

KIWIFRUIT INDUSTRY RESTRUCTURING ACT 1999

1999 No 95

An Act to provide for—

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

[8 September 1999

ANALYSIS
(List of Sections)

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

Producer referendum on restructuring plan

13. Producer referendum on restructuring plan

14. Procedure for consulting with producers

15. Way in which referendum to be conducted

16. Level of support 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 Zespri Group Limited

21. Effect of registration as company

22. Final report of Board

Miscellaneous provisions

23. Taxation

24. Cross-directorships

25. Decisions in transitional period

PART 2 — REGULATION OF EXPORT OF KIWIFRUIT

26. Regulations

New Board

Regulation of Export of Kiwifruit

Mitigation Measures

Information Disclosure

General

27. Revocations

28. Amendments to Official Information Act 1982

29. Saving

SCHEDULE

PROVISIONS RELATING TO RESTRUCTURING OF BOARD

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 27, 28(2), and 29 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—

(1) In this Act, unless the context otherwise requires,—

“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”:

“Kiwifruit” means the fruit of a kiwifruit vine:

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

“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:

“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; or

(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—

(a) Choses in action and money:

(b) Goodwill:

(c) Any copyright, patent, registered design, trademark, know-how, service marks, 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:

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

(2) The decision as to who is a producer in respect of any particular kiwifruit orchard (whether an owner of land referred to in paragraph (a) of the definition of producer or any other person referred to in paragraph (b) of the definition) is for the Board to make.

(3) The Board, in exercising that discretion, may have regard to—

(a) Whether the orchard was developed by a lessee of the land; or

(b) Whether the landowner or lessee who would otherwise be the producer consents to another person being the producer, in a case where the other person—

(i) Has a family association with the landowner or lessee; and

(ii) Is engaged in the production of kiwifruit on that land.

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 producers as at 31 March 2000; 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 producers, based on supply history of the land on which the kiwifruit is produced, in the assets of the Board before the restructuring; and

(c) That the share allocation plan specifies the proposed basis of allocation.

(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:

(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—

(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.

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 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—

(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 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.

Producer referendum on restructuring plan

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.

(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:

(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

(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

(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.

(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.

16. Level of support 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.

(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.
- (3) The Minister must confirm the restructuring plan once 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):
 - (b) A constitution for the company that, in the opinion of the Minister, is consistent with this Act and the regulations.
 - (2) Before specifying the documents under subsection (1), the Minister must—
 - (a) Consult with persons or representatives of persons likely to be affected by the restructuring plan; and
 - (b) Give the Board an opportunity to propose changes to the documents proposed to be specified by the Minister; and
 - (c) Take into account the views expressed under paragraphs (a) and (b) in specifying those documents.
 - (3) 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—
 - (a) The Board is deemed to be a company registered under the Companies Act 1993 with the name "Zespri Group Limited"; and
 - (b) The Registrar of Companies must issue a certificate of registration for the company; and

(c) 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.

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 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.

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

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

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

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

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

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

(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 have—

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

(b)Subject to section OD5(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.

(3)For the purposes of the definition of the term "available subscribed capital" in section OB1 of the Income Tax Act 1994, the company—

(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 consideration in respect of the issue of shares to producers on the restructuring day.

(4)With respect to amounts paid by the Board before 1 April 2000, (a) of the definition of the term "rebate" in each of section HF1(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.

(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.

(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.

PART 2 - REGULATION OF EXPORT OF KIWIFRUIT

26. Regulations—

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

(a)Providing for the establishment, functions, powers, membership, funding, and other matters relating to the new Board:
Regulation of Export of Kiwifruit

(b)Restricting the export of kiwifruit otherwise than for consumption in Australia:

(c)Providing for the new Board to grant to Zespri Group 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 to export kiwifruit in collaboration with other persons approved by the Board:

(f)Providing for the terms and conditions or other requirements that may or may not be part of the authorisation, permit, or collaborative marketing approval:
Mitigation Measures

(g)Restricting discrimination among suppliers of kiwifruit for export to commercial grounds:

(h)Restricting certain diversification of business:

(i)Imposing requirements in respect of the corporate form and governance of the company and the tradeability of its shares, including any rules about maximum share holding:
Information Disclosure

(j)Requiring Zespri Group to make publicly available prescribed financial statements that follow generally accepted accounting principles:

(k)Requiring Zespri Group to publish in the prescribed manner information which 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:

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

(p) Requiring persons other than Zespri Group 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:

(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):

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:

(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:

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

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

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

(x) Providing for transitional provisions:

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

(2) In this section, "Zespri Group" means the company and its subsidiaries.

(3) 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.

27. Revocations—

The following regulations are revoked:

(a) The Kiwifruit Marketing Regulations 1977 (SR 1977/281):

(b) The Kiwifruit Marketing Regulations 1977, Amendment No 4 (SR 1988/227):

(c) The Kiwifruit Marketing Regulations 1977, Amendment No 5 (SR 1989/50):

(d) The Kiwifruit Marketing Regulations 1977, Amendment No 6 (SR 1991/63):

(e) The Kiwifruit Marketing Regulations 1977, Amendment No 7 (SR 1991/147):

(f) The Kiwifruit Marketing Regulations 1977, Amendment No 8 (SR 1992/224):

(g) The Kiwifruit Marketing Regulations 1977, Amendment No 9 (SR 1992/344):

(h) The Kiwifruit Marketing Regulations 1977, Amendment No 10 (SR 1993/22):

(i) The Kiwifruit Marketing Amendment Regulations 1998 (SR 1998/48).

28. Amendments to Official Information Act 1982—

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

"The New Zealand Kiwifruit Board."

(2) Schedule 1 of the Official Information Act 1982 is amended by omitting the item relating to the New Zealand Kiwifruit Authority.

29. 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.

(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.

(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.

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 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 conversion of the Board:

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

(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 30 June 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 to 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.