

CORPORATIONS ACT 2001

**A PUBLIC COMPANY LIMITED BY GUARANTEE
AND NOT HAVING SHARE CAPITAL**

Constitution
of
Apple and Pear Australia Limited



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Corporations Act 2001

A Company Limited by Guarantee

Constitution

of

Apple and Pear Australia Limited

Preamble

The Australian Apple and Pear Growers Association Inc (“AAPGA”) was incorporated under the *Associations Incorporation Act (Vic) 1981* on 19 February 1992. At the annual general meeting of AAPGA in 1998, the membership of AAPGA charged the AAPGA Executive with the task of developing possible alternatives to the current industry structure.

In response, the AAPGA Executive established a working group to consider all available issues and options and to prepare a restructure proposal.

One of the main aims of the task force restructure proposal was to ensure effective representation of apple and pear growers within the Australian apple and pear industry and the wider horticultural industry.

The accepted restructure model was that AAPGA would transfer its incorporation from the *Associations Incorporation Act (Vic) 1981* to the *Corporations Act (Cth) 2001* and become a company limited by guarantee, and in so doing adopt a new constitution and change its name to Apple and Pear Australia Limited (“APAL”).

APAL will have two classes of members; Class A Members, being levy paying apple and pear growers; and Class B Members, being state apple and pear growing organisations.

On 7 July 2002, the members of AAPGA resolved by special resolution to transfer the incorporation of AAPGA to the *Corporations Act (Cth) 2001*, to change the name of AAPGA to “Apple and Pear Australia Limited” and to adopt this constitution.

Chapter 1 - Interpretation

1. This Constitution

1.1 This Constitution sets out the manner in which the Members of the Company have agreed to conduct the internal administration of the Company.

1.2 This Constitution takes the place of the replaceable rules contained in the Act.

2. Definitions

2.1 In this Constitution, unless the context otherwise requires:

“**AAPGA**” means the Australian Apple & Pear Growers Association Inc registration number A0024650D;

“**Accounting standards**” has the meaning ascribed to it in the Act;

“**Act**” means the *Corporations Act 2001* or any statutory modification, amendment or re-enactment in force and any reference to any section, part or division is to that provision as so modified, amended or re-enacted;

“**Apple Levy Issues**” means any and all issues relating to changing Levy rates and consideration of proposals to impose new statutory levies effecting the apple industry;

“**Annual General Meeting**” means an annual general meeting of Members held in accordance with clause 58 and the Act.

“**ASIC**” means the Australian Securities and Investments Commission;

“**Auditor**” means the auditor for the time being of the Company;

“**Board**” means the board of Directors from time to time;

“**Business Day**” means a day on which banks are open for business in Melbourne, Victoria;

“**Company**” means Apple and Pear Australia Limited;

“**Constitution**” means this constitution and any supplementary, substituted or amended constitution being in force from time to time;

“**Chair**” means the person appointed to be the chair of Board and General Meetings pursuant to clause 52;

“**Class A Member**” means a Class A Member of the Company admitted pursuant to clause 9 or 10;

“**Class B Member**” means a Class B Member of the Company admitted pursuant to clause 9 or 10;

"**Director**" means any person formally and lawfully appointed as a director of the Company;

"**Enterprise**" means a producer of apples and/or pears which includes a natural person, a partnership, an association (whether incorporated or unincorporated), a trust, a joint venture, a company or any other entity or relationship commonly recognised at law or in equity whether or not the entity or relationship is a legal person;

"**General Meeting**" means a general meeting of Members;

"**Guarantee**" means the maximum amount each Member agrees to pay to the Company in accordance with clause 5;

"**Interim Director**" means a Director appointed pursuant to clause 26;

"**Levy**" means a statutory levy imposed on the horticultural industry pursuant to either the:

- (a) *Primary Industries (Customs) Charges Act 1999*;
- (b) *Primary Industries (Excise) Levies Act 1999*; or
- (c) *Primary Industry Levies and Charges Collection Act 1991*;

for payment to Horticulture Australia Limited ACN 095 566 108 or any substantially similar Federal statutory levy or payment;

"**Levy Payer**" means an Enterprise that is required to pay a Levy because of its involvement in the production and/or sale of apples and/or pears (as the case may be);

"**Managing Director**" means a Director appointed as the managing director of the Company in accordance with clause 47;

"**Member**" means a person admitted as a Class A Member or a Class B Member under clause 9 or 10;

"**Memorandum of Understanding**" means the memorandum of understanding between the Company and the Class B Members in the form annexed as "A" as amended from time to time;

"**Nominator**" means the Levy Payer who nominates a Class A Member under clause 11.2;

"**Officer**" means an officer of the Company within the meaning of section 9 of the Act;

"**Pear Levy Issues**" means any and all issues relating to changing Levy rates and proposals to impose new statutory levies effecting the pear industry;

"**Register of Members**" means the register of members to be kept pursuant to clause 17 and the Act;

"**Replacement Director**" means a Director appointed pursuant to clauses 26 or 28;

"**Secretary**" means any person formally and lawfully appointed as a secretary of the Company pursuant to clause 76 including any assistant or acting secretary;

“**State**” means a state of Australia;

“**Subscription**” means any subscription fee payable by a Member pursuant to clause 15; and

“**Territory**” means a territory of Australia.

2.2 Words importing:

- (a) persons include companies and corporations and vice versa;
- (b) the masculine gender include the feminine gender and vice versa; and
- (c) the singular number include the plural number and vice versa.

2.3 Division 8 of Part 1.2 (other than section 109X) of the Act applies in relation to this Constitution, so far as it is capable of application.

2.4 Sections 4 and 29, Parts III, IV, V, VII and VIII (other than sections 25A, 33(4)(b) and 34AB(b)) of the *Acts Interpretation Act 1901* apply in relation to this Constitution, so far as they are capable of application.

2.5 Unless the context otherwise requires, an expression used in this Constitution that has a particular meaning in the Act has the same meaning in this Constitution.

2.6 This Constitution is subject to the Act and where there is any inconsistency between a clause of this Constitution and the Act, the Act shall prevail to the extent of the inconsistency.

Chapter 2 - Nature Of The Company

3. Public Company

The Company is a public company limited by guarantee.

4. Limitation of Company

4.1 The Company must not be operated for the purpose of the profit or gain of any Member.

4.2 The Company does not have the power to:

- (a) issue shares of any kind; or
- (b) apply, pay or transfer, whether directly or indirectly, any portion of the income or property of the Company for the benefit of, or to, a Member, other than as provided in clauses 4.3, 33 or 34.

4.3 The Company may remunerate a Member for services provided to the Company on arms length terms as determined by the Board.

5. Guarantee of Members

Each Member undertakes to contribute a maximum of \$10.00 to the Company for payment of:

- (a) the debts and liabilities of the Company;
 - (b) the costs, charges and expenses of any winding up; and
 - (c) the adjustment of the rights of Members among themselves,
- in the event that the Company is wound up:
- (d) while the Member is a Member; or
 - (e) within one year after the Member ceases to be a Member.

6. **Objects of the Company**

The objects for which the Company is established are:

- (a) to engage in activities and to create an environment that will allow Australian apple and pear producers to retain their position as, or to become, profitable, efficient and reliable producers of high quality fruit that is suited to national and international markets;
- (b) to act in what it deems to be the best interests of Australian apple and pear growers in connection with any existing or proposed legislation or regulation that impacts directly or indirectly on the business environment of the Australian apple and pear industry;
- (c) to formulate what it deems to be appropriate strategies and policies by which exporters, exporter groups, marketers, marketing groups and grower groups with a commercial focus may or may not operate within the Australian apple and pear industry;
- (d) to work to create an Australian apple and pear industry that is regarded by its participants and seen by others to be unified, balanced and proactive;
- (e) to work to ensure that national and international promotions of Australian apples and pears are effective and are directed at increasing the demand for, and consumption rates of, apples and pears;
- (f) to work to ensure that the markets and marketing activities through all levels in the marketing chain, from growers to consumers, are continually developed for the benefit of the Australian apple and pear industry as a whole;
- (g) to work to increase the value of apples and pears to growers;
- (h) to ensure that the management process by which research and development projects are approved and funded is as efficient as possible and that the outcomes of the process reflect the needs and aspirations of the Australian apple and pear growing industry;
- (i) to support ongoing apple and pear breeding programs that are approved through the established mechanisms;

- (j) to promote improved communication, education and technology transfer to Australian apple and pear growers through state associations, regional bodies and other appropriate avenues;
- (k) to implement with diligence and in good faith the policies and resolutions carried out at general meetings of Members;
- (l) to seek and promote the implementation of apple and pear growing and post-harvest practices that protect and improve the environment of the planet; and
- (m) any other objects ancillary to and not inconsistent with the above.

7. Scope of Powers

Provided that its capacities and powers are exercised directly or indirectly in seeking the furtherance of its objects, the Company shall have the legal capacity and powers of an individual both inside and outside Australia as provided by section 124 of the Act.

Chapter 3 - Members

Division 1 – Membership

8. Classes of Member

The Members of the Company shall comprise of Class A Members and Class B Members.

9. Initial Members

At the date of adoption of this Constitution, the initial Class A Members shall be those persons listed in Schedule 1 and the initial Class B Members shall be those persons listed in Schedule 2.

10. Further Members

10.1 In addition to the initial Members listed in Schedules 1 and 2, the Board must take all measures it considers reasonable to invite applications for membership from all eligible persons and, on receipt of any such application, must admit:

- (a) any person which meets the qualifications for Class A Membership set out in clause 11.1 or 11.2 (as the case may be) as a Class A Member; and
- (b) any person which meets the qualifications for Class B Membership set out in clause 11.3 as a Class B Member.

10.2 Each Member shall sign an undertaking to be bound by the Constitution.

11. Qualification for Membership

11.1 Subject to clause 11.2, to be admitted as a Class A Member a person must be an Enterprise that is a Levy Payer.

11.2 A Levy Payer which is not a legal person may by written notice to the Company nominate a natural person to be admitted as a Class A Member and may at any time by such notice withdraw such nomination and may nominate another natural person and that nominee shall be deemed to meet the requirements of clause 11.1 for so long as the Levy Payer meets those requirements

11.3 To be admitted to membership as a Class B Member a person must at the time of admission become a signatory to the Memorandum of Understanding and must be:

(a) the person recognised by the Board as the principal *bona fide* organisation of apple and pear growers in a State; or

(b) any other structured regional apple and/or pear growers organisation approved for admission by the Board.

12. Rights of Class A Members

12.1 Subject to clauses 12.2, 12.3, 12.4, 25 and 27, Class A Members shall have all the rights granted to Members by this Constitution, including, but not limited to, the right to attend and vote at any General Meeting of Members.

12.2 Only Class A Members who are noted in the Register of Members as an apple Levy Payer shall be entitled to vote on Apple Levy Issues.

12.3 Only Class A Members who are noted in the Register of Members as a pear Levy Payer shall be entitled to vote on Pear Levy Issues.

12.4 A Class A Member may be noted as both an apple Levy Payer and a pear Levy Payer and in such case the Class A Member may vote on both Apple Levy Issues and Pear Levy Issues.

13. Rights of Class B Members

Subject to clauses 15 and 69, each Class B Member shall have the right, by notice in writing to the Company, to nominate a natural person as its representative who may attend and be heard at any General Meeting but who has no right to vote (but who may be appointed as proxy pursuant to clause 69) other than in any matter varying or cancelling the rights of the Class B Members. The Class B Member may, by notice in writing at any time, withdraw such nomination and make another nomination in its place.

14. Obligation of Class A Member to pay Levies

Each Class A Member must, upon request specifying a reasonable time in which to do so, provide evidence to the Secretary that any Levy which is due and payable by the Class A Member or its Nominator has been paid. In the absence of such evidence, the Company is entitled to presume that the Levy has not been paid.

15. Subscription

15.1 Subject to clause 15.2, the Board may determine that each Member or each Member of a class of Members shall pay an annual subscription fee to the Company on a date nominated

by the Board and that each Member or each Member of the class shall be liable for such subscription fee.

- 15.2 Any determination by the Board made pursuant to clause 15.1 shall be subject to ratification by the Members or the Members of the class (as the case may be) by ordinary resolution in a General Meeting.

16. Address of Member

- 16.1 Each Member shall provide to the Secretary details of an address in Australia where the Company can send notices and may nominate a facsimile number and/or email address for such notices.

- 16.2 If a Member fails to provide an address in accordance with clause 16.1, the address of the Member is deemed to be the registered office of the Company.

17. Register of Members

- 17.1 The Secretary must keep a Register of Members at the registered office of the Company and must promptly enter in the Register all information supplied by a Member from time to time and other relevant information in respect of:

- (a) the Member's full name and address;
- (b) the date on which the Member became a Member;
- (c) the class of Membership of the Member;
- (d) the date on which the Member ceases to be a Member;
- (e) in the case of a Class A Member that is a nominee, the name of its Nominator;
- (f) in the case of a Class A Member, whether the Class A Member is an apple grower or a pear grower or both;
- (g) in the case of a Class A Member, the State in which the Member or its Nominator carries on the business (or pursuant to clause 17.4, is deemed to carry on the business) which gives rise to payment of a Levy or, if there is more than one such State, the State which the Member nominates as the principal State in which it or its Nominator carries on business; and
- (h) any changes to the above information of which the Company is notified by the Member or otherwise becomes aware.

- 17.2 The Register of Members is not to be used for any other purpose and is to be open for inspection by Members.

- 17.3 Unless the Board otherwise resolves in the case of a particular Member, the Register of Members shall, for the purposes of the Constitution, be conclusive evidence that the information it contains is true and correct in relation to each Member.

17.4 For the purposes of clause 17.1(g):

- (a) if a Class A Member or its Nominator carries on business principally in the Australian Capital Territory, that Class A Member shall be deemed to be a Class A Member who carries on business in the State of New South Wales; or
- (b) if a Class A Member or its Nominator carries on business principally in the Northern Territory, that Class A Member shall be deemed to be a Class A Member who carries on business in the State of South Australia.

Division 2 - Cessation Of Membership

18. Events Leading to Cessation

18.1 A Member ceases to be a Member if:

- (a) the Member or the Member's Nominator is no longer qualified pursuant to clause 11;
- (b) in the case of a Class A Member, except when the Board is satisfied on reasonable grounds that exceptional circumstances exist (including but not limited to weather conditions adversely affecting the Class A Member or its Nominator), the Class A Member or the Member's Nominator has not paid any Levy due;
- (c) the Member dies;
- (d) the Member resigns in writing;
- (e) the Member becomes of unsound mind or becomes liable to be dealt with in any way under any act relating to mental health;
- (f) if the Member is a body corporate, the Member is wound up, has a liquidator, a receiver or a receiver and manager appointed to its assets or some of them, or passes a resolution or takes any action having the effect of its winding up or has such action taken against it; or
- (g) if the Member is a Class A Member nominated pursuant to clause 11.2, the Company receives notice that the Nominator has withdrawn the nomination.

19. Non-payment of Subscription

If any Subscription of a Member that is due and payable remains unpaid, the Member will be debarred from all privileges of membership, provided that the Board may, if they think fit, reinstate the Member on payment of all arrears.

20. Effect of Cessation

A Member who ceases to be a Member continues to be liable for:

- (a) any Subscription and all arrears due and unpaid at the date of cessation;
- (b) any other moneys due by them to the Company; and

- (c) subject to clause 5, the Guarantee.

21. Power of Directors in respect of a Member's Conduct

21.1 The Directors have the power to censure, fine, suspend or expel the Member from the Company pursuant to a resolution of the Board if any Member (or the Member's Nominator):

- (a) wilfully refuses or neglects to comply with the provisions of the Constitution; or
- (b) is guilty of any conduct which, in the opinion of the Board, is unbecoming of a Member or prejudicial to the interests of the Company.

21.2 At least one week before the meeting of the Board at which a resolution under clause 21.1 is passed, the Company shall provide the Member with:

- (a) notice of the meeting;
- (b) details of the allegations against the Member;
- (c) details of the intended resolution; and
- (d) advice that the Member shall, at the meeting and before the passing of the resolution, have an opportunity to give, orally or in writing, any explanation of defence they may think fit.

21.3 Any Member receiving notice under clause 21.2 may, by notice in writing lodged with the Secretary at least 24 hours before the time for holding the meeting at which the resolution is to be considered by the Board, elect to have the question dealt with by the Company in general meeting.

21.4 If an election is made under clause 21.3:

- (a) a general meeting must be convened and the resolution and any explanation or defence given by the Member considered; and
- (b) if the resolution is passed by a majority of two-thirds of those present and entitled to vote and voting (such vote to be taken by ballot), the Member concerned shall be dealt with accordingly.

Chapter 4 – Directors

Division 1 – Appointment Of Directors

22. Board Composition

22.1 Subject to clauses 26, 28, 30, 35, 36 and 37 the Board must at all times comprise:

- (a) one Director representing each State appointed pursuant to clause 22.2 or elected pursuant to clause 25 ;

- (b) one Director representing the pear industry (in addition to the Directors representing each State) appointed pursuant to clause 22.3 or elected pursuant to clause 27; and
- (c) up to three additional Directors, including the Managing Director (if any) and one or two other Directors appointed by the Board pursuant to clause 29.

22.2 The initial Director appointed to represent each State shall be the member of the executive of the AAPGA appointed to represent that State as at the date of adoption of this Constitution.

22.3 The initial Director appointed to represent the pear industry shall be the member of the executive of the AAPGA appointed to represent the pear industry as at the date of adoption of this Constitution.

23. **Term of Appointment**

23.1 At each of the three Annual General Meetings which follow the initial Annual General Meeting held in the calendar year of the Company's registration, two initial Directors appointed to represent the States pursuant to clause 22.2 shall retire until all six initial Directors appointed to represent the States have retired. In default of agreement between the Directors, then the initial Directors to retire at each Annual General Meeting shall be determined by ballot.

23.2 At the first Annual General Meetings which follows the initial Annual General Meeting held in the calendar year of the Company's registration, the initial Director appointed to represent the pear industry pursuant to clause 22.3 shall retire.

23.3 Subject to clauses 23.1, 23.2, 26, 28, 35, 36 and 37 each Director shall hold office for a term of three years after which time the Director's position becomes vacant.

23.4 A retiring Director is eligible for re-election and re appointment.

24. **Directors' Qualifications**

24.1 For the purpose of clauses 25.4, 27.4 and 29.1 the Director shall demonstrate a knowledge of and experience in one or more of the following areas:

- (a) corporate governance;
- (b) financial management;
- (c) commerce;
- (d) research;
- (e) international trade;
- (f) environmental management;
- (g) apple and/or pear production;
- (h) harvesting;

- (i) packing;
- (j) transport;
- (k) marketing;
- (l) retailing;
- (m) exporting; or
- (n) promotions.

24.2 A Director, other than a Director appointed under clause 29 or 47, shall be a Class A Member or, where the Class A Member is not a natural person, an officer or representative of that Class A Member.

25. Procedure for Appointment of Directors Representing Each State

25.1 The procedure for appointment of each Director representing a State shall be substantially in accordance with the procedures set out in this clause.

25.2 The Class B Member representing a State shall, by publication of an advertisement in a leading industry journal or other method approved by the Board, and no later than 60 Business Days before the Annual General Meeting in which a Director who is representing that State is due to retire, call for candidates for election as a Director by a postal ballot to be conducted pursuant to this clause.

25.3 A candidate for a Director representing a State shall be a Class A Member which carries on business in that State (as noted on the Register of Members) or, where the Class A Member is not a natural person, an officer or representative of a Class A Member which carries on business in that State (as noted on the Register of Members) and a written nomination of that person shall be delivered to the Class B Member (and copied to the Secretary) and signed by or on behalf of the Class A Member no later than 45 Business Days prior to the Annual General Meeting in which the Director who is representing that State is due to retire.

25.4 The Class B Member shall, in consultation with the Board, be satisfied that a candidate or candidates meet the qualifications listed under clause 24.1 in order to determine whether it approves of a candidate or candidates.

25.5 Where there is only one approved candidate, a postal ballot shall not be required and that candidate shall be appointed as a Director representing that State at the Annual General Meeting in which the current Director who is representing that State is due to retire.

25.6 Where there is more than one approved candidate the Class B Member shall, no later than 30 Business Days prior to the day before the Annual General Meeting in which Director who is representing that State is due to retire, post to each Class A Member which carries on business in that State (as noted on the Register):

- (a) a ballot paper for the election of a Director representing that State;
- (b) a card bearing a distinctive number;

- (c) an envelope marked "ballot paper" addressed to the Secretary at such address as the Secretary may determine; and
 - (d) a copy of any material not exceeding 300 words provided by the candidate, giving information about the candidate's views on industry policy and evidence that the candidate has a knowledge of and experience in one or more of the areas set out in clause 24.1.
- 25.7 Each ballot paper must:
- (a) be initialled for the purposes of identification by the Class B Member or a person authorised by the Class B Member;
 - (b) set out the surname, followed by the christian name, of each duly nominated candidate, in the order selected by lot by the Class B Member.
- 25.8 Each Class A Member which has received a ballot paper must, in order to cast a valid vote:
- (a) mark the ballot paper by placing an "x" next to the name of the candidate who that Class A Member wishes to vote for;
 - (b) indicate its name on the numbered card;
 - (c) place the numbered card and marked ballot paper in the envelope marked "ballot paper" and seal the same; and
 - (d) post it, deliver it or cause it to be delivered to the Secretary at the address marked on the envelope.
- 25.9 Only ballot papers received by the Secretary no later than 5.00 p.m. on the tenth Business Day prior to Annual General Meeting in which the Director who is representing that State is due to retire may be admitted to the ballot.
- 25.10 The candidate who receives the highest number of votes shall be declared elected as a Director representing a State. In the event of a tie for a vacancy the Class B Member shall determine by lot which of the tied candidates shall fill the relevant vacancy or vacancies.
- 25.11 The postal ballot shall be counted by the Class B Member which called for the candidates and the Secretary shall be entitled to nominate one scrutineer to oversee the counting of the votes in respect of those candidates.
- 25.12 The successful candidate shall sign a consent to act in writing which the Director undertakes to the Company to not act in the interests of a particular Member.
- 25.13 The Class B Member shall certify in writing to the Chair as at the Annual General Meeting the result of the ballot. The Director so elected shall hold office from the close of that Annual General Meeting.
- 25.14 The decision of the Secretary shall be final and binding in respect of all matters affecting the postal ballot.

- 25.15 The ballot papers must be retained by the Class B Member for a period of 40 Business Days after the Annual General Meeting and, unless the Board otherwise resolves, shall then be destroyed by the Class B Member.
- 25.16 Where there is more than one Class B Member representing a State, those Class B Members shall act jointly in all aspects.
- 25.17 For the purpose of this clause, where there is no Class B Member representing a State, the Board shall do all things required by a Class B Member representing that State until such time as a Class B Member representing that State is appointed pursuant to clause 10.
- 25.18 For the purpose of clause 25.6:
- (a) a Class A Member which carries on business in that State shall be deemed to have been notified of the ballot paper three days after the ballot paper has been posted; and
 - (b) where a Member is not notified of an election, non receipt by that Member does not invalidate that election.

26. Casual Vacancy of Director Representing Each State

- 26.1 If there is not a Director representing a State (due to retirement, resignation or any other reason other than the expiry of the Director's term), the Board shall as soon as practicable and in consultation with the Class B Member representing the State which is not represented (if any), or if more than one, those Class B Members jointly, appoint an Interim Director to represent that State or until such time as a Replacement Director is appointed under clause 26.2.
- 26.2 At any time after the Interim Director is appointed to the Board, the Class B Member (if any), representing that State or if more than one, those Class B members jointly, may at its absolute discretion, conduct an election on substantially similar terms to those set out in clause 25 for a Replacement Director who shall replace the Interim Director at the next Annual General Meeting following the Replacement Director's election.
- 26.3 The Replacement Director shall retire at such time as he or she would have retired had he or she been initially appointed under clause 25 as a Director representing a State.
- 26.4 In the event that there is no Class B Member representing a State, the Board shall have the discretion that that Class B Member would otherwise have had pursuant to clause 26.2.

27. Procedure for Appointment of Director Representing the Pear Industry

- 27.1 The procedure for appointment of the Director representing the pear industry shall be substantially in accordance with the procedures set out in this clause.
- 27.2 The Board, by publication of an advertisement in a leading industry journal or other method as it may determine, and no later than 60 Business Days before the Annual General Meeting in which a Director who is representing the pear industry is due to retire, call for candidates for

election as a Director representing the pear industry by a postal ballot to be conducted pursuant to this clause.

- 27.3 A candidate for a Director representing the pear industry shall be a Class A Member which is a pear grower or an apple grower and a pear grower (as noted on the Register of Members) or, where the Class A Member is not a natural person, an officer or representative of a Class A Member which is a pear grower or an apple and a pear grower (as noted on the Register of Members) and a written nomination of that person shall be delivered to the Secretary and signed by the Class A Member or its Nominator no later than 45 Business Days prior to the Annual General Meeting in which the Director who is representing the pear industry is due to retire.
- 27.4 The Board shall consider the qualifications listed under clause 24.1 in order to determine whether it approves of a candidate or candidates.
- 27.5 Where there is only one approved candidate, a postal ballot shall not be required and that candidate shall be appointed as a Director representing the pear industry at the Annual General Meeting in which the current Director representing the pear industry is due to retire.
- 27.6 Where there is more than one approved candidate, the Board shall, and no later than 30 Business Days prior to the day before the Annual General Meeting in which Director who is representing the pear industry is due to retire, post to each Class A Member which is a pear grower or an apple grower and a pear grower (as noted on the Register of Members):
- (a) a ballot paper for the election of a Director the pear industry;
 - (b) a card bearing a distinctive number;
 - (c) an envelope marked "ballot paper" addressed to the Secretary at such address as the Secretary may determine; and
 - (d) a copy of any material not exceeding 300 words provided by the candidate, giving information about the candidate's views on industry policy and evidence that the candidate has a knowledge of and experience in one or more of the areas set out in clause 24.1.
- 27.7 Each ballot paper must:
- (a) be initialled for the purposes of identification by the Secretary or a person authorised by the Secretary; and
 - (b) set out the surname, followed by the christian name, of each duly nominated candidate, in the order selected by lot by the Board.
- 27.8 Each Class A Member which has received a ballot paper must, in order to cast a valid vote:
- (a) mark the ballot paper by placing an "x" next to the name of the candidate who that Class A Member wishes to vote for;
 - (b) indicate its name on the numbered card;

- (c) place the numbered card and marked ballot paper in the envelope marked "ballot paper" and seal the same; and
 - (d) post it, deliver it or cause it to be delivered to the Secretary at the address marked on the envelope.
- 27.9 Only ballot papers received by the Secretary no later than 5.00 p.m. on the tenth Business Day prior to Annual General Meeting in which the Director who is representing the pear industry is due to retire may be admitted to the ballot.
- 27.10 The candidate who receives the highest number of votes shall be declared elected as a Director representing the pear industry. In the event of a tie for a vacancy the Secretary must determine by lot which of the tied candidates shall fill the relevant vacancy or vacancies.
- 27.11 The postal ballot shall be counted by the Secretary.
- 27.12 The successful candidate shall sign a consent to act in writing in which the Director undertakes to the Company to not act in the interests of a particular Member or group of Members.
- 27.13 The Secretary shall certify in writing to the Chair as at the Annual General Meeting the result of the ballot. The Director so elected shall hold office from the close of that Annual General Meeting.
- 27.14 The decision of the Secretary shall be final and binding in respect of all matters affecting the postal ballot.
- 27.15 The ballot papers must be retained by the Board for a period of 40 Business Days after the Annual General Meeting and, unless the Board otherwise resolves, shall then be destroyed by the Secretary.
- 27.16 For the purpose of clause 27.6:
- (a) a Class A Member which carries on business in that State shall be deemed to have been notified of the ballot paper three days after the ballot paper has been posted; and
 - (b) where a Member is not notified of an election, non receipt by that Member does not invalidate that election.
- 28. Casual Vacancy of Director Representing the Pear Industry**
- 28.1 If there is not a Director representing the pear industry (due to retirement, resignation or any other reason other than expiry of the Director's term) the Board shall, as soon as practicable, appoint an Interim Director to represent the pear industry.
- 28.2 Subject to clause 28.3, the Interim Director shall retire at such time as he or she would have retired had he or she been initially appointed under clause 27 as a Director representing the pear industry.

28.3 If there is an Interim Director representing the pear industry and a petition representing 15% or greater of the Class A Members who are either pear growers or apple and pear growers (as noted on the Register of Members) is presented to the Board requiring an election to appoint a new Director representing the pear industry, the Board shall conduct an election on substantially similar terms to those set out in clause 27 for a Director who shall replace the Interim Director at the next Annual General Meeting following the new Director's election.

28.4 A Director elected pursuant to clause 28.3 shall hold office for a term of three years after which time the Director's position becomes vacant.

29. **Additional Directors**

29.1 In addition to the Directors appointed pursuant to clause 22 and elected pursuant to clauses 25, 26, 27 and 28, the Board may appoint up to three additional Directors (including a Managing Director appointed pursuant to clause 47 and one or two other Directors), provided that the Board is satisfied that each additional Director meets the qualifications as set out in clause 24.1.

29.2 Subject to clause 47, an additional Director may be appointed for a term of up to three years, such term to (subject to the Act and any other provisions of this Constitution) otherwise be at the sole and unfettered discretion of the Board.

30. **Age Limit of Directors**

30.1 Unless approved annually by special resolution at the Company's Annual General Meeting, a person shall not be appointed as a Director if that person has reached the age of 72.

30.2 Unless approved annually by special resolution at the Company's Annual General Meeting, a Director who has reached the age of 72 shall not continue to act as a Director beyond the conclusion of the next Annual General Meeting held after the day in which the Director turns 72.

31. **Non-eligibility of Auditor**

The Auditor is ineligible to be elected or appointed as a Director.

32. **Other Offices Held by Directors**

A Director may hold any other office or position of profit in the Company together with the directorship on such conditions (including additional remuneration) as may be agreed by the Board.

Division 2 - Remuneration Of Directors

33. **Remuneration of Directors**

33.1 Subject to section 202B and Chapter 2E of the Act, Directors may receive remuneration for their services as a Director as determined by the Board.

33.2 The Company may pay a Director's travelling and other expenses that the Director properly incurs:

- (a) in attending Board meetings or any meetings of committees of the Directors;
- (b) in attending any general meeting of the Company; and
- (c) in connection with the Company's business.

34. Remuneration of Directors for Extra Services

34.1 If the Company requests a Director to perform services in addition to those required by the Act, the Company may remunerate the Director in any manner the Company thinks fit.

34.2 Any remuneration paid as contemplated by clause 34.1 is in addition to remuneration paid under clause 33.

Division 3 – Removal and Resignation of Directors

35. Director may resign

A Director may resign as a Director of the Company by giving written notice of resignation to the Company at its registered office.

36. Removal of Directors

A Director may be removed from office following a resolution of Members carried in accordance with section 203D of the Act.

37. Vacation of Office

A Director vacates office if the Director:

- (a) dies;
- (b) ceases to be a Director or becomes prohibited from being a Director by virtue of any provision of the Act;
- (c) other than in the case where a Director is appointed pursuant to clause 29 or 47, ceases to be Class A Member or a nominee of a Class A Member nominated pursuant to clause 11.2
- (d) retires pursuant to clause 30;
- (e) resigns office by written notice to the Company pursuant to clause 35;
- (f) for more than two consecutive meetings is absent without permission of the other Directors from meetings of the Board held during that period;
- (g) has a material personal interest in a matter that relates to the affairs of the Company (other than as a Member) and fails to disclose details of that interest in accordance

with clause 39 or the Act and the Board resolves at that time or subsequently (with the Director entitled to be heard but not vote) that the Director shall vacate office; or

(h) is removed from the office of Director in accordance with clause 36.

38. Class B Member Ceases to be a Member

Subject to clause 37, if a Class B Member ceases to be a Member, the Director representing the State of the Class B Member shall not be required to vacate office as a result of that Class B Member ceasing to be a Member.

Division 4 – Directors’ Interests

39. Material Personal Interest - Director's Duty to Disclose

39.1 Unless an exception under section 191 of the Act applies, if a Director has a material personal interest in a matter that relates to the affairs of the Company, the Director must give the other Directors notice of the interest.

39.2 The notice required by clause 39.1 must:

- (a) include details of:
- (b) the nature and extent of the interest; and
- (c) the relation of the interest to the affairs of the Company; and
- (d) be given at a Board meeting as soon as practicable after the Director becomes aware of their interest in the matter.

40. Director May Give Standing Notice about an Interest

A Director with a material personal interest in a matter that relates to the affairs of the Company may give standing notice of this ongoing interest in accordance with the Act.

41. Voting and Completion of Transactions in which a Director has a Material Personal Interest

A Director who has a material personal interest in a matter that is being considered at a Directors' meeting shall not:

- (a) be present while the matter is being considered at the meeting; or
- (b) vote on the matter,

unless:

- (c) the interest does not need to be disclosed under section 191 of the Act; or
- (d) the other Directors at the meeting who do not have a material personal interest in the matter pass a resolution that:

- (i) identifies the Director, the nature of their interest in the matter and its relation to the affairs of the Company; and
- (ii) states that those Directors are satisfied that the interest should not disqualify the Director from voting or being present.

42. Financial Benefits to Related Parties

The Company shall not give a financial benefit to a related party of the Company unless it is authorised in accordance with the Act.

Division 5 - Alternates And Attorneys

43. Alternates

A Director is not permitted to appoint an alternate.

44. Attorney

A Director is not permitted to appoint an attorney.

Chapter 5 - Management of Business by the Board

45. Powers of Board

45.1 Subject to the Act and to any provision of this Constitution, the business of the Company is to be managed by or under the direction of the Board.

45.2 The Board may exercise all of the powers of the Company except any powers that any provision of the Act or this Constitution require the Company to exercise in General Meeting.

46. Negotiable Instruments

46.1 Any two Directors may sign, draw, accept, endorse or otherwise execute a negotiable instrument.

46.2 The Board may resolve that negotiable instruments may be signed, drawn, accepted, endorsed or otherwise executed in any other way.

47. Managing Director

47.1 The Board may, in accordance with clause 29, appoint a Managing Director of the Company for a period and (subject to the Act and the Constitution) on the terms (including as to remuneration) as the Board sees fit.

47.2 The Board may confer on a Managing Director any of the powers that the Board can exercise.

47.3 The Board may revoke or vary:

- (a) the appointment of the Managing Director; or

- (b) any of the powers conferred on the Managing Director.

48. Delegation to Committees

- 48.1 The Board may delegate any of its powers to a committee of Directors, a Director, an employee of the Company or any other person.
- 48.2 The delegate must exercise the powers delegated to it in accordance with any directions of the Board.
- 48.3 The effect of the delegate so exercising a power is the same as if the Board exercised it.
- 48.4 The Board may, by power of attorney in writing, appoint any company, firm, person or body of persons to be the attorney of the Company:
 - (a) for such period; and
 - (b) for such purposes and with such powers, authorities and discretions vested in or exercisable by the Board under this Constitution as are specified in the instrument of appointment.

Chapter 6 - Board Meetings

49. Circulating Resolutions

- 49.1 The Board may pass a resolution without a Board meeting being held if all of the Directors entitled to vote on the resolution sign a document containing a statement that they are in favour of the resolution set out in the document.
- 49.2 Separate copies of a document may be used for signing by Directors if the wording of the resolution and statement is identical in each copy.
- 49.3 The resolution is passed when the last Director signs.

50. Calling Board Meetings

A Board meeting may be called by at least three Directors giving reasonable notice individually to every other Director.

51. Use of Technology

- 51.1 A Board meeting may be called or held using any technology consented to by all the Directors provided that all Directors at the meeting can have equal opportunity to participate.
- 51.2 Any consent may be a standing consent.
- 51.3 A Director may only withdraw their consent within a reasonable period before the meeting.

52. Chair

- 52.1 The Board shall elect a Director as Chair of Board Meetings and General Meetings.

52.2 The Board may determine the period for which the Director is to be the Chair.

52.3 The Board must elect a Director present to chair a Board meeting, or part of it, if:

- (a) a Director has not already been elected to chair the meeting; or
- (b) a previously elected Chair is not available or declines to act as Chair for the meeting or part of it.

53. Quorum at Board Meetings

53.1 Unless the Board determine otherwise, the quorum for a Board meeting is two-thirds of the current number of Directors and the quorum must be present at all times during the meeting.

53.2 If within 30 minutes after the time appointed for the meeting a quorum is not present, the meeting will stand adjourned to the same day in the next week at the same time and place or to such other day, time and place as the Directors present determine. The quorum for the adjourned meeting shall be at least three Directors.

53.3 A Board meeting that does not have the quorum required by clause 53.2 within 30 minutes of the time for the meeting is to be dissolved.

54. Passing of Board Resolutions

54.1 A resolution of the Board must be passed by a majority of the votes cast by Directors entitled to vote on the resolution.

54.2 The Chair has no casting vote in addition to any vote the Chair has in their capacity as a Director.

55. Validity of Board Decision

No decision made by the Board shall be affected by any subsequent discovery that one or more of the Directors participating in that decision was not validly appointed.

Chapter 7 - General Meetings

56. Calling of General Meetings by Directors

Three or more Directors are required to call a General Meeting.

57. Calling of General Meetings

57.1 If requested by Members entitled under section 249D(1) of the Act to call a General Meeting, the Directors must call and arrange to hold a General Meeting.

57.2 Class A Members holding at least 5% of the votes that may be cast at a General Meeting may call and arrange to hold a General Meeting in accordance with section 249F of the Act.

57.3 A court may order a General Meeting to be called in accordance with section 249G of the Act if it is impracticable to call the meeting in any other way.

58. Annual General Meetings

Subject to any extension of time granted under the Act, the Company shall hold an Annual General Meeting at least once in each calendar year and within 5 months after the end of its financial year.

59. Amount of Notice of General Meetings

Subject to the Act, at least 21 days notice must be given of a General Meeting.

60. Notice of General Meetings

60.1 Written notice of a General Meeting must be given individually to each Member and to each Director.

60.2 The Company may give the notice of meeting to a Member:

- (a) personally;
- (b) by sending it by post to the address of the Member in the Register of Members or the deemed address pursuant to clause 16;
- (c) by sending it to the facsimile number or electronic mail address (if any) nominated by the Member; or
- (d) by any other means authorised by the Act.

60.3 A notice of General Meeting sent by post is taken to be given three days after it is posted.

60.4 A notice of General Meeting sent by facsimile or electronic mail is taken to be given on the Business Day after it is sent.

61. Auditor Entitled to Notice and Other Communication

The Company must give its Auditor:

- (a) notice of General Meeting in the same way that a Member is entitled to receive notice; and
- (b) any other communication relating to the General Meeting that a Member is entitled to receive.

62. Notice of Adjourned Meetings

When a General Meeting is adjourned, new notice of the resumed meeting must be given if the meeting is adjourned for one month or more.

63. Members' Resolutions

The Members may propose a resolution to be moved at a General Meeting only in accordance with the provisions of Division 4 of Part 2G.2 of the Act.

64. Time and Place for General Meetings

A General Meeting must be held at a reasonable time and place in Melbourne or at any other place as determined by the Board.

65. Technology

If the Board so decides, the Company may hold a General Meeting at two or more venues using any technology that gives the Members as a whole a reasonable opportunity to participate.

66. Quorum

66.1 A quorum for a General Meeting shall be fifteen Members entitled to vote in person, by proxy or by a representative, provided that:

- (a) at least three States are represented by those Members entitled to vote;
- (b) there must be at least eight individuals present at the meeting who are either:
 - (i) a Member entitled to be present and vote at the meeting;
 - (ii) a representative of a body corporate entitled to present and vote at the meeting; or
 - (iii) a proxy of a Member entitled to be present and vote at the meeting; and
- (c) a quorum shall be present during the meeting at all times.

66.2 In determining whether a quorum is present:

- (a) each individual who is present and entitled to attend and cast a vote (either as a Member or as a representative of a body corporate) who does not hold any proxy votes will be counted once;
- (b) each individual who is present and entitled to attend and cast a vote and who holds one or more proxy votes will be counted in their own capacity and in respect of each proxy vote that he or she holds;
- (c) each individual who is a representative of a body corporate which is entitled to vote, who is present and who holds one or more proxy votes will be counted in their capacity as a representative of that body corporate and in respect of each proxy vote that he or she holds;
- (d) each individual who is present and entitled to attend but not entitled to cast a vote in their own capacity and who holds one or more proxy votes will be counted in respect of each proxy vote that he or she holds only and not in their own capacity; and
- (e) each individual who is a representative of a body corporate which is not entitled to vote, who is present and who holds one or more proxy votes will be counted in respect of each proxy vote that he or she holds only and not in the capacity as a representative of a body corporate.

66.3 A General Meeting that does not have a quorum present (if any) within 30 minutes, or such further period determined at the sole and unfettered discretion of the Chair (provided that such period does not extend beyond the day appointed for the meeting) after the time for the meeting set out in the notice of meeting, is to be dissolved.

66.4 For the purpose of clause 66.1, the State represented by a Member shall be the State as recorded on the Register pursuant to clause 17.1(g) or 17.4

67. Chairing General Meetings

67.1 The Chair elected by the Board pursuant to clause 52 shall chair General Meetings.

67.2 The Members present at a General Meeting must elect a Member present to chair the meeting (or part of it) if:

- (a) a Chair has not previously been elected by the Board to chair General Meetings; or
- (b) a previously elected Chair is not available or declines to act as Chair for the meeting (or part of the meeting)

67.3 If Members present with a majority of votes at the meeting agree or direct that the Chair must do so, the Chair must adjourn the General Meeting in accordance with that agreement or direction.

68. Auditor's Right to be heard at General Meetings

The Auditor is entitled to attend and be heard at General Meetings.

69. Proxies and Body Corporate Representatives

69.1 A Member who is entitled to attend and cast a vote at General Meetings of Members may appoint a proxy or, if the Member is a body corporate, a representative, to attend and cast a vote at that meeting.

69.2 Any proxy or representative appointed under clause 69.1 must be appointed in accordance with Division 6 of Part 2G.2 of the Act and shall have the rights set out in that Division.

69.3 A proxy must be a Class A Member, a representative of a Class A Member appointed pursuant to clause 69.1 or a representative of a Class B Member.

70. Voting at General Meetings

70.1 Unless otherwise provided by this Constitution and subject to clauses 12, 15 and 72.1, at a General Meeting:

- (a) on a show of hands, each Class A Member has one vote; and
- (b) on a poll, each Class A Member has one vote.

70.2 Subject to clauses 13, 15 and 69, a Class B Member shall have no right to vote.

70.3 The Chair shall not have a casting vote.

71. Objections to Right to Vote

A challenge to a right to vote at a General Meeting:

- (a) may only be made at the meeting; and
- (b) must be determined by the Chair whose decision is final.

72. How Voting is Carried Out

72.1 Each individual present at a General Meeting is entitled to cast one vote on a show of hands and, on a poll, one vote for each person he or she represents.

72.2 A resolution put to the vote at a General Meeting must be decided on a show of hands unless a poll is demanded.

72.3 On a show of hands, a declaration by the Chair is conclusive evidence of the result.

72.4 Neither the Chair nor the minutes need to state the number or proportion of the votes recorded in favour or against a resolution.

73. Matters on which a Poll may be Demanded

73.1 A poll may be demanded on any resolution other than resolutions concerning:

- (a) the election of the Chair; or
- (b) the adjournment of the meeting.

73.2 A poll may be demanded in accordance with section 250L of the Act.

74. When and How Polls must be Taken

A poll must be taken as soon as reasonably possible after the demand for the poll, at a time and in the manner the Chair directs.

Chapter 8 - Directors' And Members' Minutes

75. Minutes

75.1 The Company must keep minute books in which it records:

- (a) proceedings and resolutions of General Meetings;
- (b) proceedings and resolutions of Board meetings, including committee meetings; and
- (c) resolutions passed by the Board without a meeting.

75.2 The Company must ensure that the minutes of a General Meeting are signed by the Chair of the meeting or the Chair of the next General Meeting within a reasonable time after the meeting.

76. Members' Access to Minutes

Members are entitled to gain access to the minute book of meetings of Members in accordance with the Act.

Chapter 9 - Secretary

77. Appointment

77.1 The Company must have a Secretary or Secretaries, who is or are ordinarily resident in Australia.

77.2 The Secretary shall be appointed by the Board on such terms, at such remuneration and upon such conditions as the Board thinks fit.

Chapter 10 – Accounts And Audit

78. Accounting Records

78.1 The Directors shall cause accounting and other records to be kept to correctly record and explain the transactions and financial position of the Company, to enable true and fair profit

and loss accounts and balance sheets to be prepared and to permit preparation of any other documents required by the Act or this Constitution.

78.2 The records shall be kept:

- (a) in such manner as to enable them to be conveniently and properly audited;
- (b) for seven years after the completion of the transactions or operations to which they relate; and
- (c) at the Company's registered office or at such other place as the Directors think fit.

78.3 The records shall at all times be open to inspection by the Directors.

79. Accounts

Each financial year, the Company shall prepare a financial report and a Directors' report in accordance with the Act.

80. Auditor

The Company shall appoint an Auditor to audit the Company's financial statements in accordance with the Act.

Chapter 11 - Winding Up

81. Rights of Members on Winding Up

If the Company is wound up or dissolved, the Members have no right to participate in any distribution or payment of the assets or property of the Company.

82. Distribution of Assets

82.1 If the Company is wound up or dissolved, the assets and property available for distribution after satisfaction of all debts and liabilities shall be given or transferred to some other institution or institutions:

- (a) which has objects similar to the objects of the Company;
- (b) whose constitution prohibits the distribution of its income and property to an extent at least as great as that imposed by clauses 4.2(b) and 81; and
- (c) which is approved by the Commissioner of Taxation as an institution exempt from income tax.

82.2 For the purposes of clause 82.1, the Directors shall identify the institution or institutions at the time of dissolution.

82.3 If the Directors fail to identify the institution or institutions under clause 82.1, the Supreme Court of Victoria shall make that determination.

Chapter 12 – Indemnity and Insurance

83. Indemnity

Subject to Part 2D.2 of the Act, a person who is or has been an officer (as defined in the Act) or auditor of the Company is indemnified (to the maximum extent permitted by law), out of the assets of the Company against any liability incurred by the person as such an officer or auditor:

- (a) to another person (other than the Company or a related body corporate) unless the liability -
 - (i) is for a pecuniary penalty order made under section 1317G of the Act or a compensation order made under section 1317H of the Act; or
 - (ii) arises out of conduct involving a lack of good faith; and
- (b) for legal costs and expenses incurred by the person, unless the costs and expenses are incurred -
 - (i) in defending or resisting proceedings in which a person is found to have a liability for which they could not be indemnified under section 199A(2) of the Act;
 - (ii) in defending or resisting criminal proceedings in which the person is found guilty;
 - (iii) in defending or resisting proceedings brought by ASIC or a liquidator for a court order if the grounds for making the order are found by the court to have been established; or
 - (iv) in connection with proceedings for relief of the person under the Act in which the court denies the relief.

84. Insurance

Except to the extent precluded by the Act (including under section 199B), the Company may pay or agree to pay a premium in respect of a contract insuring the person who is or has been an officer (as defined in the Act) or auditor of the Company or of a related body corporate of the Company against any liability -

- (a) incurred by the person as such an officer or auditor which does not arise out of conduct involving a wilful breach of duty in relation to the Company or a contravention of sections 182 or 183 of the Act; or
- (b) for costs and expenses incurred by the person in defending proceedings as such an officer, whether civil or criminal and whatever their outcome.

Schedule 1

Initial Class A Members

Mr Kevin Baddiley

Mr John Plummer

Mr Jos Driessen

Mr Ugo Tomasel

Mr Kevin Sanders

Mr Andrew McNab

Ms Diane Fry

Mr Darral Ashton

Mr Ian Bolitho

Mr Richard Sedgwick

Mr John Magarey

Mr Mark Salter

Mr Vic Grozotis

Mr Marcel Veens

Schedule 2

Initial Class B Members

Apple and Pear Growers Association of SA Inc

New South Wales Farmers Association

Queensland Fruit and Vegetable Growers Limited

Tasmanian Apple and Pear Growers Association

Victorian Apple and Pear Growers' Council

Western Australian Fruit Growers Association

“A”

Memorandum of Understanding