Ministry for Primary Industries
Manatū Ahu Matua

Review of the New Zealand Horticulture Export Authority Act 1987

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Growing and Protecting New Zealand

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1 Introduction

1.1 THE REVIEW

The New Zealand Horticulture Export Authority Act 1987 (the HEA Act) has served the horticultural sector well over the last 25 years, and according to a recently undertaken independent performance review, remains popular with smaller export based horticultural industries. This 25 years of experience has given the Ministry for Primary Industries (MPI) and the horticulture industries the ability to identify opportunities to make the HEA Act more functional, useful, effective and efficient, and reduce compliance costs. This review is also an opportunity to position the HEA Act to enable the HEA to respond effectively to future developments in food technology, and changing consumer trends, and make the Act a more effective industry development and management tool.

The proposals in this discussion paper focus on:

- providing greater flexibility by enabling the product groups to differentiate between markets[1] by applying the HEA Act framework only to certain markets (i.e. market segmentation) or by issuing different types of licences (i.e. two-tier licences);
- clarifying the procedures for demonstrating industry support for seeking an HEA Export Order or for exiting the HEA Act;
- asking whether the licence application assessment criteria are adequate;
- asking whether the enforcement and penalty provisions require updating after 25 years of operation; and
- updating a number of ambiguous and out of date provisions of the HEA Act.

1.2 OUT OF SCOPE

There has been some suggestion that the scope of the HEA Act should be expanded to include sectors outside of horticulture. This would allow other primary industries to seek to use the HEA Act framework for industry and market development purposes by being able to co-ordinate export marketing of their commodities. While the concept may have merit, it would require a first principles review of the HEA Act. This would be a significantly bigger project than the current targeted review, and therefore this issue is not included at this time.

Nor is the Government considering the reintroduction of quantitative controls to restrict volumes of exports or number of exporters to particular markets. Among other reasons, such controls would be contrary to New Zealand's international obligations and trade policy settings.

1.3 REGULATORY CONTEXT

With any legislative review, it is important to look at Government's overarching policy objectives as a backdrop against which to consider the specific policy issues.

In 2009 the Government released the first Government Statement on Regulation. It contained two key commitments: to introduce new regulation only when the Government is satisfied that it is required, reasonable and robust; and to review existing regulation to identify and remove requirements that are unnecessary, ineffective and excessively costly.

[1] In this paper 'market' refers to countries or group of countries.

These commitments are often referred to as “better and less regulation”. For the review of the HEA Act, government will look to ensure that any amendment is justified and beneficial to the industry. The proposals must add value without introducing unnecessary costs. Specifically, MPI wants to ensure that the proposals will not introduce high barriers for industry participants. The HEA Act should not restrict action unless there is good reason; rather it should be a tool to assist in collective action, helping the industry to work together. This approach is important for the growth of New Zealand’s horticulture industries.

An effective regulatory regime must also be consistent with general principles of good regulatory practice, such as transparency, cost-effectiveness and timeliness of regulatory processes, and certainty and predictability of regulatory outcomes.

2 Information for Submitters

Written submissions on the issues raised in the consultation paper are invited from all interested parties. The closing date for submissions is 15 February 2013. Submissions should be directed to:

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Submissions will be considered by officials in the preparation of advice to Ministers. Specific questions have been posed to submitters, but these are only suggestions. Submissions on all issues that are within the scope of this consultation document will be considered. Submissions backed by evidence and argument will carry more weight that statements of opinion.

MPI considers that substantive elements of the Regulatory Impact Analysis (RIA) apply to this review of the HEA Act. This discussion paper contains topics relevant to RIA analysis.

2.1 POSTING AND RELEASE OF SUBMISSIONS

MPI may post all or parts of any written submission on its website at www.mpi.govt.nz. Unless you clearly specify otherwise in your submission, MPI will consider you to have consented to posting by making a submission.

In any case, content of submissions provided to MPI are likely to be subject to public release under the Official Information Act 1982 following requests to MPI (including via email). Please advise if you have any objection to the release of any information contained in a submission, and in particular, which part(s) you consider should be withheld, together with the reason(s) for withholding the information. MPI will take into account all such objections when responding to requests for copies and information on submissions to this document under the Official Information Act 1982.

2.2 PRIVACY

The Privacy Act 1993 establishes certain principles with respect to the collection, use and disclosure of information about individuals by various agencies including MPI. It governs access by individuals to information about themselves held by agencies. Any personal information you supply to MPI in the course of making a submission will be used by MPI only in conjunction with matters covered by this document. Please clearly indicate in your submission if you do not wish your name to be included in any summary of submissions that MPI may publish.

3 Background

3.1 THE HEA ACT

The purpose of the HEA Act is to promote effective export marketing of horticultural products. It does this by providing sectors with a structure within which they can set minimum quality standards and co-ordinate their marketing and ongoing sector development if they so choose.

The New Zealand Horticulture Export Authority (the HEA) is a body with statutory powers which, through the licensing of exporters, co-ordinates and controls the export marketing of certain horticultural produce. The intent at the time of introduction of the HEA Bill in 1983 was to provide for the best possible returns for the producer and a reduced risk of any irresponsible exporter jeopardising markets[2].

Horticultural industries, in general, benefit from some degree of industry coordination in export marketing because:

- of the homogeneous nature of their products;
- there are a large number of producers and exporters in each sector, and most compete in the same markets;
- the products have short harvesting and selling windows;
- the products are highly perishable;
- the products have close substitutes; and
- the industries face significant tariff and non-tariff barriers.

The HEA regime is not compulsory. Growers and exporters decide when and whether to come under or exit from the HEA. The industry's product group, representing both growers and exporters, applies to the Minister for the Order-in-Council. The Minister must consider the extent of any opposition to the proposal, from both growers and exporters, before recommending the making of the Order-in-Council.

Once a particular horticultural product has entered the HEA regime it is subject to an export marketing strategy (EMS). The EMS is developed by the product group and applies to all markets. Once the product group has decided on the content of its EMS, it goes to the HEA Board for consideration. The HEA Board will approve the EMS once it is satisfied its contents are within the scope of the HEA Act. Minimum quality standards (including pesticide residue levels) and collation of information are the key focus areas of every EMS.

Once an industry's EMS is approved by the HEA Board, all products covered by that EMS become subject to export licensing in accordance with the EMS requirements. Exporters of the product must apply to the HEA for an export licence.

An EMS cannot restrict volume of exports or the number of exporters to a particular market (or part of a market) or set the price of the products exported. Such restrictive provisions would be contrary to New Zealand's international obligations and trade policy settings.

[2] When introducing the HEA Bill in 1983, the Minister of Agriculture said "a *body with statutory powers was needed to co-ordinate and control, through the licensing of exporters, the export marketing of horticultural produce to get the best possible returns for producer and to prevent any irresponsible exporter from jeopardising recently developed markets*."

Other than for kiwifruit exports to Australia[3], an EMS cannot specify or exclude particular markets.

Currently, eleven product groups have chosen to come under the HEA framework[4], with eight of those currently exporting their products under the HEA framework.

Table 1: Export earnings for HEA Product Groups (NZ$ million):

Forex for HEA Product Groups y.e. June							
NZ$ m	2007	2008	2009	2010	2011	2012	**2012 % of total**
Avocados	$ 28.5	$ 56.3	$ 38.4	$ 59.9	$ 51.3	$ 96.9	36.6%
Blackcurrants	$ 12.8	$ 20.0	$ 13.6	$ 13.6	$ 13.2	$ 17.3	6.6%
Boysenberries	$ 4.9	$ 6.0	$ 4.2	$ 5.8	$ 5.7	$ 4.5	1.7%
Persimmons	$ 6.8	$ 7.4	$ 7.6	$ 6.9	$ 6.7	$ 7.1	2.7%
Squash/Kabocha	$ 66.0	$ 64.9	$ 69.3	$ 53.2	$ 64.0	$ 65.0	24.6%
Kiwifruit to Australia	$ 34.7	$ 33.0	$ 29.0	$ 34.4	$ 36.2	$ 41.6	15.7%
Summerfruit	$ 17.3	$ 21.3	$ 30.1	$ 30.7	$ 31.4	$ 31.9	12.0%
Others	$ 0.9	$ 1.3	$ 0.5	$ 0.3	$ 0.5	$ 0.2	0.1%
Total	**$ 172.0**	**$ 210.2**	**$ 192.6**	**$ 204.8**	**$ 209.0**	**$ 264.6**	100.0%

Source: Statistics NZ
Note: Foreign Exchange (Forex)

3.2 FINDINGS OF THE RECENT HEA PERFORMANCE REVIEW

The HEA Act requires that every five years the HEA and the Minister jointly appoint a person to undertake a review of HEA's performance. At the last review in 2009, the independent reviewer concluded that:

- the HEA Act remains the appropriate model for the horticulture industry;
- the HEA Act's coverage should be widened so that other industries can also benefit from the disciplines of the HEA model; and
- the HEA Act needs to be reviewed and amended to strengthen some of the enforcement and penalty provisions of the Act.

[3] The HEA Act has specifically allowed an Order-in-Council (HEA Export Order) to be made for regulating kiwifruit exports to Australia, as all other kiwifruit export markets are regulated by the single-desk export powers in the Kiwifruit Export Regulations 1999. The single-desk powers cannot be used for the Australian market because of New Zealand's Closer Economic Relationship agreement with Australia. Some of the proposals in this discussion paper would likely require a consequential amendment to the section of the HEA Act relating to kiwifruit exports to Australia.

[4] Avocado, Blackcurrants, Boysenberries, Buttercup Squash, Chestnuts, Kiwifruit to Australia, Nashi Pears, Persimmon, Summerfruit, Tamarillo, and Truffles. Nashi Pears, Chestnuts and Truffles have HEA Export Orders, but are not currently exporting products under the HEA framework.

4 Policy Objective

The policy objective is to provide a framework for increasing returns to New Zealand from horticultural exports, without putting at risk the interests of domestic consumers.

The review of the HEA Act will help to achieve this objective by improving the HEA Act framework as an industry and market development tool with provisions that are clear, transparent, effective and efficient, and are relevant to today's business and trade environment.

5 Issues with the Current HEA Act framework

MPI and the horticulture industries have identified a number of issues with the HEA Act that could prevent it from fulfilling the objective outlined above.

5.1 FLEXIBILITY

The HEA Act currently only provides for a 'one-size-fits-all' approach to export markets and licences through the requirement that all exported product must comply with the EMS. That is, it offers limited flexibility for product groups to be able to differentiate between markets or types of licence and design export rules accordingly. This could impede the development of some export markets and may result in overly burdensome compliance costs for producers and/or exporters to other markets.

5.2 ENTRY AND EXIT

The HEA Act is ambiguous with regard to entry to and exit from the Act. It does not provide sufficient clarity on how to determine support from industry participants:

- for making an HEA Export Order; or
- for revoking an HEA Export Order.

5.3 LICENCE APPLICATION ASSESSMENT CRITERIA

Questions have been raised as to the appropriateness and adequacy of the existing licence application assessment criteria (for exporters).

5.4 ENFORCEMENT AND APPROPRIATE PENALTIES

The current penalties were set 25 years ago and may no longer provide a suitable deterrent to those considering non-compliance with the Act. Are there other enforcement tools suitable for use under the HEA model?

5.5 NEED FOR MODERNISATION

The HEA Act was passed in 1987. While certain amendments have been made over time, the Act has not evolved to the same extent as the horticultural industry. The industry has continued to develop and adapt to the changing business and trade environment. The result is that certain elements of the HEA Act are now in need of modernising and/or are ambiguous and lack relevance.

6 Potential Options

A number of options could address the issues identified above. Each issue will be looked at in turn, with the costs and benefits for the various options set out for consideration.

ISSUE 1: FLEXIBILITY – SHOULD THE HEA ACT PROVIDE FOR THE ABILITY TO DIFFERENTIATE BETWEEN MARKETS AND, IF SO, HOW WOULD THIS BEST BE ACHIEVED?

Background and analysis

Under the HEA framework, all producers and exporters must comply with the relevant EMS for their particular product and all exporters must comply with the licence requirements. EMS and export licensing are the two key provisions under the HEA Act for coordinating export marketing.

Not all export markets[5] are equal, so the ability to differentiate and prioritise markets based on their intrinsic value is attractive to sectors. As the HEA Act provides limited ability for markets to be differentiated, 'export rules' are applied to all export markets. From a practical perspective, applying the same EMS and licensing framework has considerable merit. For some product groups, however, there are '2nd tier markets' for which a rules-based system is of limited value, while the ability to apply rules to high-value markets remains attractive.

For most commodities there is a 'long tail', each has a small number of high-volume, high-value markets with many small-volume and/or low-value markets. For instance, around two thirds of New Zealand's apple exports (not currently under the HEA) by value are to the European Union and the United States, and the remaining one third exported to 41 different markets. Export data for avocados and buttercup squash (see tables 1 and 2 in the appendix) show similar distribution.

The current inflexibility in the HEA Act was highlighted in 2011 when the pipfruit sector considered operating under the HEA framework, but only for exports to Australia. The HEA Act does not enable export orders to be made only for specified countries, except for kiwifruit to Australia. Another recently proposed example is 'potatoes to Chinese Taipei'. These groups (and potentially others) may only consider using the HEA's rules-based system in their key markets, but are required to apply the rules to all their markets. In this sense, the problem and the solution are not well aligned.

This misalignment results in missed opportunities. Industry groups that could benefit from the HEA framework (through better industry development and increased returns) choose not to join because of its inflexibility.

[5] In this paper 'market' refers to countries or group of countries.

Options for resolving this include:

Option 1 – Retain the Status Quo:

Under this option, the HEA Act would remain unchanged. Product groups would continue to make use of the existing exemption clauses[6], as well as the ability to design each individual EMS in such a way as to be specific and differentiated, as far as possible, with regard to markets. In addition, there is the ability to exclude a particular variety of horticultural product. This option retains the simplicity of the system, making it easy to understand and comply with and straightforward to monitor.

This option does not address the concern that, for some product groups, there are low-value commodity markets where applying a rules-based system may not be effective and may constrain market development of the high-value markets. Nor does this option reduce compliance costs for any group, or for the industry as a whole. It also imposes unnecessary costs on small exporters exporting low-volume consignments to low-value markets where regulation of exports adds little or no value. It may mean that opportunity is lost by preventing lower grade commodities from being exported to markets that cannot afford commodities that have been subject to an EMS.

Option 2 – Introduce Market Segmentation:

Under this option, a product group would have the option of applying the HEA framework to some of its export markets (for example, its priority markets) and not others. Anyone who exports only to markets that are not included in the EMS would not come under the HEA framework at all.

This option provides industry groups flexibility in their export strategies and allows groups to compare/contrast exporting under two different systems. It is consistent with a 'fit for purpose' philosophy and would result in more targeted (and better) regulation. This option also makes the HEA regime more appealing to product groups who could benefit from coming under the HEA framework, but who have been put off by the 'one-size-fits-all' nature of the existing system.

Market segmentation does, however, introduce certain risks. There is the possibility of "leakage". That is, a product shipped to a market not under a licensing regime is diverted in transit to a market for which licences are required. The practicalities of applying a monitoring system to specific markets and not others present exporters with an opportunity to circumvent the licensing system (and the HEA cost structure). This could undermine the value the HEA structure would otherwise provide. That said, it is arguable how likely this behaviour would be, given the cost to exporters of doing so.

Markets (and importing authorities) tend to perceive all products from the originating country as the same. This means a priority market may not differentiate between the product it receives (supplied via the HEA structure) and product being exported to a market outside of the HEA structure, which may not be subject to the same EMS requirements. This could result in a negative reaction from that priority market to New Zealand's product. In other words, one of the key benefits of the HEA structure could be undermined from product exported outside the structure. In addition, this option increases the complexity of the regime

[6] The HEA Act currently allows for exemptions from the EMS and from the licensing requirements through exporters lodging applications on a case-by-case basis for very small consignments, mainly for trial purposes.

and raises some operational and logistical challenges that would need to be carefully thought through.

This option does reduce compliance costs for those product groups who only get value from the HEA system for some of their markets. However it is likely to result in increased operational and monitoring costs and a likelihood of loss of integrity in the system, should any leakages occur.

Option 3 – Introduce two-tier licensing:

This option would see the HEA having the ability to issue different categories of licence, based on defined criteria. There would likely be two categories of licence – class 1 and class 2 – depending on which markets an exporter wished to export to. Under this option an EMS still applies to all markets, but the EMS stipulates what category of licence each market requires, i.e. whether a market is tier one or tier two.

This 'two categories of licence' option allows for differentiation between markets using the EMS as the mechanism to identify the priority markets and set out the associated exporting requirements. Exporters wanting to service the class 1 markets could be issued with a class 1 licence. Exporters only interested in supplying the 2nd tier markets could be issued with a class 2 licence at a lower fee.

The key advantage of this option is that it addresses the concern about the disproportionate cost and compliance of licences for those exporters only wishing to export to secondary markets. This option promotes cost efficiencies by allowing exporters to determine the cost structure that reflects their exporting ambitions and requirements. It gives product groups the flexibility to distinguish between markets and adjust their export requirements accordingly and to determine how extensively they wish to apply the HEA structure.

As with market segmentation, a risk associated with this option is leakage (although MPI understands that the risk is likely to be even lower than with option 2 above, as all exporters will still need to be licensed and, in doing so, have to comply with some rules). The monitoring of export licences is through the New Zealand Customs (NZ Customs) database. Every shipment of HEA product requires a NZ Customs export entry to be raised to enable the product to be loaded on a vessel/aircraft. That entry requires a licence number, which is initially generated by the NZ Customs database. When the HEA grants a licence, it provides a licensee with a licence number that will be compatible with the NZ Customs system. This means that when the licence holder makes a shipment it is accepted by the NZ Customs' system.

There is a potential monitoring problem with this option. The NZ Customs' system has limited ability to link a licence number with a specific market. Exporters looking to minimise compliance costs could apply for the 'least cost' licence option, then use that licence to ship products to the higher paying priority markets (i.e. markets for which the licence is not valid). Compared with the status quo, this option is likely to increase the monitoring and compliance component of the HEA's role, yet this option could also see a reduction in the HEA's revenue as some exporters would no longer need class 1 licences.

Option 4 – Introduce both market segmentation and two-tier licensing:

This option involves implementing both options 2 and 3 as outlined above. It represents the greatest flexibility for product groups to extract the maximum value from the HEA system.

This option, however, introduces significant complexity to the HEA system. It would require increased compliance monitoring and enforcement activity by the HEA and presents operational and logistical challenges, which mean the HEA's (and therefore the industry's) costs may rise significantly.

Questions

Do you consider that the limited ability to differentiate between markets is an issue with the HEA framework? Is it an issue you have struggled with? If so, please tell us about your experience.

- Do you agree with the costs and benefits outlined for each option?
- Are there any other costs or benefits you believe should be considered?
- Are there any other options you believe should be considered?
- What is your preferred option, and why?
- Which do you believe is more important for the HEA regulatory regime to provide, flexibility or certainty?
- If it is decided to introduce different categories of licence, do you consider two tiers to be sufficient?

ISSUE 2: CLARIFY ENTRY AND EXIT REQUIREMENTS – WHAT SHOULD BE THE REQUIREMENTS UNDER THE HEA ACT TO DEMONSTRATE INDUSTRY SUPPORT TO ENTER OR EXIT THE REGIME?

Background and analysis

The Minister cannot recommend the making of an HEA Export Order unless the Minister:

- is satisfied that the product group has made reasonable efforts to inform producers and exporters of the product, and other persons affected, of the nature of the request for an HEA Export Order;
- has given regard to any representations made concerning the request, and to the extent and nature of any opposition to the proposed HEA Export Order; and
- has given regard to opposition from producers or exporters of any particular variety or cultivar of the commodity to its inclusion within the proposed order.

The HEA Act, however, provides no direction to industry as to how to demonstrate support or otherwise. If a product group no longer wishes to operate under the HEA framework, it must request the Minister to revoke the Order in Council, but the mandate necessary to make that request is not specified in the HEA Act.

Options for ENTRY requirements include[7]:

Option 1 – Retain the status quo:

This option will be less costly than options that impose additional regulatory requirements on industry groups. This is particularly so for industries that are very small with few producers and exporters, and that can easily demonstrate support (i.e. with a vote at the Annual General Meeting (AGM)). The status quo allows a product group to choose the way that suits it best to demonstrate support and with this, provides a sense of ownership over the process.

[7] Note that these options are not mutually exclusive and it may be appropriate for more than one of the options to be implemented in order to best achieve the overall objective of the regime.

This option does not remove ambiguities in the HEA Act and provides no additional clarification as to what is required. For most industry groups, the cost of this uncertainty is estimated to be greater than the costs saved by retaining the status quo. The greatest risk of this option is that of judicial review of the Minister's decisions due to the lack of definitive requirements. To date there has not been a judicial review of any Ministerial decision under the HEA Act.

Option 2 – Minister to determine entry requirements for each product group:

Under this option, the Minister would determine, on a case-by-case basis, the requirements a product group must fulfil to enter the HEA regime. For example, for a very small group where the members are all in regular contact, the Minister may decide that a vote at an AGM is sufficient, whereas for a very large group the Minister may require a full referendum. In making these determinations, the Minister would be guided by criteria set out in some published guidelines or in a published policy statement.

This option has the benefit of greater flexibility by allowing for differing requirements depending on the product group in question, while still providing certainty (to each group individually) about the requirements they need to fulfil.

This option would create additional administrative costs by requiring the Minister to make the determination in each case and thereby introducing an extra stage in the process. This would likely lengthen the amount of time it would take to have an Order in Council made. It could also result in the Minister being subjected to intensive lobbying and/or challenge in relation to the decisions made.

Option 3 – Clarify the entry process by prescribing resolution at an AGM or a Special General Meeting:

The benefit of this option is that it clarifies the process needed to demonstrate support. It would likely be simpler and less costly than a referendum.

There would be some additional costs, compared to the status quo, but these are expected to be negligible. The key cost is that it limits consultation to those who are, at the time, paid up members of the industry group (and therefore eligible to vote at an AGM). It doesn't seek wider views, such as from domestic growers who may be considering exporting in future.

Option 4 – Introduce a requirement for a referendum to enter:

If this option was accepted, MPI would recommend that provisions similar to those in the Commodity Levies Act 1990 (the CLA) be used, as they are clear, transparent and democratic, which makes it a good model to follow. Both growers and exporters will be able to vote.

Requiring a referendum removes the ambiguity about opposition to the application. It provides clarity for industry groups as to the requirements they must meet before submitting an application. This option ensures the HEA Act would have clearly specified thresholds for mandate. It removes debate on whether or not to hold a referendum. It would also provide clear guidelines as to how a referendum should be conducted (who should get to vote, how their votes should be counted and so on).

The disadvantage of this option is that it imposes significant additional costs on industry. This could make joining the regime less appealing for some industry groups, particularly the smaller ones. It also removes the flexibility that allows product groups to choose the method that best suits them. There is also a risk that even with a referendum process it is questionable

whether the results are truly reflective of the industry position[8]. To mitigate this risk, it would be imperative that the referendum provisions are designed to provide a very clear measure of support.

If it is ultimately decided that a requirement for a referendum is the preferred option, the design details of the proposed referendum would be extremely important. Key questions that would need to be considered include:

- Should producers' and exporters' votes in a referendum be counted separately?
- If so, should they be weighted differently?
- Should approval threshold be over 60% 'yes' vote, rather than a simple majority?
- Should that 'yes' vote be based on number of votes cast, or quantity of product exported, or both?

Questions

- Does the HEA Act provide sufficient direction as to how a product group should demonstrate support for entering the regime? If not, how much further direction is required and in what form?
- Does the HEA Act provide sufficient flexibility to allow a product group to determine for itself how to demonstrate support for entering the regime? If not, how could this be achieved?
- Do you agree with the costs and benefits outlined for each option?
- Are there any other costs or benefits you believe should be considered?
- Are there any other options you believe should be considered?
- What is your preferred option, and why?
- If it is decided to introduce a requirement for a referendum:
  - do you consider that producers' and exporters' votes in a referendum should be counted separately?
  - should they be weighted differently? If so, why?
  - should approval threshold be set at 60% 'yes' vote, rather than a simple majority?
  - should that 'yes' vote be based on number of votes cast, or quantity of product exported, or both?

6.1.1 Options for EXIT requirements include:

Option 1 – Retain the status quo:

The key benefit of the status quo is the flexibility afforded to product groups to choose the method that best suits their particular situation. For example, for a small group with few members and regular contact, it may be sufficient to simply pass a resolution at the AGM. However, that very lack of direction from the legislation can also result in uncertainty for a group as to what is required.

Option 2 – Minister to determine exit requirements for each product group:

The Minister could determine, depending on the size of the industry, the requirements a product group must fulfil to exit the HEA regime. For example, for a very small group where the members are all in regular contact, the Minister may decide that a simple vote at an AGM is sufficient, whereas for a very large group the Minister may require a full referendum. In

[8] For example, an industry was granted a Commodity Levies Order because the majority of those voting voted 'yes', but that support equated to only 20% of the industry because of low participation in the referendum.

making these determinations, the Minister would be guided by criteria set out in published guidelines or in a published policy statement.

The benefit of this option is that it allows for differing requirements depending on the product group in question, while still providing certainty (to each group individually) about the requirements they need to fulfil.

This option would create additional administrative costs by requiring the Minister to make the determination in each case and thereby introducing an extra stage in the process. This would likely lengthen the amount of time it would take to have an Order in Council revoked. It could also result in the Minister being subjected to intensive lobbying and/or challenge in relation to the decisions made.

Option 3 – Clarify the exit process by prescribing resolution at an AGM or Special General Meeting:

The benefit of this option is that it removes uncertainty about the mandate required to seek a revocation of the Order in Council (HEA Export Order).

Any new regulatory requirement means some additional cost, but this is expected to be negligible as the AGM must take place regardless. Additional costs are likely to be limited to the provision of relevant information and any consultation undertaken.

Option 4 – Clarify the exit process by introducing a referendum requirement:

This option clarifies the mandate required to seek a revocation of the Order in Council (HEA Export Order).

The costs of holding a referendum are likely to be significantly higher than those associated with an AGM resolution. See discussion under Option 4 for seeking a HEA Export Order on page 12 for more details and costs and benefits of this option.

Option 5 – Introduce a sunset clause:

Under this option, HEA export orders would have an automatic expiry date. This means that after joining the HEA framework, a product group would be required to periodically test ongoing support for its participation in the HEA regime (for example, every five years). Options for testing support would likely be either holding a special vote at an AGM or holding a referendum.

The key benefit of a sunset clause from a product group's perspective is that it has a finite period for financially committing to the HEA structure. It forces the industry to periodically assess whether the industry continues to value being part of the HEA regime and whether the net benefit has changed. This is particularly important as incumbents (who originally chose to be part of the regime) move out of the industry and new growers and exporters enter. It ensures that the product group communicates with the wider industry and is aware of any changing views over time.

The disadvantage of this option is that it imposes significant additional compliance costs (potentially unnecessarily, where an industry is clearly firmly supportive of the HEA regime). It also increases administrative costs to Government and could create a degree of regulatory uncertainty. While this is also true under the status quo (where a product group can vote to leave the regime at any point in time), this option legislates for the decision to be made every five years. This is not the case with the status quo, where the decision to leave would only arise due to dissatisfaction with the regime. Concerns about regulatory uncertainty are particularly relevant for growers, who have a long term investment in the industry. It may also

be unnecessary, as industries already have the flexibility to seek withdrawal from the HEA Act through remits at an AGM or special general meeting.

Questions

- Do you believe that the HEA needs a more defined process for exit? If so, what should that process be?
- Do you agree with the costs and benefits outlined for each option?
- Are there any other costs or benefits you believe should be considered?
- Are there any other options you believe should be considered?
- What is your preferred option, and why?

ISSUE 3 – LICENCE APPLICATION ASSESSMENT CRITERIA – ARE THE CURRENT CRITERIA APPROPRIATE? IF NOT, WHAT SHOULD THEY BE?

Background and analysis

Section 34(1) of the HEA Act specifies no 'person' may export prescribed product unless that person holds an export licence for that product, or a certificate of exemption from the licensing requirements. When assessing the suitability of a licence applicant, HEA must be satisfied that the applicant meets the following requirements:

- the applicant has adequate experience and competence in international marketing and in handling export product;
- the applicant is likely to be competent in handling, exporting, and marketing the product for which the licence is sought;
- the applicant understands the current Export Marketing Strategy for the product, and is willing and able to carry on its business in a way that does not prejudice that strategy;
- the applicant is of sound financial standing and of sound business repute; and
- the applicant has not been convicted of an offence that would impact on their business operations, for example, fraud.

Before granting an export licence HEA must first seek a recommendation from the recognised product group. The product group is expected to meet with licence applicants to get a good understanding of the company, their business, and plans for exporting the product.

Concerns have been raised by some industry members that the assessment criteria are too permissive and consequently inexperienced and potentially incompetent exporters can be granted a licence, which impacts on the credibility of the HEA framework.

There is a counter argument that the existing criteria could already be overly stringent, creating barriers to entry, preventing new entrants and the development of new markets and potentially stifling innovation.

Options for licence application assessment include:

Option 1 – Retain the status quo:

The status quo provides growers with the assurance of a certain level of competence and experience in exporters. Retaining the status quo removes the need for regulatory change and its associated cost.

A cost of this option is that if the criteria are too strict, this creates barriers to entry. On the other hand, if there are any current or potential participants who do not believe the criteria are

sufficiently robust, they may perceive the entire framework as lacking in credibility and opt not to be a part of it.

Option 2 – Relax the licence approval criteria:

A key benefit of this option is that it would remove (or at least significantly lower) barriers to entry, allowing for efficiency driven by competition. It could attract new players to the industry, increasing competition (and efficiency) and promoting innovation. This option also gives growers the opportunity to choose an exporter depending on their own preferences. For example, some will want the security of a very experienced exporter, while others may prefer to try a newer exporter, with fresh ideas or a sharper price. This option leaves that choice to the market rather than limiting the pool of exporters through regulatory measures.

The cost of this option is the risk of inexperienced or incompetent exporters damaging the reputation of a particular product and/or New Zealand horticulture more generally in our overseas markets. This could also result in a negative impact on the return to growers and New Zealand Inc. In addition, given some product groups already consider the criteria are too lenient, this option would be unpopular with those groups. It could impact negatively on the perceived value proposition for those groups of joining or staying under the HEA framework.

Option 3 – Bolster the licence approval criteria:

Some growers believe tightening up or 'raising' the licence application assessment criteria will provide benefits to industry on the basis that only those with the requisite skills, competency, and experience will be able to qualify. If licence applicants are aware of a risk of having their application rejected, they are likely to put more effort into their preparation, planning and organisation. Only genuine and serious applicants will apply (thus lifting standards required to be a licensed exporter).

The key cost of this option is that it creates barriers to entry for exporters, limiting the pool of exporters and also potentially stifling innovation. It is also likely unnecessary, as the HEA itself already determines measures of 'competency', and what constitutes 'sound financial standing'. On competency, the HEA has developed guidelines for considering licence applications. With regard to the definition of 'sound financial standing' the HEA has developed financial criteria with respect to companies and limited partnerships.

Questions

- Do you consider that the current licence approval criteria are appropriate? If not, what changes do you believe are needed?
- Do you agree with the costs and benefits outlined for each option?
- Are there any other costs or benefits you believe should be considered?
- Are there any other options you believe should be considered?
- What is your preferred option, and why?
- If you consider that the criteria need to be bolstered, which additional aspects do you consider are required?
- If you believe the criteria need to be relaxed, which aspects to you believe are not required or should be amended?

ISSUE 4: APPROPRIATE PENALTIES – WHAT ARE APPROPRIATE ENFORCEMENT POWERS AND WHAT IS THE RIGHT LEVEL OF PENALTY?

Background and analysis

Currently, the HEA has powers to revoke, suspend or cancel an exporter's licence. It can also seek, upon conviction, a maximum penalty of $10,000 for exporting a prescribed product without a valid licence; or a maximum penalty of $4,000 for an offence against the HEA Act. These penalties were set in 1987 and the HEA considers them now to be outdated. Given inflation, the effective value of the fines has decreased over time. If the penalties were adjusted for inflation over the period from 1987 to 2012, the $10,000 figure would now be $19,546, and the $4,000 figure would now be $7,818.

Options for enforcement powers for the HEA include:

Option 1 – Retain the Status Quo:

A benefit of the status quo is that the respective enforcement responsibilities sit with the appropriate parties. The HEA has enforcement powers associated with the licensing regime, which it administers. Fines, however, are more appropriately issued by the Courts.
The fines were set at the time the HEA Act was passed in 1987, and the HEA considers that the fines are negligible in today's terms. The HEA considers a fine of $4,000 or $10,000 is unlikely to create any disincentive to an exporter considering non-compliance.

Option 2 – Retain the existing enforcement provisions, but increase the fine:

This option has the benefit of ensuring the fines are significant enough to create real disincentive to non-compliance.

What the fines will be increased to will be discussed with the Ministry of Justice before putting any recommendations to the Government. This will need to be at levels similar to what is in other legislation.

Option 3 – Are there other enforcement tools that the HEA could use?

The HEA has powers under the HEA Act to suspend or revoke an exporter's licence, and can impose conditions on a licence. Are there other tools that the HEA should have at its disposal for enforcement purposes?

Questions

- Do you believe that the HEA requires 'more teeth'? If so, what elements would you like to see introduced?
- Do you agree with the costs and benefits outlined for each option?
- Are there any other costs or benefits you believe should be considered?
- Are there any other options you believe should be considered?
- What is your preferred option, and why?

ISSUE 5: UPDATING OTHER PROVISIONS IN THE HEA ACT – PROPOSALS TO ADDRESS OUTDATED OR AMBIGUOUS PROVISIONS IN THE HEA ACT

Background and analysis

A number of minor issues have been identified relating to outdated or ambiguous provisions in the HEA Act. Each of these is outlined below, along with a proposal to amend the provision. Interested parties are invited to provide their opinion on the proposals.

Definition of 'processed'. Question has been asked whether the definition of "processed" in the HEA Act[9] requires updating because there is now a greater range of product forms and combinations of products being produced than was the case in 1987. This issue was raised in 2004 regarding boysenberries and again in 2008, regarding boysenberries and blackcurrants[10]. Other than those two instances, the issue has not been raised officially with the HEA and it is therefore arguable whether this is significant enough to require amendment. MPI welcomes views from interested parties as to whether the current definition poses a problem.

The HEA's funding mechanism. The regulation making powers of the HEA Act enable regulations to be made for the HEA to collect levies from producers and exporters of a prescribed product. There is some ambiguity in the HEA Act around the mandate for the HEA to collect such levies from product groups, as opposed to from individual growers and exporters. This needs to be clarified by inserting in the regulation making powers the ability for the HEA to charge prescribed product groups fees or levies to meet some of the HEA's operating costs. This is the most effective and efficient method of levy collection.

Licence status. There is ambiguity in the HEA Act about the status of an export licence where the commercial state of an entity is materially changed, such as through merger or acquisition. The HEA has established a policy to follow in these situations. The proposal is to clarify in the HEA Act that a new licence application is required from the new entity in the case of company mergers and acquisitions. While this proposal would result in less flexibility for the HEA to be able to determine, on a case-by-case basis, whether a new licence is required, this is outweighed by the benefit to be gained from simple, clear and objective rules.

Conflicts of interest. The HEA Act provides that any Board conflict of interest is managed by the provisions of the Public Bodies Contracts Act 1959 and the Local Authorities (Members' Interests) Act 1969. Provisions in both Acts are now out of date and the latter is being reviewed with the intention of repeal. It is therefore opportune to insert into the HEA Act a provision for addressing conflicts of interest[11]. This will ensure the HEA has recourse to a more relevant provision for managing conflicts of interest, should they arise.

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[9] The definition in the HEA Act is that "processed", in relation to a product,

a) means an applied change to the natural state of the product by i) an alteration to the chemical structure of the product, whether by blanching, cooking, the addition of preservatives, or by other means; or ii) a physical change to the product by the addition or removal or extraction of any material part, whether the chemical structure of the product is altered or not.

In addition, the definition provides for some exclusions, including for certain product that is frozen, concentrated or pureed.

[10] Specifically, whether the addition of sugar constituted a change to the natural state of the product.

[11] The new provision could read as follows: "If any Member has or may have a conflict of interest (as determined by the Members), the Member shall declare his or her interest in the minutes. The remaining Members must determine whether the conflicted Member may participate in the deliberations affecting the matter and whether the conflicted Member may vote on such matter. If the remaining Members determine that the conflicted Member may not participate in the deliberations and/or vote on the matter, the conflicted Member shall leave the meeting for any such vote."

Updating Board remuneration provisions. The HEA Act provides that Board members' remuneration is to be determined by Board resolution. This is inconsistent with Government's fees framework for members of statutory boards. The fees framework provides a mechanism for classifying all statutory boards and sets a remuneration range in each of the categories, to achieve consistency across all the statutory boards. The HEA Board's remuneration is already determined by the Government's fees framework. The proposal is to amend the HEA Act so that Board remuneration is set in accordance with the Government's fees framework. This will formalise the current practice and ensure consistency with other statutory entities.

Redundant provisions. To aid the HEA to focus on its primary regulatory function of promoting the effective export marketing of horticultural products some of the functions in the HEA Act may no longer be necessary. You may want to submit whether you consider the following functions to be superfluous to the HEA's activities and therefore should be removed from the HEA Act:

Section 6(2)(d)(i): remove the provision that enables the HEA to liaise with horticultural groups and other interested persons on matters such as the distribution, transportation, and packaging of horticultural products. The HEA considers that this liaison role remains valid.

Section 6(2)(d)(iv): remove the provision that enables the HEA to liaise with horticultural groups and other interested persons on matters such as participation in international trade exhibitions.

Section 10(3): remove 'Nursery and Garden Industry Association' as a body that could jointly with Horticulture New Zealand nominate two members to the HEA Board. No products from that industry have used the HEA Act to date, and the sector has not indicated any interest in utilising the structure in the foreseeable future.

Section 13: Deputies of board members – none have been appointed in the last 25 years. If members are unable to attend to Board meetings due to long term unavailability they should be replaced, and this can be achieved by section 12 of the HEA Act. The proposal is to remove this provision, but the Horticulture Exporters Council (HEC) would like this retained. As exporters have only one position on the HEA Board by having a deputy it would ensure that HEC is represented at all HEA Board meetings.

Section 26(2)(a): remove "export pricing of the product" and replace it with "export price reporting". Setting of product price on an export commodity is contrary to New Zealand's international obligations and trade policy settings. In addition this type of price setting is unable to be accurately enforced. The replacement text will enable industries to continue to gather information via exporters being required to periodically report on export pricing levels as required in various EMS documents.

S36(6)(a) is redundant as it has passed the 5-year expiry of the licences granted prior to 1992.

Questions

- For each proposal, do you agree with the proposed amendment? If not, why not?
- Are there any other provisions in the HEA Act you consider are outdated or ambiguous and require amendment?
- Are there any other provisions in the HEA Act you consider are redundant and should be removed?

7 Monitoring, evaluation and review

Through its close relationship with industry and the HEA, MPI will continue to monitor the effectiveness of the HEA framework for increasing returns to New Zealand from horticultural exports and as an industry and market development tool.

In addition, the HEA Act requires that every five years the HEA and the Minister jointly appoint a person to undertake a review of HEA's performance. The next review is due to take place in 2014. That statutory review will provide an opportunity to evaluate the impact of any amendments made as a result of the current legislative review and of the overall success of the HEA framework.

8 Summary of questions

- Do you agree with the issues with the HEA Act that have been highlighted? Are there any other issues with the HEA Act you believe should be considered?
- For each issue, are there any other options you believe should be considered?
- For each option outlined in this discussion document, do you agree with the costs and benefits set out? If not, why not?
- For each option outlined in this discussion paper, are there any other costs or benefits you believe should be considered?
- For each issue, what is your preferred option, and why?
- Generally speaking, do you believe it is more important for the HEA framework to provide flexibility or certainty?
- If it is decided to introduce a requirement for a referendum:
  - do you consider that producers' and exporters' votes in a referendum should be counted separately?
  - should they be weighted differently? If so, why?
  - should approval threshold be set at 60% 'yes' vote, rather than a simple majority?
  - should that 'yes' vote be based on number of votes cast, or quantity of product exported, or both?
- Do you agree with the proposed amendments for provisions of the HEA Act that are outdated or ambiguous?
- Are there any other provisions in the HEA Act you consider are outdated or ambiguous and require amendment?
- Are there any other provisions in the HEA Act you consider are redundant and should be removed?

Written submissions on the issues raised in the discussion paper are invited from all interested parties. The closing date for submissions is 15 February 2013. Submissions should be directed to:

Forestry and Plant Sector Team
Sector Policy
Ministry for Primary Industries
PO Box 2526
Wellington 6140

Delivery Address: Level 7, Pastoral House, 25 The Terrace, Wellington
Email: consultation@mpi.govt.nz

9 APPENDIX

Table 1: Avocado (largest HEA group in 2012) export markets:
(Year ending June, tonnes and $NZ-FOB)

	2010		2011		2012	
Market	**Volume**	**Value**	**Volume**	**Value**	**Volume**	**Value**
Australia	12,598	52,809,105	10,341	47,854,027	19,950	83,931,702
Japan	1,379	4,679,254	609	2,324,999	2,351	8,321,128
Singapore	317	942,249	142	551,098	525	1,836,151
United States of America	291	647,781	0	1,019	826	1,037,115
Korea	111	487,359	180	411,303	226	762,717
Hong Kong	81	251,729	0	822	144	505,869
Malaysia	6	20,827	11	52,992	56	193,468
European Union	0	134	4	16,197	42	173,561
Thailand	1	2,350	18	105,606	22	90,170
Taiwan	7	36,183	?	?	17	87,264
New Caledonia	5	23,155	11	52,992	11	43,550
United Arab Emirates	0	0	0	0	21	19,463
Fiji	1	3,075	1	7,718	4	18,287
French Polynesia	2	6,614	3	12,409	1	3,097
Pacific Islands	0	23	0	299	0.24	1,352
Papua New Guinea	0	0	0	0	0.26	1,075
Philippines	0	0	0	0	0.10	647
Indonesia	0	0	0	0	0	0
Total	**14,798**	**$59,909,838**	**11,929**	**$53,716,480**	**24,198**	**$97,026,616**

Source: Statistics New Zealand

Table 2: Buttercup Squash (second largest HEA group in 2012) export markets:
(Year ending June, tonnes and $NZ-FOB)

Market	2010		2011		2012	
	Volume	**Value**	**Volume**	**Value**	**Volume**	**Value**
Japan	73,242	43,492,560	73,374	51,621,291	69,010	46,752,175
Korea	15,945	8,953,413	19,155	11,526,767	25,903	16,167,165
China	74	40,952	456	277,326	2,375	1,530,663
United States of America	679	521,337	190	202,358	212	240,036
Taiwan	48	28,562	69	35,968	128	120,103
Canada	0	0	189	141,797	128	120,000
European Union	174	136,171	102	77,056	64	39,536
Bahrain	0	0	0	0	28	16,390
French Polynesia	12	4,412	23	48,198	9	9,811
Pacific Islands	1	1,462	3	3,117	1	2,261
New Caledonia	25	21,315	2	1,240	1	1,632
Fiji	0	157	2.89	3,489	0.04	82
Australia	0	176	73	62,164	0	0
Singapore	20	18,880	0	0	0	0
Hong Kong	0	0	0.15	1,333	0	0
Total	**90,221**	**$53,219,397**	**93,638**	**$64,002,104**	**97,857**	**$64,999,854**

Source: Statistics New Zealand