Crown Law Office,
Wellington, 22nd April, 1937.

The Director-General of Agriculture.

HONEY EXPORT CONTROL ACT 1924
PURCHASE OF AUSTRALIAN HONEY BY BOARD.

In reply to your memorandum of 21st instant asking for a ruling as to the legality of the Board's action.

1. I regret that on the information supplied it is impossible to give a confident opinion, even if the statute were clear enough in any case to enable that to be done.

2. In my opinion the dominant provision of the Act is Section 12 (1) under which 'the Board is empowered to assume control of all honey intended for export from New Zealand.' Two relevant questions arise. In the first place, in my opinion, regarding the whole scope of the Act, the Board's powers are limited to honey produced in New Zealand and do not extend to assuming control of honey produced abroad and imported into New Zealand even though it be intended for subsequent re-export. In the second place control, even absolute control as referred to in Section 13 and elsewhere, stops short of acquisition by the Board of honey as owner. That somebody else than the Board remains owner is to be inferred from provisions such as Sections 16 (2), 17, 21 (f) and 23 (1). It follows that generally speaking a contract by the Board for the purchase of honey would be ultra vires.

3. Nevertheless there may be an exception to this rule. It is suggested that the Board has entered into "forward commitments with the Board's London Agents for the delivery of honey." This in itself means nothing. Such an arrangement cannot be part of a contract of agency, and it is difficult, though perhaps not impossible for the same persons to act as vendors' agents and be themselves the purchasers. Nevertheless it is conceivable that the Board may have contracted (as producers' agent) for sales of honey for forward delivery. A person so contracting takes a certain risk, should unforeseen circumstances prevent him from carrying

out his contract. It may be that from the standpoint of prudent conduct of its business the Board was justified in taking such a risk, if according to the custom of trade in Great Britain it could not otherwise have arranged for disposal of the produce under its control at reasonably satisfactory prices. If such a contract was made, and if it can be shown to have been a prudent one and therefore within the Board's powers, the Board would be liable for a breach of it. As an ancillary power, and for the sake of reducing its liability in damage, the Board could, I think, legitimately take steps to ensure supplies from some other source reaching its purchasers, if the latter were prepared to accept them. This consideration prevents me from saying out of hand that the purchase of honey in Australia was ultra vires. It must nevertheless be observed that the act of sending it to Great Britain by way of New Zealand is one which calls for explanation; and further that purchases in quantities sufficient to reduce liability under contracts is a different thing from purchases of foreign honey in greater quantities merely as a market speculation.

4. If and so far as such transactions are ultra vires, different considerations apply to an executed contract, which I take to be the position of the thirty tons already arrived in Auckland, and to the contracts that are still executory, which may be the position of a further 120 tons. Although the authorities conflict, I think that in the former case although the contract was ultra vires, the property in the goods passed to the Board and the Board can legally now dispose of the goods: Ayers v. South Australian Banking Co.,(1871) L.R. 3 P.C. 548, followed in Batson v. London School Board, (1903), 67 J.P. 457. This principle is indeed doubted in Street on Ultra Vires, pp. 119-124. No doubt the position arrived at is illogical in that a good title arises from actions which are nullities in law; but this is no more illogical than the established principle that a corporate body may be liable civilly or criminally for illegal acts, notwithstanding that it has of

course no power to do an act that is illegal, and that a stricter logical analysis would regard all such acts as the necessarily unauthorised acts of individuals purporting (but not enabled) to act for the company.

5. As regards executory contracts, I think these could be intercepted by an action for injunction at the suit of the Attorney-General as representing the public interest. In view of the particular circumstances of this case the name of the Attorney-General could not be used automatically and the Hon. Attorney-General must himself be asked to consider the position it is not unlikely that he would prefer to have it considered in Cabinet.

6. As regards the proceeds from the sale of the honey already in the Board's ownership, ex hypothese, this will be applied in mitigation of purchaser's claim for damages, if the circumstances so require. If the transaction proves to be completely ultra vires then the money must go to the Board's account established by Section 21 of the Act. It can be applied for any of the purposes enumerated in paragraphs (a) to (e) of that section. It cannot apparently be applied for the purposes set out in paragraph (f). In view of the convenient provisions of paragraph (e) what is to happen to it if none of the purposes of paragraphs (a) to (e) are adopted is a question which ought not to arise.

7. As to any direct liability imposed on members of the Board in consequence of the transaction, I am unable to advise with confidence that any steps can be taken. Section 22 of the Act says that the accounts of the Board shall be subject to audit as if the moneys of the Board were 'public moneys' within the meaning of the Public Revenues Act 1910 (now to be read as a reference to the Public Revenues Act 1926). This however is only a limited application of the Public Revenues Act. Sections 69 to 71 of that Act, referring to surcharges, deal with something more than an audit of moneys and it may be that Section 22 is insufficient to import them. As the matter is not clear you may feel justified in calling the

attention of the members of the Board to the provisions of Sections 69 to 71.

8. As has been agreed in conversation, the legal position is not the only thing to be considered. Questions of policy arise. On the one hand it has to be borne in mind that the Honey-export Control Board has succeeded in conducting its affairs so as to produce a result which compares very favourably with activities of other export boards. On the other hand is the consideration that if and when it becomes known that a New Zealand Board has been dealing in Australian produce, and perhaps making a profit out of it that the Australian producers think should have gone to them, commercial relations between the Governments of New Zealand and Australia may suffer some strain.

(Sgd.) A. E. Currie.
Crown Solicitor.