (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.
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- (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
- 10 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).
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- 27. Amendments to other Acts**—(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:
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“The New Zealand Apple and Pear Board”.

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

Section 21 (3)

SCHEDULE

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 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 of the Board:
- (e) All transactions entered into by, and acts of, the Board before the dissolution 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.