

Regulatory Impact Statement

Proposed amendments to the New Zealand Horticulture Export Authority Act 1987

Agency Disclosure Statement

This Regulatory Impact Statement (RIS) has been prepared by the Ministry for Primary Industries (MPI).

In 2010 the New Zealand Horticulture Export Authority (the HEA) approached the Government for amendments to the Horticulture Export Authority Act 1987 (the Act). The Act has not been reviewed since its introduction and the HEA is seeking amendments to improve the flexibility of the framework, enable more targeted marketing, foster innovation and increase the transparency of the HEA requirements. The intention is to reduce the barriers for producers wanting to export. Changes to the framework will not impose quantitative limits on exports but will create more flexibility and greater opportunities. Growers support the Act and changes to the legislative framework. It is not mandatory that product groups join the framework, it is their decision.

Gaps, assumptions, and significant constraints

While the amendments have been driven by industry demand, the level of uptake from product groups and industries (not already under the HEA framework) is unknown. Increased flexibility and efficiency will make it easier and clearer for product groups that do wish to join.

Otherwise, the RIS does not highlight any constraints or assumptions. MPI has good data on exports values, volumes, commodity, and destination markets. Options were discussed with industry representatives and the HEA at workshops and through submissions.

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EXECUTIVE SUMMARY

This RIS provides analysis of options to improve:

- the flexibility of the current New Zealand Horticulture Export Authority Act 1987 (the HEA Act) so that the provisions are more efficient and cost effective, and enable greater targeted marketing;
- the clarity and transparency of the requirements under the HEA Act; and
- compliance with and enforcement of the HEA Act.

The analysis relies on information held by MPI and/or supplied by the HEA. In addition, MPI consulted with the sector as follows:

- MPI developed a discussion document in consultation with the HEA;
- in November 2012, Cabinet agreed to release the discussion document; and
- MPI considered the submissions on the discussion document and held two workshops with sector representatives on revised proposals.

The proposed amendments will:

- reduce potential for cross-subsidisation between industries and licence holders;
- increase competition among exporters for the supply of products while protecting product reputation in high-value export markets; and
- increase incentives on businesses to innovate and invest.

The amendments will not impose additional costs on the participating industries and are consistent with the principles of fundamental common law.

Preferred options

Issues	Preferred option
1. Limited ability to set different requirements for different markets	Multi-tier licensing. All exporters (under the HEA) will be licensed and all markets will be regulated, but the product groups will have the option to specify different requirements and licensing fees for different markets.
2. Unclear entry and exit requirements for product groups	Referendum or general meeting resolution as determined by the Minister. The product group will first seek the Minister's approval for the appropriate method to demonstrate industry support. The proposal must be supported by at least 60 percent of participants.
3. Insufficient deterrent for non-compliance with the Act	Increase the fines. Adjusting for inflation and increasing the fines ensure an effective deterrent.
4. Impractical funding mechanism	The HEA Act to provide for product groups to collect levies/fees from all participants to fund the HEA and Export Marketing Strategy (EMS) and the HEA given powers to collect fees from product groups. The product groups are best placed to recover fees/levies from all industry participants. They have the infrastructure, information and relationships to collect from

	growers, exporters and packhouse operators in a more efficient manner. HEA does not deal directly with growers.
5. Joint Ventures by current licence holders	Amend the HEA Act to allow for joint ventures between export licence holders without requiring a further licence for their 'new' exporting entity.
6. Entities with changes in shareholding/control	Amend the HEA Act to require entities with shareholding changes of more than 50% or changes in governance or senior management to apply for a new licence.

1. STATUS QUO

1.1 The HEA Act

The New Zealand Horticulture Export Authority Act 1987 (the HEA Act) established the New Zealand Horticulture Export Authority (the HEA) and provides for its functions and powers.

1.1.1 *Purpose of the HEA Act*

The purpose of the HEA Act is to promote the effective export marketing of horticultural products by providing a structure to implement minimum recognised quality standards and market coordination. Export marketing strategies (EMS) and export licensing are the two main tools it uses.

The HEA Act protects the reputation of horticultural commodities by requiring exporters to be licensed and to act in accordance with an industry produced export marketing strategy containing minimum recognised quality standards. This gives growers some control and influence over exporter behaviour, and enables them to protect the reputation of their product and their long-term returns. All producers and exporters must comply with the relevant EMS for their particular product and all exporters must comply with the licence requirements.

Due to unobservable characteristics (taste, internal fruit quality, chemical use) it can be difficult for consumers to tell the difference between high-quality and low-quality product. Suppliers can use their reputation, or in some cases their collective reputation, to communicate information to consumers about these unobservable characteristics. In an unregulated environment, suppliers face incentives to exploit this collective reputation by selling lower quality, lower cost goods. This behaviour ultimately reduces buyers' willingness to pay, and reduces returns to the industry in general.

1.1.2 *Key features of the HEA Act*

The HEA Act enables growers, pack-house operators and exporters to work together through their product groups. The product groups (made up of the growers, packhouses and exporters):

- formulate their EMS;
- are consulted by the HEA when it considers an export licence application; and
- assist the HEA to implement their EMS.

The HEA Act is an enabling piece of legislation with a flexible framework. The industries decide:

- whether to come under the ambit of the HEA Act and when to exit; and
- on the contents of their EMS that underpins export licensing.

The HEA Act is not a single-desk export framework as:

- the HEA, or any of the product groups, do not have the power to buy and sell; and
- there is no ability to impose volume limits or restrict the number of exporters.

1.2 Size of the issue

In the year to 30 June 2012, around \$264 million worth of products were exported under the HEA Act framework, representing around 15 percent of the value of fresh horticultural exports in 2012. As at 30 September 2013, there were 54 exporting companies/entities holding HEA export licences. Commodities are exported to between 40 and 50 countries (different country mixes for each product). There are approximately 3,600 growers producing product for export. This includes growers of kiwifruit who export product to Australia. Exporting kiwifruit to markets other than Australia comes under the governance of Zespri (authority given by Kiwifruit New Zealand), rather than the HEA.

In 2010 the HEA, with support from participating industries, approached the Government to update and provide greater flexibility and clarity on the HEA Act's key provisions. MPI agrees that a review is timely, especially given that this is a first review of the HEA Act since its enactment in 1987. The review allows for greater flexibility, giving participants the ability to focus on certain markets and reducing compliance costs for other markets. This will encourage market development and growth.

The HEA Act framework is strongly supported by the product groups¹ using it. The last statutory performance review of the HEA in 2009 concluded that the framework remains the appropriate model for horticulture-based industries.

2. PROBLEM DEFINITION

In the 26 years since the HEA Act's enactment in 1987, the horticulture industry has grown and changed significantly. For example, during the 1980s, industries struggled with 'fly by night' exporters. These one-off shipment operators were not concerned about market development and quality of product and drove prices down. Industry competition and oversupply caused fragmentation and reputational issues. It is important to ensure that the regulations continue to deliver on their purpose effectively and efficiently to match changes within the horticulture industry. This section identifies a number of issues with the current provisions in the HEA Act.

¹ The 11 product groups currently under the HEA Act are: Avocado, Blackcurrants, Buttercup Squash, Kiwifruit to Australia, Persimmon, Summerfruit, Tamarillo, Boysenberries, Chestnuts, Nashi Pears, and Truffles. The latter 4 have HEA orders but are not currently exporting products under the HEA Act.

1. Limited ability to set different requirements for different markets

The HEA Act currently only provides for a 'one-size-fits-all' approach to all export markets. It offers industries limited flexibility to differentiate between markets or types of licence and to design rules accordingly. This may:

- impede the development of some high-value markets because of the 'averaging' of the standards and the inability to focus on key markets specific to them; and
- act as a barrier to entry and result in lost opportunities in secondary markets because of overly burdensome requirements and higher licence fees than what is required in those markets.

Most commodities have a 'long tail'. That is, each has a small number of high-volume, high-value markets and many small-volume and/or low-value markets. For instance, in the 2012 season around 83 percent of New Zealand's avocado exports by volume were exported to Australia, 10 percent to Japan, and the remaining 7 percent to 15 other countries. For buttercup squash, 97 percent by volume was exported to Japan and Korea in that season and the remainder to 10 other countries.

The current inflexibility was highlighted in 2011 when the pipfruit industry considered operating under the HEA Act framework, but only for exports to Australia. The HEA Act does not enable orders to be made only for specified countries, except for kiwifruit to Australia².

2. Unclear entry and exit requirements for product groups

The HEA Act does not specify the mandate required for a Minister to recommend the making (or revoking) of an Export Order, or the process the industry must use to determine that mandate. The HEA Act requires the Minister to give regard to any representations made concerning the request from an industry, and to the extent and nature of any opposition to the proposed Order. This process lacks clarity and leaves decisions about entry and exit from the HEA framework open to challenge. It can also impose considerable uncertainty and unnecessary costs on an industry.

3. Insufficient deterrent for non-compliance with the HEA Act

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. More serious offences require further action by the HEA (suspension or revocation of licence), while smaller incidents are managed through audits and surveillance. Those outside the product group are of more concern as they are operating without a licence. Therefore exercising some of their powers is not possible (revoking/suspending a licence). Going through the courts to seek a conviction is costly for the HEA. Currently, product groups work with exporters to ensure compliance. Audits and surveillance by the HEA and product groups for non-compliant operators are at the operator's cost. For licence holders, the risk of not being able to export is a deterrent against non-compliance.

² The HEA Act has specifically allowed an Order in Council 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.

These penalties were set in 1987 and the HEA considers them to be outdated. Given inflation, the effective value of the fines as a deterrent has decreased over time. If the fines 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.

As a comparison, the fine for any contravention of any restrictions on exports under the Kiwifruit Industry Restructuring Act 1999 is a maximum of \$50,000.

4. Impractical funding mechanism

The legislation only allows the HEA to collect fees and levies directly from growers and exporters. This is impractical as the HEA interacts with product groups, not individual growers and therefore has no ability for it to compile a database of all growers. This is a result of the evolution of the horticulture industry and industries since the Act came into force in 1987. The HEA currently collects fees, via contractual obligations, from product groups who in turn recover from growers, exporters and packhouse operators. There is no legislative provision for this current fee collection mechanism. Without guaranteed funding there is a high risk of the HEA being unable to perform its legislated functions.

5. Joint ventures by current licence holders

Under the HEA Act, a new licence is required if current licence holders create a joint venture entity. This licenced entity is responsible for compliance with the relevant product group EMS. Applying for a new licence incurs costs to the exporters which does not encourage collaboration (sharing of innovation or research) and engagement within industries. In the last 5 years, there has been two cases of this type and two more are likely in the next year.

6. Entities with changes in shareholding/control

The legislation does not provide for how mergers and acquisitions are managed (in regards to licences) particularly when one party in a merger holds a licence but the other entity does not. This is a risk management issue; if one of the entities has been assessed through the formal licence application process by the HEA but the other has not. Clear direction is required on when entities need to reapply through the HEA licence application process (in terms of shareholding and governance changes). There has been between five and ten cases of this type in the last 5 years.

3. OBJECTIVES OF THE REVIEW

Key objectives: To improve the HEA Act to further promote the effective export marketing of horticultural products and greater export returns by making:

- it more effective and cost efficient by enabling greater targeted marketing;
- the entry and exit requirements for product groups clearer and more transparent;
- incentives to comply with the HEA Act greater;
- HEA's funding mechanism more practicable; and
- provisions in the HEA Act more relevant to the current environment.

4. OPTIONS CONSIDERED AND ANALYSIS OF OPTIONS

This section outlines the options considered to address issues and provides an assessment of the options. MPI's preferred options and submitters' views are also included. The symbols in the analysis tables below reflect:

- indicates worse-off than status quo
- indicates no gain or loss over status quo
- + indicates positive but low to medium benefits over status quo
- ++ indicates positive with medium to high level benefits over status quo

Each issue has its own set of criteria as they are materially different issues.

Issue 1: Limited ability to set different requirements for different markets

The HEA Act currently only provides for a 'one-size-fits-all' approach to all export markets. This lacks flexibility for exporters and might impede development of some high-value markets or act as a barrier to secondary or small-volume/value markets.

Option 1 – Retain the Status Quo

Product groups would continue to design their EMS in a 'one-size-fits-all' manner.

Option 2 – Introduce market segmentation

Product groups would have the option of applying the HEA Act framework to some of its export markets (e.g. high-value markets) but not other markets.

Option 3 – Introduce multi-tier licensing

EMS and export licensing would apply to all markets, but with the ability to have different categories of EMS requirements, licences, and fees for different markets.

Product groups would have the option of including in their EMS up to five different tiers of export licence. The 'highest-tier' licence would enable the holder to export to all markets, while lower-tier would restrict the holders to lower-value markets. The different tiers would have different fees to reflect the different administration costs³.

At its lowest level (i.e. a tier 5 licence) exporters would merely be required to register with the HEA,⁴ provide export market information and pay a minimal fee. More rigorous requirements could be placed on exporters to high-value markets (i.e. holders of higher tier licences).

Product groups will decide how many tiers of licence they will have when formulating their EMS. When making this decision, the Ministry anticipates that the product groups will weigh the benefits of having different licence tiers with the extra monitoring compliance and enforcement by the HEA. These extra costs will be borne by the industries.

³ The fees associated with the different licence tiers must be specified in the HEA regulations. The different markets those tiers applied to and the product requirements for those markets would be specified in the EMS. The differing level of fees reflects the fact that higher-tier licences will require a larger amount of compliance monitoring and greater investment in market development and promotion.

⁴ Exporters would still be required to meet the licence application assessment criteria.

Option 4 – Introduce both market segmentation and multi-tier licensing.

This option involves implementing both options 2 and 3 as outlined above. For example, all markets *except* Europe (tier 1 licence) and Asia (tier 2 licence) would fall outside of the licensing requirements of the HEA framework. This means that only tier 1 and 2 licences would have restrictions, compliance, and monitoring components under the framework.

Analysis of options:

Option:	Provides sufficient flexibility for the industries	Maintains product reputation and integrity of the HEA regime	Provides effective monitoring & enforcement	Reduces costs & barriers to entry to secondary markets
<input type="checkbox"/> Status Quo	<input type="checkbox"/> Limited flexibility. Limited ability for market specific rules.	<input type="checkbox"/> All exporters are licensed.	<input type="checkbox"/> All exports monitored. Can reduce monitoring in low-value markets and focus on high value markets.	<input type="checkbox"/> No ability to set lower licence fees for secondary markets and limited ability to set different market requirements.
+ Market segmentation	++ Could exclude secondary markets from licensing, and target high value markets. Simplicity of approach.	- Some risk of leakage, i.e., using unregulated markets to send poor quality produce to regulated markets, undermining credibility of the HEA regime.	- Would require closer monitoring of exporters and markets, with limited powers over unlicensed exporters.	++ Would enable removal of licensing in some markets, and opportunity for greater focus on high-value markets. Lowers administrative costs overall.
++ Multi-tier licensing	++ EMS and licensing could be designed to meet the specific requirements of the different markets.	+ All exporters will be licensed and have EMS for all markets. Greater opportunity to focus on high-value markets.	++ All exports will be monitored, but can reduce monitoring in low-value markets and focus on high- value markets.	++ Opportunity to lower entry barriers and fees in secondary markets. Increase in administration costs for different tier licences.
+ Market segmentation & multi-tier licensing	++ Same flexibility as under multi-tier licensing and market segmentation.	- Risks similar to that under market segmentation.	- Risks and costs similar to that under market segmentation.	++ Same benefits as under market segmentation.

Preferences of submitters:

MPI consulted on two-tier, and not multiple-tier, licensing in the discussion document. However, upon consideration of the submissions and follow up consultations with the HEA and the industry representatives this was changed to multi-tier licences.

Many submitters believed that the status quo had worked reasonably well. On balance, there was support for introducing more flexibility, but submitters were divided on which option was best to accomplish it. Supporters of market segmentation thought it was the simplest and administratively straightforward. Proponents of two-tier licensing liked the fact that all exported product would remain regulated, which supports the credibility of the HEA regime. However, opponents thought two-tier licences would be more complex and costly to monitor.

Preferred Option:

MPI's preferred option is multi-tier licensing. All exporters will be licensed and all markets will be regulated, but the product groups will have the option to specify different requirements and licensing fees for different markets. The HEA supports the multi-tier licensing proposal.

This option would:

- give greater flexibility to the product groups;
- enable product groups to maintain higher standards in high-value markets;
- reduce barriers to entry into low-value markets; and
- preserve the integrity of the HEA system, product reputation and “brand NZ”.

Currently, the Horticulture Export Authority (Fees) Regulations 2002 (Fees Regulations) provide for a number of fees for different services in relation to export licensing. It is proposed that these Fees Regulations will be amended to provide different fees appropriate to the new multi-tier licensing system. MPI plans to consult on the proposed fees.

Risks with the preferred option:

Benefits of the flexibility offered by the multi-tier licensing will exceed costs of administering it. These extra costs will be borne by the industries. MPI does not consider that these costs would be substantial. Multi-tier licensing will create additional administrative burden and greater monitoring by the HEA (an increase of approximately 0.5 FTE administration). When deciding on standards and the number of tiers to use within an EMS, we anticipate that the product groups will weigh the benefits of having different tiers with the extra costs on the HEA.

Issue 2: Unclear entry and exit requirements for product groups

Unclear entry and exit requirements increase the risk of legal challenge to the Minister's decision. They also lack clarity and transparency of the process for product groups.

Option 1 – Retain the status quo

To recommend the making of an HEA Export Authority Order, the Minister must:

- be 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 Order; and
- give regard to any representations made concerning the request, and to the extent and nature of any opposition to the proposed Order.

Option 2 – Resolution at a meeting of growers and exporters

The Minister’s decision to make an Order would be based on the industry’s support expressed through a majority vote at the product group’s annual general meeting (AGM) or a special general meeting (SGM).

Option 3 – Referendum of growers and exporters

The Minister’s decision to make an Order would be based on the industry’s support expressed through a majority vote in a referendum of growers and exporters.

Option 4 – Referendum or meeting resolution based on industry circumstance

The product group would first seek the Minister’s approval for the appropriate method to demonstrate industry support and then submit the results to the Minister.

The Minister will determine whether a referendum or vote at a general meeting will satisfactorily demonstrate industry support. This will be based on factors such as the number of growers and exporters in the industry, the geographic concentration of growers, and the views presented to the Minister from within the industry.

Option 5 - Sunset clause (for exiting HEA)

Under this proposal, export orders would have an automatic expiry date. This means a product group would be required to periodically test ongoing support for its participation in the HEA regime (e.g. every five years). If an export order was voted against, product groups could continue on a voluntary basis, however, free-rider situations may arise outside of the EMS without enforcement of penalties.

Option 6 - Entry and exit threshold

It is proposed that the threshold to measure industry support under options 2 to 4 above to be at least 60 percent of growers and 60 percent of exporters who vote, by both number and value of exports. This ensures fairness for smaller operators by not allowing a simple majority vote where larger producers can exert undue influence.

Analysis of options:

Option	Provides clarity and transparency	Provides flexibility	Provides administrative simplicity
<input type="checkbox"/> Status quo	<input type="checkbox"/> Little guidance in the HEA Act on the process and threshold for support is ambiguous.	<input type="checkbox"/> Different industries can demonstrate support in different ways.	<input type="checkbox"/> Less costly for industries with fewer participants or geographically concentrated but can be expensive for others.
<input checked="" type="checkbox"/> Resolution at a general meeting	<input checked="" type="checkbox"/> Clarifies the process but outcome may not be accepted by all participants in larger and geographically dispersed industries.	<input checked="" type="checkbox"/> Inflexible.	<input checked="" type="checkbox"/> Significantly lower costs. But greater risk of decisions and processes being challenged, potential to make it quite expensive.

☐ Referendum	++ Brings the most clarity and confidence in industry support.	- Inflexible.	- Unnecessarily costly for industries with fewer participants or where support is unanimous.
++ Referendum or general meeting resolution as determined by the Minister	++ Greater clarity on the requirements for both small and large industries.	☐ Preserves flexibility	++ Simple for small industries. Costly for larger industries but clarity of requirements would make this cheaper than status quo.
- Sunset clause	+ Clearer and more transparent than status quo.	- Inflexible.	- Poses significant additional costs in seeking a mandate through referenda/voting at regular intervals even if there is strong support.
++ Entry and exit threshold	++ Clearly outlines requirements for support of entry or exit from framework.	+ Inflexible but provides clarity, transparency and administrative simplicity.	++ Clarity of requirements means simplicity of assessment.

Preferences of submitters:

Many submitters believed that the status quo had worked reasonably well and provided flexibility. There was however significant support for introducing more clarity for the entry and exit requirements, with a vote at a general meeting being the preferred option. Many submitters also noted that referenda and sunset clauses would impose significant compliance costs on industry.

Preferred Option:

MPI's preferred option is a 'referendum or vote at a general meeting as determined by the Minister'. The product group will first seek the Minister's approval for the appropriate method to demonstrate industry support then submit the results to the Minister. The proposal must be supported by at least 60 percent of participants, as proposed above.

The Minister will determine whether a referendum or a general meeting vote will satisfactorily demonstrate industry support based on factors such as the number of growers and exporters in the industry; geographic concentration of growers; and views presented to the Minister from within the industry.

Risks with the preferred option:

The 60 percent threshold of both growers and exporters by number and value sets a reasonably high bar and this may prevent future entry or exit. However, the high bar would mitigate the risk of any voting outcome being challenged because of a low participation rate, which is generally the case in the primary sector. For example, the average participation rate under the Commodity Levies Act 1990 is under 50 percent.

Issue 3: Insufficient deterrent for non-compliance with the HEA Act

Fines were set over 25 years ago and do not take inflation, or increased size of the industry and export potential, into account. The HEA lacks efficiency and credibility with fines set at much lower levels than comparable organisations with similar offences.

Option 1 – Retain the Status Quo

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.

Option 2 – Increase the fines

Under this option the existing enforcement provisions would be retained, but the fines would be increased as follows:

- Increase the fine for exporting without a valid licence (section 34(4)) from \$10,000 to a maximum of \$50,000; and
- Increase the fine for breaching the HEA Act (section 62(d)) from \$4,000 to a maximum of \$10,000.

In addition, extend the fine in section 34(4) to also apply when an exporter exports to a market for which the exporter does not have the required export licence under the proposed multi-tier licensing regime.

Option 3 – Introduce additional enforcement powers for use by the HEA

Other enforcement tools considered were:

- allowing the HEA to issue cease and desist orders;
- enforcement and penalty orders issued by the HEA, where for each day of breach debt is incurred to the HEA; and
- public ‘naming and shaming’ of offenders.

Analysis of options:

Options	Efficient deterrent	Ability of HEA to exercise powers	Natural justice/Due process
<input type="checkbox"/> Status Quo	<input type="checkbox"/> Current fines unlikely to provide deterrent to an exporter considering non-compliance as these fines were set in 1987.	<input type="checkbox"/> HEA hold powers to fine and revoke, suspend, or cancel a licence.	<input type="checkbox"/> Status quo.
++ Increase the fines	++ Fines are significant enough to provide a real deterrent and are inflation adjusted. Fines raised to a level consistent with those under the Kiwifruit Industry Restructuring Act 1999.	<input type="checkbox"/> HEA retains powers to fine and revoke, suspend, or cancel a licence.	++ Justifiable through due process. Fines adjusted for inflation and increased.

<p>- Additional enforcement powers for use by the HEA</p>	<p>+ Fines and additional enforcement powers would be significant deterrents for non-compliance.</p>	<p>+ Additional benefits to the HEA.</p>	<p>- Imposition of penalties does not meet the requirements of natural justice.</p>
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Preferences of submitters:

Submitters generally supported adjusting for inflation and increasing the fines. Many also suggested additional enforcement tools for the HEA. However, this does not abide by the rules of natural justice. Giving further powers to the HEA would circumvent the justice process. There was a general consensus that the fines were currently too low to provide an effective deterrent.

Preferred option:

MPI's preferred option is to increase the fines as proposed under option 2 above.

Risks of the preferred option:

None identified.

Issue 4: Impractical funding mechanism

The horticulture industry has evolved and the HEA no longer interacts with growers as it once did. It is impractical to have the HEA collect fees directly and without guaranteed funding, there is a high risk of the HEA being unable to perform its legislated functions.

Option 1 – Retain the Status Quo

The product groups would continue to collect fees from growers, exporters and packhouse operators on a voluntary contractual basis to fund their EMS and HEA costs. The HEA would fund its costs through fees it charges its product groups on contractual basis and licence fees collected under the regulations from licence applicants and holders. The current legislative provision enabling the HEA to collect fees directly from growers is viewed as unworkable.

Option 2 – Product groups to use the Commodity Levies Act to fund the HEA

Amend the HEA Act to enable the HEA to collect fees from product groups. The product groups may use the Commodity Levies Act (CLA) or voluntary levies to fund their EMS and HEA costs.

Option 3 – Provisions in the HEA Act to provide for product groups to collect fees/levies from all participants to fund the HEA and EMS programmes and the HEA given powers to collect fees from product groups

Under this option, product groups would be provided with a specific legislative basis for collecting fees/levies from growers, packhouse operators and exporters to fund their EMS and HEA costs. The HEA would also be provided with a legislative basis for collecting fees/levies from product groups. This will be in addition to the fees the HEA collects from applicants and holders of export licences that are already available to the HEA under the current legislation.

Analysis of options:

Options	Provides certainty to the HEA and the product groups	Efficient and transparent collection mechanism
<p><input type="checkbox"/> Status Quo</p>	<p><input type="checkbox"/> No legislative provision for the HEA to charge fees/levies to product groups or product groups to collect from industry participants.</p>	<p><input type="checkbox"/> Current legislative provision not very practical. While the voluntary collection is working reasonably well, the risks are high and open to challenge.</p>
<p>- Product groups funded through the Commodity Levies Act (CLA) or voluntary levies and the HEA given powers to collect fees from product groups</p>	<p>- The 6 year cycle under the CLA would create funding risks for product groups and the HEA, creating a default sunset clause for the HEA. Growers oppose sunset clause for the product groups.</p>	<p>- The CLA does not enable the HEA to collect a levy from packhouse operators and exporters as it is only used to collect levies from growers and producers of commodities.</p>
<p>++ The HEA Act to provide for product groups to collect levies/fees from all participants to fund the HEA and EMS programmes and the HEA given powers to collect fees from product groups</p>	<p>++ Would provide greater certainty of funding and a clearer and transparent legislative basis for levy/fee collection to fund the HEA and the product groups' EMS'.</p>	<p>++ The product groups are best placed to recover fees/levies from all industry participants. They have the infrastructure, information and relationships to collect from growers, exporters and packhouse operators in a more efficient manner. HEA does not deal directly with growers.</p>

Preferences of submitters:

Submitters had mixed views on updating this provision, with most preferring change to remove ambiguity and clarify mechanisms for funding.

Preferred option:

MPI's preferred option is to insert into the regulation making powers of the HEA Act:

- the ability for the HEA to charge the product groups fees/levies to meet some of the HEA's operating costs (the balance met from licence fees); and
- the ability for the product groups to recover the costs of the HEA fees/levies mentioned above and to fund their EMS programmes by collecting fees/levies from growers, exporters and packhouse operators.

The product groups may choose not to use this option, but instead use the CLA or other means to meet their HEA costs.

Risks of the preferred option:

There is a risk of inefficient use of funds collected by the product groups under the proposed mechanism. Product groups might attempt to use funding collected for Export Management Strategies to bypass the Commodity Levies Act 1990 (CLA). The Act must be specific about the use of funding to ensure that funding for industry-good activities still comes under the CLA. This would be mitigated by limiting the use of the funds collected to funding the product groups' fee charged by the HEA and funding their own EMS programmes.

Issue 5: Joint Ventures by current licence holders

As the horticulture industry has changed, collaborations and joint ventures have become more common. Under the HEA Act, current licence holders are unable to create a joint venture without applying for a new licence for the new entity. This licenced entity is responsible for compliance with the relevant product group EMS. Applying for a new licence incurs costs to the exporters and does not encourage collaboration and engagement within industries.

Option 1 – Retain the Status Quo

Licence holders wanting to work together and export within a market need to apply for a separate licence through the HEA licence application process. This is alongside their individual export licences. This places further costs on exporters and additional administration burden on the HEA. Licences are \$2,500 for a first licence and \$500 for each subsequent licence.

Option 2 – Amend the HEA Act to provide for joint ventures between current licence holders

Enable any export licence holder to form a new joint venture entity with any other export licence holder and be able to use their existing licences. This change will encourage greater collaboration within the product groups and exporters, and reduce unnecessary extra costs on exporters and the HEA.

Preferred option:

MPI's preferred option is option 2 - to amend the HEA Act to allow for joint ventures between export licence holders without requiring a further licence for their 'new' exporting entity. Industry representatives support this option and are already operating under this policy.

Risks of the preferred option:

Any instances of suspension or revocation of a licence in this context will be handled as the current Act allows under section 39.

Issue 6: Entities with changes in shareholding/control

When entities undergo mergers or major changes in shareholding this can significantly change the operations and management systems of the entity. The legislation is silent on how mergers and acquisitions are managed in regards to licences, particularly when a smaller entity holds a licence but the larger entity does not.

Option 1 – Retain the Status Quo

While the HEA has policies to manage this process, the Act does not reflect this change in business practice since it was enacted in 1987. This creates risk management issues if one of the entities has not been assessed through the formal licence application process by the HEA.

Option 2 – Amend the HEA Act to require new entities with changes in shareholding/control to apply to the HEA for a new licence

An entity with shareholding changes of more than 50 percent in governance or senior management as a result of company mergers and acquisitions will be required to apply to the HEA for a new licence. The HEA will assess whether the changes are significant enough to require a new licence under the HEA. This also removes the risk of a previous licence being used by the 'new' entity without adequate assessment by the HEA. New licences cost \$2,500 (plus GST) for the first licence and \$500 for each subsequent licence. This is the usual licence fee and there have been between five and ten cases of this type in the last 5 years.

Preferred option:

MPI's preferred option is option 2 - to amend the HEA Act to require entities with shareholding changes of more than 50% or changes in governance or senior management to apply for a new licence. This option best manages the risk that an entity coming in without a licence could use this as a 'back door' to export without going through the licence application and scrutiny process. Industry representatives support this option and are already operating under this policy.

Risks of the preferred option:

None identified.

5. CONSULTATION

Following consideration of the HEA's 2010 request for amendments, Cabinet agreed in November 2012 to release a discussion document for public consultation on HEA Act issues and options for improvements.

After reviewing the submissions (17 received), MPI held workshops in Tauranga and Wellington (main growing regions) with the HEA and industry representatives to discuss revised options. Industry representatives covered growers, packhouses, and exporters of various horticultural commodities.

MPI consulted the following departments and their views have been incorporated into the development of the proposed amendments:

- The Treasury;
- Ministry for Business, Innovation, and Employment;
- Ministry of Foreign Affairs and Trade;
- New Zealand Customs Service;
- Inland Revenue Department;
- Ministry of Justice; and
- Te Puni Kokiri.

No significant issues were raised.

The Department of Prime Minister and Cabinet has been informed. MPI sought advice from the Ministry of Justice (MoJ) on raising the fines. MoJ considers the proposed fines to be within its framework for similar offences.

The New Zealand Customs Service was consulted specifically on the multi-tier licensing system.

6. CONCLUSION AND RECOMMENDATIONS

MPI believes that multi-tier licensing will give greater flexibility to product groups, enable product groups to maintain higher standards in high-value markets, reduce barriers to entry into low-value markets, and preserve the integrity of the HEA framework, product reputation and 'brand NZ'. All exporters (under the HEA framework) will be licensed and all markets will be regulated, but the product groups will have the option to specify different requirements and licensing fees for different markets.

A 'referendum or vote at a general meeting as determined by the Minister' is the preferred option to support entry or exit from the HEA framework. The proposal must be supported by at least 60 percent of participants. The Minister's decision to agree to an Order in Council will be based on the number of growers and exporters in the industry; the geographic concentration of the growers; and the views presented to the Minister from within the industry.

Existing enforcement provisions would be retained in the preferred option, but the fines would be increased, with the maximum fine of \$50,000 for exporting without a valid licence or for exporting to a market which the exporter does not have the required licence.

The funding mechanism for the HEA requires the ability for the HEA to charge the product groups fees/levies to meet some of the HEA's operating costs (the balance met from licence fees). This in turn requires the ability for the product groups to recover the costs of the HEA fees/levies mentioned above and to fund their EMS programmes by collecting fees/levies from growers, exporters and packhouse operators.

The product groups may choose not to use this option, but instead use the CLA or other means to meet their HEA costs.

7. IMPLEMENTATION

The HEA will take the lead on implementing and informing product groups of changes. It is expected that if a product group decides to change from the current one tier only system to a multi-tier system the transition will be over time and in consultation with growers, packhouses, and exporters within the product group itself.

The proposed changes would provide improvements to the HEA Act's functionality, and do not fundamentally alter existing arrangements, some of which are voluntarily implemented by the HEA. The proposals will remove some of HEA's current risks and uncertainties. The product groups that are already under the HEA can choose to continue with their existing arrangements. These changes are not a compliance measure; it is a voluntary framework. Changes are to make the framework more flexible and suitable to the current economic climate.

Use of multi-tier licensing can increase monitoring costs on the HEA and the product groups. The product groups will decide on the number of tiers to use. When making this decision, we anticipate the product groups will weigh the benefits of what, and how many, tiers they choose with extra costs. These extra costs will be borne by the industries. MPI does not consider these costs would be substantial. Benefits such as reduced barriers to entry and lower licence fees for secondary markets will exceed costs of administering multi-tier licensing.

The New Zealand Customs Service estimates that existing resources can meet the extra administration required to implement a multi-tier licensing system.

8. MONITORING, EVALUATION, REVIEW

How will effectiveness of the changes be measured?

The HEA has its performance reviewed every 5 years with the next scheduled for 2014. The Terms of Reference (ToR) for a review are decided between the HEA Chair and the Minister before each review. At that time, new details of the Act will be incorporated into the ToR. The 2019 review provides an excellent opportunity to evaluate the changes made to the HEA Act.

In addition, MPI will engage informally with stakeholders in the horticultural-based industries and with the HEA to monitor how the changes are working.