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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**WHEAT EXPORT MARKETING BILL 2008**

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Agriculture, Fisheries and Forestry,  
the Hon. Tony Burke, MP)



# WHEAT EXPORT MARKETING BILL 2008

## OUTLINE

This Bill establishes a system for regulating the export of bulk wheat. Exporters of bulk wheat must be accredited under a wheat export accreditation scheme which Wheat Exports Australia will formulate and administer. To become accredited under the scheme as an exporter an applicant must demonstrate that it is fit and proper through the satisfaction of eligibility criteria contained in the scheme.

The Bill will introduce competition into the bulk wheat export industry. Rather than forcing growers to sell their wheat through a single exporter they will be able to choose from a number of accredited exporters as well as domestic outlets. This will also mean greater contestability in service provision, which will drive down the cost that growers pay for services associated with marketing their grain.

The Bill provides WEA with the flexibility to manage the scheme effectively. While all applications for accreditation must be considered against specific eligibility criteria, WEA has the capacity to exercise judgement on how an applicant's record is likely to impact on its ability to fulfil its obligations as an accredited exporter. WEA has the discretion to make decisions based on the applicant's particular circumstances and proposed export arrangements and impose specific conditions of accreditation on an exporter.

The accreditation process is intended to introduce companies or co-operatives of good repute and financial capability to the bulk wheat export industry. While it is intended that such companies or co-operatives will maintain high standards in their dealings with growers and international marketplaces, this Bill in no way indemnifies them, nor provides any guarantees relating to contracts and payments of any kind. It is important for growers to continue exercising prudential judgment in decisions surrounding the sale and marketing of their wheat.

WEA will also have significant monitoring and enforcement responsibilities to protect the interests of growers and other industry participants. The Bill provides WEA with the necessary powers to perform this role.

The Wheat Export Marketing Bill 2008 and Wheat Export Marketing (Repeal and Consequential Amendments) Bill 2008 must be read in conjunction with other legislation controlling trade and commerce such as Part IV of the *Trade Practices Act 1974*. The legislation amended or repealed by the Wheat Export Marketing (Repeal and Consequential Amendments) Bill 2008 is in no way an exhaustive list of legislation assisting in the facilitation, control and operation of the Australian wheat export industry.

## **FINANCIAL IMPACT STATEMENT**

Funding of Wheat Exports Australia will be provided through application fees under the wheat export accreditation scheme as well as the Wheat Export Charge. Funds held by the Export Wheat Commission will be transferred to WEA.

The government will provide up to \$9.37 million for transitional measures to aid implementation of the new arrangements. Up to \$4.37 million of this cost will be offset from the funding appropriated to the Department of Agriculture Fisheries & Forestry.

## **REGULATION IMPACT STATEMENT**

This Regulation Impact Statement details information on the proposed reforms to export wheat marketing arrangements through the Wheat Export Marketing Bill 2008 and Wheat Export Marketing (Repeal and Consequential Amendments) Bill 2008.

### **1. Background**

After the end of World War II attempts were made to continue the national wheat marketing and stabilisation arrangements which had been put in place as a wartime measure. In 1948, the Commonwealth and States passed complementary wheat marketing legislation which established a statutory Australian Wheat Board with power to acquire all wheat produced in Australia; to market that wheat both within Australia and overseas; and to control the export marketing of wheat products. The legislation also provided for guaranteed prices to growers.

Statutory wheat marketing with single desk selling through the Australian Wheat Board was continued for over fifty years. Over this time there were a number of reviews, and various changes to the legislation relating to the Board's guaranteed price, underwriting, administered domestic pricing, and the pooling arrangements.

In 1989, the domestic wheat market was completely deregulated and since that time has operated without any specific government regulation. At the same time, the Guaranteed Minimum Price scheme was replaced with a government underwriting of Australian Wheat Board borrowings.

In 1999, the commercial functions of the former statutory Australian Wheat Board were transferred to a grower owned and controlled company, AWB Ltd. The former Board continued as a legal entity but with a regulatory role as the Wheat Export Authority (the Authority). The objective of this process was to separate the regulatory functions from the commercial operations. At this time Government underwriting of borrowing ceased.

Single desk selling of export wheat was retained with the legislation exempting AWB (International) Limited (AWBI), a subsidiary of AWB Ltd, from the requirement to seek export consent from the Authority, and by giving it a veto over bulk wheat exports applications made to the Authority. AWB Ltd listed on the Australian Stock Exchange in August 2001.

In 2002, the legislation was again amended to introduce a Wheat Export Charge (WEC) to fund operations of the Authority. In addition to the WEC, the Authority

was given increased information gathering and reporting powers for monitoring AWBI.

In December 2006, further amendments provided for a range of changes for a temporary period until 30 June 2007. The temporary changes included transferring the power of veto from AWBI to the Minister for Agriculture Fisheries and Forestry.

In June 2007, additional amendments extended the Minister's power of veto until 30 June 2008 and provided him with the power, effective from 1 March 2008 until 30 June 2008, to designate a new single desk holder.

The same amendments provided for the deregulation of wheat exports in bags or containers, effective as of 27 August 2007.

On 1 October 2007, new governance arrangements for the regulator came into effect with the establishment of the EWC to replace the Authority.

Currently the *Wheat Marketing Act 1989* provides the legislative basis for the current export wheat marketing arrangements. The Act establishes the EWC and prescribes its functions and powers. The EWC controls the export of bulk wheat from Australia; monitors the single desk's performance in relation to the export of wheat and examines and reports on the benefits to growers that result from that performance. It also monitors compliance with the conditions of export consents issued and administers the Non-bulk Wheat Quality Assurance Scheme.

## **2. The Problem**

Shipments of wheat in bulk represent approximately 95 per cent of all wheat exports. The remainder is made up of shipments in bags and containers.

The fundamental problem with the current arrangements is the restriction on participation in the export wheat market and subsequent lack of competition. The holder of the single desk privilege (AWBI) is exempt from the requirement to seek export consent for bulk wheat shipments. Until December 2006, AWBI had the power of veto over other export consent applications. This provided it with a monopoly on the provision of services to market bulk wheat from Australia.

Government action is needed to address the problems associated with export wheat marketing arrangements because the current regulations are both ineffective – they restrict competition yet there is no evidence that they are maximising returns to growers or to the wider community – and there are significant unintended consequences that stifle innovation in market development and impede the realisation of cost savings in the services associated with marketing and export of grain.

The National Competition Policy Review of the *Wheat Marketing Act 1989* (Irving et al. 2000) reported it could not find clear, credible evidence that single desk arrangements were of net benefit to the Australian community but found convincing evidence of an inhibiting effect on both innovation in marketing and the realisation of cost savings in grain transport and handling.

Each year the EWC is required to produce a report for growers on the performance of AWBI in managing the single desk. The 2007 Growers Report highlighted problems such as the unfair risk sharing between growers and AWB on hedging operations and the excessive cost to growers of ship chartering activities.

An additional problem is that having a single seller of Australian bulk wheat in the international market carries the inherent risk of exclusion from a particular market if the single desk holder gets it wrong. The recent exclusion of AWBI from the important Iraq market is an example of this risk.

### **3. Objectives**

The objectives of Government action in reforming export wheat marketing arrangements are to:

- promote the development of a bulk wheat export marketing industry that is efficient, competitive and responsive to the needs of wheat growers; and
- provide a regulatory framework for exporters participating in the bulk wheat export trade.

### **4. Options**

#### Option A. Status Quo - retention of the current wheat marketing arrangements

Retention of the current arrangements would mean AWBI retains the single desk privilege and monopoly on service provision to growers. Under the existing legislation, the Minister's power of veto over consents to export expires on 30 June 2008. If no changes are made, the EWC will determine who may export in bulk from 1 July 2008. AWBI will remain exempt from the need to obtain an export consent.

#### Option B. Accreditation of bulk wheat exporters

The Australian Government announced its policy to reform wheat marketing arrangements as part of its 2007 election commitments.

A new body, Wheat Exports Australia (WEA) will replace the EWC to manage the control of bulk wheat exports. WEA will be an agency under the *Financial Management and Accountability (FMA) Act 1997* and will be subject to all the requirements of that Act. The WEA will administer an export accreditation scheme for bulk wheat exports.

The system will allow companies and co-operatives to become accredited exporters provided they meet the accreditation requirements. AWB Ltd will hold no special status and will need to apply for accreditation on the same basis as other exporters.

Accreditation will be dependent on passing a probity and performance test. The legislation will specify the broad principles on which the test will be based but WEA will have the power to impose specific conditions it deems appropriate when issuing an export accreditation. The details of the conditions will be publicly available.

This approach is consistent with the practices of other Commonwealth regulators such as the Australian Fisheries Management Authority which operates under general principles but has the power to impose specific conditions on fishing permits.

The applicant will be required to demonstrate to WEA's satisfaction that:

- it is a legal entity that is capable of being subject to legal action;
- it has sufficient operational resources (financial and managerial) to meet its obligations;
- it has procedures in place to operate its wheat export business; and
- it will be able to meet all fundamental legal and regulatory obligations.

The WEA will be funded through the existing Wheat Export Charge (WEC) and a cost recovery fee for processing applications relating to accreditation.

The existing requirement for a quality assurance scheme for exports in bags and containers under Section 67 of the *Wheat Marketing Act 1989* will not be included in the new arrangements.

The new arrangements will be enacted through a new Act, the *Wheat Export Marketing Act 2008* (the Act).

#### Option C. Accreditation of bulk wheat exporters plus an access test

The objective of reform may be mitigated if bulk handling companies (and potential exporters) deny other potential exporters reasonable access to critical handling and storage infrastructure.

Under option B if a potential exporter was having difficulty gaining access to port terminal services, it would need to apply to the National Competition Council for a declaration that the port terminal facility was essential infrastructure. This method relies on Part IIIA of the *Trade Practices Act 1974* to ensure access by declaration.

Option C differs from B in that the Act would include a specific section dealing with access to port terminals. The Act would require an accredited exporter, who operates a bulk wheat port terminal facility, to provide access to this service to other accredited exporters.

The access test in the Act would work in two ways. Before 30 September 2009 accredited exporters with a bulk wheat port terminal would be required to publish the terms and conditions of access to these services. WEA may revoke the accreditation of an exporter if it fails to provide access to another accredited exporter on the published terms and conditions.

From 1 October 2009 onwards an accredited exporter would need to have in operation, under Part IIIA of the *Trade Practices Act 1974*, an access undertaking relating to its port terminal.

The different time periods are to allow time for the Australian Competition and Consumer Commission (ACCC) to process the access undertakings.

Failure to comply with the access test would be grounds for suspension or cancellation of accreditation.

### **5. Impact analysis**

The main groups affected by the problems associated with the current wheat marketing arrangements are:

6. Australian wheat farmers who grow wheat for export;
7. Export wheat traders as the regulated community; and
8. Providers of services related to the marketing and transport of export wheat and other grains.

The Australian Bureau of Agricultural and Resource Economics (ABARE) has undertaken an analysis of the potential implications of the proposed removal of the single desk.



The analysis considers issues raised by proponents of the status quo about:

- the ability of wheat producers – especially small ones – to successfully market their crops;
- prices to growers in the absence of a single desk acting as a ‘buyer of last resort’;
- whether the industry can continue to achieve ‘price premiums’ in export markets;
- the availability of marketing services if there are no AWB export pools;
- the skills of growers in managing their marketing if AWB withdraws from some regions; and
- whether the grains storage, transport and export terminal infrastructure can successfully handle large crops in the absence of a single desk seller for Australian export wheat.

Conclusions on each of these issues are summarised below.

#### The ability of wheat producers to successfully market their crops

Concerns have been raised that some wheat producers may have difficulty marketing their crops without the fall-back of the single desk. There appears to be a belief that smaller producers, in particular, have been very reliant on the single desk and may lack the experience to utilise other marketing options.

Farm survey data and industry information show producers are not entirely reliant on the current single desk to market their wheat.

With the large 2004-05 and 2005-06 crops, growers in New South Wales, Victoria and Queensland marketed about half their wheat through AWBI, while in Western Australia and South Australia the proportion was 80-85 per cent;

The smallest third of producers in those years sold between 11 per cent (New South Wales) and 71 per cent (South Australia) of their wheat through AWBI.

As small producers have already had experience with selling wheat to non-single desk outlets, concerns that small producers may have difficulty in marketing their crop without the single desk appear unwarranted.

#### Prices to growers in the absence of a ‘buyer of last resort’

Currently, AWBI has a legislative obligation to receive wheat into a pool but there is no price guarantee. This obligation is usually referred to as the ‘buyer of last resort’ (although more correctly it is a ‘receiver of last resort’).

Many growers perceive some comfort from this obligation, but in reality the wheat needs to meet certain quality specifications set by AWBI and the price paid to growers is set according to market forces.

Prices received by Australian growers largely reflect the overall supply-demand situation in the global and domestic markets and movements in the exchange rate. In the event of a large crop, prices will decline from recent highs to around ‘export parity’. That is, prices will fall to the approximate equivalent of the world price for wheat of similar quality to Australian wheat, less the cost of freight to overseas markets.

With the proposed new arrangements, competition among traders for market share will ensure prices do not fall below export parity.

### Achieving 'price premiums' in export markets

Concern has been raised that the removal of the single desk powers will mean that the price premiums currently received from some markets may be competed away, resulting in a loss of income for producers delivering to export pools.

The basis for this view is that single desk exporting of Australian wheat allows growers to exercise market power where that potential exists. The theory is that the single desk marketer has in the past been able to set the price for Australian wheat in each market without being undercut by other Australian exporters.

However, Australia has no control over the ability of exporters in the United States, Canada, the European Union and Argentina to supply an importing country. If the price set by the Australian exporter is too high and similar quality wheat can be purchased from another supplier at a lower cost, the customer may switch suppliers. Such competition would therefore significantly curtail the extent of any export premium that could be obtained.

Consistent with the above view, Irving et al. 2000 expressed doubt about the magnitude of any single desk price premiums. The Review argued that, when averaged across all markets, any price premiums from managing the supply of Australian wheat to some customers were likely to be small. In its view, the introduction of more competition into wheat export marketing would be likely to deliver greater net benefits to producers and the wider community. The Review also argued that restrictions on competition in the export of Australian wheat have had an inhibiting effect on innovation and the development of new markets.

In the case of higher export returns attributable to the provision of specialised marketing services (including flour milling, grain handling and baking) that strengthen the demand for Australian wheat, the Productivity Commission (2000) argued that the extra returns should be considered as a 'common marketing' premium rather than a benefit attributable to the single desk. A further angle on possible price 'premiums' is that they may occur when Australian shippers are able to take advantage of lower freight costs to some geographically close markets. However, all exporters from Australia can take advantage of these gains, not just a 'single desk' seller.

Claims that price premiums for Australian wheat in some export markets are attributable to the single desk have long been a matter of debate in the industry. In instances where it appears there may have been a price premium, it seems that this can largely be attributed to freight advantages or to the provision of services associated with the sale of wheat – both of which are not dependent on a single desk arrangement.

### Availability of marketing and handling services

Marketing and handling services are taken to mean infrastructure and services such as grain accumulation, transport and logistics, quality control, shipping, international marketing, brand promotion, customer relationships, product control, pool management and payment, risk management, and harvest financing.

Supporters of the 'single desk' have in the past argued that market infrastructure and services currently provided to producers by AWB could be jeopardised if it is not effectively guaranteed the right to market a significant proportion of Australia's

wheat crop. However, a review of the storage facilities and services on offer from the principal grain marketers and handlers suggests that there is adequate scope for grain producers to use a range of companies (including AWB) to receive and market their grain. Removal of 'single desk' marketing of export wheat is therefore unlikely to have an effect on the availability of marketing options or on the provision of storage and handling services.

Services are provided to wheat growers by a range of major companies: ABB Grain Limited, Co-operative Bulk Handling, GrainCorp Limited and AWB. There are also an increasing number of smaller private grain trading and marketing businesses operating Australia wide, servicing both domestic and international markets.

In addition the wheat Industry Expert Group (IEG) found that market promotion and assistance are commercial functions that are best delivered by industry. However, the government recognises that it may take time for new entrants to the export wheat market to develop support arrangements for customers. In particular smaller operators looking to establish niche markets may need help in areas such as training customers to fine tune their milling and baking equipment to suit Australian wheat.

To facilitate the entry of smaller operators into the export market, the government will provide funding in the first three years to help small to medium exporters provide technical market support to their customers.

Similarly the National Agricultural Commodities Marketing Association (NACMA), in conjunction with industry, is developing an industry code of conduct. The code is aimed at improving clarity in prices posted at silos and would allow farmers to make better informed marketing decisions. Funding is to be provided by government to NACMA in 2008-09 to publicise the code and encourage widespread adoption.

#### Skills of growers in managing their marketing

In regard to the marketing skills of growers, there are concerns that the removal of the single desk will leave growers exposed to a steep learning curve as they are forced to market their crop following 60 years under a single desk marketer.

The deregulation of domestic wheat marketing in 1989 appears to have been achieved without disruption and was well received by growers, traders and grain users. This previous experience suggests a similarly smooth transition to a less regulated system for wheat exports is possible. The proposed changes to the 'single desk' export arrangements for wheat are consequently likely to be accommodated relatively easily.

In a market where there is no single desk, finance providers and wheat growers will use various combinations of marketing options to manage risk, develop forward budgets, and to secure finance for their businesses.

To assist growers in the transition to a more liberalised market, the government is funding a series of information sessions aimed to help wheat growers enhance their marketing skills. The sessions will commence in July 2008 and be run nationally in wheat growing districts.

#### Adequacy of the grains storage, transport and export terminal infrastructure

Infrastructure issues relating to grain storage, transport and shipping are essentially independent of single desk arrangements for wheat exports. The systems currently in place are owned and operated by the private sector which has demonstrated over a

considerable period their capacity to successfully manage the logistics of coordinating competing user demands.

Dealing with multiple wheat exporters would merely be an extension of what happens now in each state where the large grain companies and AWB work together to receive, store, transport and ship export wheat. More broadly, in most states barley and canola compete with wheat for the use of bulk terminals.

## **9. Cost-benefits of feasible options**

### Option A. Status Quo – retention of the current wheat marketing arrangements

For growers the retention of the current wheat marketing arrangements does not provide choice in marketing. For wheat exporters, the status quo option provides limited opportunity for wheat exporters to participate in the bulk wheat export market. This in turn restricts innovation in marketing.

With a single desk marketer there is no contestability in service provision and little opportunity for other potential service providers to compete in the market. Retaining the status quo also carries the inherent risk of exclusion from a particular market if the single desk seller gets it wrong.

In addition, under the status quo there is no competitive pressure on the single desk marketer to minimise costs. The holder of the single desk is the monopoly receiver of bulk export wheat. It sells this wheat into the international market, deducts all its costs and pays the growers the balance. Irrespective of its performance it is still guaranteed all bulk export wheat from the next harvest.

Some growers value aspects of the current arrangements, such as where AWBI is required to run a national pool and be a “receiver of last resort”. In particular, growers value this obligation in times of large national harvests or when there is a lot of weather damaged wheat.

However, AWBI’s obligation is to accept wheat that meets its receival standards. If wheat does not meet these standards then there is no ‘receiver of last resort’. In addition, AWBI is only obliged to pay the pool return for the wheat in question –there is no guaranteed price.

It has also been stated that a benefit of the single desk is that it achieves price premiums in the international marketplace. As previously discussed Irving et al. 2000 expressed doubt about the magnitude of any single desk price premiums. The Review argued that when averaged across all markets, any price premiums from managing the supply of Australian wheat to some customers were likely to be small. In its view, the introduction of more competition into wheat export marketing would be likely to deliver greater net benefits to producers and the wider community.

### Option B. Accreditation of bulk wheat exporters

The proposed wheat export accreditation scheme will significantly increase the marketing options for growers who will no longer be dependent on a single bulk exporter. The new arrangements will mean that more buyers will be competing for wheat and this increased competition will help growers get a price that reflects market

forces. It will also force marketers to improve the services they provide for growers if they want to secure supplies of wheat.

The accreditation scheme will create the opportunity for potential exporters to participate in an export wheat market worth approximately A\$4 billion. This is expected to drive innovation in marketing, research and development. With more than one bulk wheat exporter, the risk associated with lock out of market will be managed more effectively.

Increased competition is expected to drive supply chain efficiencies in grain marketing. The National Competition Policy Review of the Wheat Marketing Act 1989 (Irving et al. 2000) found that there was considerable evidence that the single desk has an anti-competitive effect on the grain supply chain. It further noted that it was provided with compelling evidence from overseas that open competition in grain handling generated significantly greater cost savings than coordination by a dominant marketing organisation.

The proposed reforms also provide for the removal of the Non-Bulk wheat Quality Assurance Scheme. This scheme currently provides that a company must show that the wheat it is exporting in bags or containers meets the contract specifications of the buyer. Commercial realities in a competitive environment will mean that exporters must meet contract specifications if they wish to secure and maintain long term relationships with overseas customers.

There are also measures in place through other legislation, such as the Export Control (Plant and Plant Product) Orders 2005, that require an exporter to obtain an export permit from the Australian Quarantine and Inspection Service for the export of grain (including wheat). This provides a mandatory control on trade description and practical freedom from insects, pests and noxious weeds.

There are minimal transition costs in moving to the accreditation scheme as current arrangements end on 30 June 2008, meaning changes will be required in any case.

#### Option C. Accreditation of bulk wheat exporters plus an access test

Option C is similar to B but includes in the new Act a specific section dealing with access to port terminal facilities.

Under option B if port terminal operators deny reasonable access to their services, potential exporters would need to apply to the National Competition Council for a declaration that a grain terminal is essential infrastructure. This is likely to involve long timeframes. For example in the mining sector similar applications have involved lengthy legal appeals.

To gain accreditation, under Option C, an exporter who operates a bulk export wheat port terminal facility would need to have in operation an access undertaking for these services.

While there will be costs to the port terminal operator in lodging an access undertaking, this option achieves access to port facilities. This will allow all marketers to participate effectively in the market and provide increased choice to growers in their marketing options.

## **10. Consultation**

The main affected parties are: wheat growers, potential exporters of Australian wheat and the current export monopoly holder AWBI.

All stakeholder groups were consulted on the proposed wheat marketing reforms. The draft legislation, the Wheat Export Marketing Bill 2008 and the Wheat Export Marketing (Repeal and Consequential Amendments) Bill 2008, were made available for public comment on 5 March 2008. The Department of Agriculture Fisheries & Forestry received 35 submissions on the draft legislation.

Briefing consultations on the draft legislation were held at the time of release with the Victorian Farmers Federation, National Farmers Association, AgForce Queensland, South Australian Farmers Federation, Western Australian Farmers Federation, Wheat Growers Association, Eastern Wheat Growers, Grains Council of Australia, Grain Growers Association, Pastoralists and Graziers of Western Australia and the Western Australian Grain Group.

Briefing consultations were also conducted in the week commencing 17 March 2008. Sessions were conducted with farmer groups, exporters with port terminals, industry advisors, multinational and Australian based exporters and co-operative based wheat traders.

In addition to the Department's consultation on the draft legislation, an Industry Expert Group (IEG) was established to provide advice to the Minister on the provision of industry development functions under the new export wheat marketing arrangements. The IEG released a discussion paper on industry development functions for public comment on 13 March 2008 with 42 submissions received. The Group released its final report in May 2008.

Further, the Senate Standing Committee on Rural and Regional Affairs and Transport conducted an inquiry into the exposure drafts of the Wheat Export Marketing Bill 2008 and the Wheat Export Marketing (Repeal and Consequential Amendments) Bill 2008 after these bills were tabled in the Senate on 11 March 2008. The committee held four public hearings and received 48 submissions on the bills. The committee reported its findings on 30 April 2008.

The Government has considered the outcomes of the above consultations and inquiries before finalising the Bill.

## **11. Issues raised by industry in consultation**

Some of the concerns raised by proponents of the status quo have been addressed in the impact analysis of this statement. Other major issues raised by industry were:

- Inclusions of co-operatives and individuals as accredited exporters;
- Collection of end point royalties;
- Access to critical handling and transport infrastructure
- Collection and dissemination of marketing information;
- The exemption of marketing pools under the *Financial Services Reform Act 2001*;
- The need for information sessions for growers.

These issues are addressed below.

### **Inclusion of co-operatives as accredited exporters**

Concerns were raised that the draft legislation did not allow co-operatives or individuals to be accredited exporters under the accreditation scheme.

The ability for WEA to accredit co-operatives was not included in the draft legislation because of its potential impact on the constitutional validity of the Bill.

While a link with trading and financial corporations would provide an additional source of power, the omission of such a link would not prejudice the constitutional validity of the Bill. Consequently, the draft legislation has been amended to include co-operatives.

Some submissions suggested individual wheat growers, who wish to directly export their own wheat to a third party, should be exempt from the Act. Providing exemptions creates potential loopholes and would raise definitional issues about 'individual wheat growers' and the 'ownership' of grain. In addition, the requirement to trade as a company is not onerous. Any individual shipping in bulk would prudently operate as a company to reduce their exposure to risks associated with shipping high value tonnages and for tax purposes.

For these reasons an exemption for individual growers to export their own wheat has not been included in the legislation.

#### Collection of End Point Royalties (EPRs)

Methods of financial reward for owners of plant varieties are either seed royalties or End Point Royalties (EPRs). EPRs are payments made to the owner(s) of a plant variety in exchange for the right to grow that variety where the payment is based on production. EPRs capture value for the breeder when a grower sells grain produced from that variety.

A number of submissions argued that accredited exporters should be required to collect EPRs as a condition of accreditation. They believe the new system of multiple accredited exporters will make it more difficult for wheat breeders to monitor the end point of a wheat transaction, and therefore capture EPRs. However the monitoring and payment of EPRs is a commercial function that should not be managed by government. It is also important to note that wheat breeders have legal rights under the *Plant Breeders Rights Act 1994* if they believe that they are not receiving due royalty payments.

In considering the ongoing accreditation of exporters, WEA will need to consider the company/co-operatives compliance with Australian laws. This could include compliance with the *Plant Breeders Rights Act 1994* in respect of EPRs.

Collection of EPRs has not been included as a condition of accreditation.

#### Access to Critical Handling and Transport Infrastructure

Some submissions expressed concern that bulk handling companies may restrict competition by refusing access to their up-country storage and handling facilities. To prevent this they argued that the access test proposed for port terminal services should be extended to cover up-country services as well.

Access undertakings are made under Part IIIA of the *Trade Practices Act 1974*. The regime set out in Part IIIA establishes legal rights for third parties to share the use of certain infrastructure services of national significance on reasonable terms and

conditions. Part IIIA is confined to a narrow range of infrastructure with natural monopoly characteristics.

Up-country facilities do not display natural monopoly characteristics as they have low barriers to entry and there are already a number of competitors in the industry who provide up-country storage services. Nor do they meet the criteria outlined in the *Competition Principles Agreement 1995* for the application of access regimes. Further, it would impose an excessive regulatory burden to apply access arrangements to up-country storage facilities.

#### Collection and dissemination of marketing information

There was a strong view expressed in submissions that the success of the new arrangements will depend on all industry participants having equitable access to key market information such as wheat production, availability of grain and exports.

This issue has been considered by the Wheat Industry Expert Group (IEG) which made recommendations on the most appropriate means of delivering this service in its final report. The IEG did not suggest there was a need for any legislative base.

The IEG recommended that the Australian Bureau of Statistics (ABS) and ABARE be involved in the preparation and dissemination of the appropriate information. As information is critical to the efficient operation of the market, funding is to be provided for 3 years to assist with collection and distribution of this data.

The funds will be used to allow ABARE to analyse and publish monthly base information covering:

- Production (forecast and actual) – by tonnes by major classification by state;
- Tonnes of committed and uncommitted wheat (excluding trading stocks); and
- Exports –both in containers and in bulk.

The ABS will collect and collate information on the amount of wheat available for purchase. Assistance will be offered for three years and reviewed at the end of that period.

#### The exemption of pools under the *Financial Services Reform Act (FSRA) 2001*

Pooling is when an individual grower's wheat is combined with that of other growers. The pooled wheat is marketed using a variety of methods. The growers receive the average price per tonne less costs and management fees.

A series of submissions suggested that because wheat pools have characteristics of managed funds they should be classed as a financial product under the FSRA. However, the FSRA is meant to cover situations where an entity is raising cash. This is not the case with wheat pools. It is also a broader issue in that marketing pools are offered for a range of other commodities such as domestic wheat, other grains and cotton. Responsibility for the FSRA lies within the Treasury portfolio and it is not appropriate to address this issue in legislation on export wheat marketing arrangements.

#### The need for information sessions for growers



Various submissions suggested that grower education will be essential to provide growers the opportunity to learn how to best market their wheat under the new arrangements.

The government is working with the state farmer organisations to develop an appropriate information package for wheat growers. Funding will be provided in 2008-09 to deliver a series of workshops and information sessions for growers.

## **12. Conclusion and recommended option**

The wheat export accreditation scheme will increase choice for wheat growers with respect to the quality and reliability of wheat export services; and will provide a regulatory framework for exporters participating in the bulk wheat export trade. The reforms will achieve competition in the market and contestability of provision of export market services to growers.

The scheme will allow companies and co-operatives to become accredited exporters provided they meet the accreditation requirements. Accreditation will be dependent on passing a probity and performance test. The legislation will specify the broad principles on which the test will be based but WEA will have the power to impose specific conditions it deems appropriate when issuing an export accreditation. The details of the conditions will be publicly available.

There are minimal transition costs in moving to the accreditation scheme as current arrangements end on 30 June 2008, and require changes to be made. The scheme will be run by WEA and it will be funded through the existing Wheat Export Charge set at the current rate of 22 cents per tonne of wheat exported. There will also be a fee for applications relating to the accreditation scheme, payable by exporters on a cost recovery basis.

Option C – regulation of the export of bulk wheat from Australia through a wheat export accreditation scheme that includes an infrastructure access test is the recommended option to reform export wheat marketing arrangements.

## **13. Implementation**

Reforms to the wheat export marketing arrangements will be implemented by repealing the *Wheat Marketing Act 1989* and by introducing the *Wheat Export Marketing Act 2008* to provide for Wheat Exports Australia to regulate bulk wheat exports through the Wheat Export Accreditation Scheme.

The approach is clear and consistent with the Government's election commitment to reform wheat marketing arrangements.

There will be a transition package to aid implementation of the reforms. In response to the IEG report and concerns raised by the Senate Committee, the government will provide funding:

- To develop and run a series of information sessions for growers about marketing their wheat under the new arrangements;
- To promote the code of market conduct that is being developed by industry and NACMA. The code aims to standardise industry language used in grain marketing transactions and the way this information is presented to growers;

- For the ABS and ABARE to collect and disseminate wheat market information on a monthly basis including production, wheat stocks and total exports. Assistance will be for three years and reviewed at the end of that period;
- To assist small to medium exporters provide technical market support to their customers in the first three years of the new arrangements; and
- To adequately resource the new regulator, Wheat Exports Australia.

#### **14. Review**

The Government will be required by legislation to commence a review of the new arrangements by 31 December 2010. The Productivity Commission will conduct the review. The terms of reference must include an evaluation of the costs and benefits of the arrangements. The Minister will be required to table the report of the review in Parliament.

# WHEAT EXPORT MARKETING BILL 2008

## NOTES ON CLAUSES

### Part 1 - Introduction

#### Clause 1: Short title

1. This clause is a formal provision specifying the short title of this Bill.

#### Clause 2: Commencement

2. This clause provides that the Bill will commence on the day it receives Royal Assent. The exceptions are clauses 3 to 90 which will commence on 1 July 2008.

This provides persons affected by the accreditation scheme with certainty regarding its commencement date.

#### Clause 3: Objects

3. This clause outlines the objectives and purpose of the Bill.

#### Clause 4: Simplified outline

4. This clause provides a simplified outline of the key elements of the Bill.

#### Clause 5: Definitions

5. This clause defines several terms used throughout the Bill relevant to the interpretation of its provisions. Of note are:

*'company'* is defined to include co-operatives.

*'executive officer'* is defined as directors, the chief executive, the chief financial officer and the company secretary however described. Where 'director' is used in this definition it should be given the meaning in section 9 of the *Corporations Act 2001*. This means a person acting in a capacity similar to that of a director without holding the title of director should be treated as a director for the purposes of this Bill.

Other terms defined in this clause are self explanatory.

#### Clause 6: Involved in a Contravention

6. This clause defines the term 'involved in a contravention' to assist in its interpretation throughout the Bill. In effect, this defines the circumstances when a person may be considered to have been involved in a breach of the requirements outlined in the Act.

## **Part 2 – Wheat export accreditation scheme**

### **Division 1 – Compliance with the wheat export accreditation scheme**

#### **Clause 7: Compliance with wheat export accreditation scheme**

7. This clause prohibits the export of wheat in bulk by a person who is not an accredited wheat exporter. Exporting wheat in bags or containers capable of holding 50 tonnes or less does not constitute the export of wheat in bulk.

Subclauses 7(1) and 7(4) are civil penalty provisions. The export of bulk wheat without accreditation attracts a maximum civil penalty order of 3000 penalty units which is equivalent to \$330 000 for a body corporate, or 600 penalty units which is equivalent to \$66 000 for an individual. Part 8 of the Bill details the operation of civil penalty provisions in the Bill.

Where a person is alleged to have breached subclauses 7(1) or 7(4) and wishes to defend it on the basis that the export consisted of bagged or containerised wheat, the person must point to evidence that shows that the wheat was exported in a bag or a container [see ‘evidential burden’ under clause 5 of the Bill].

This clause is intended to deter and punish those who export wheat without accreditation, ensuring maximum compliance with the scheme.

### **Division 2 – Formulation of the wheat export accreditation scheme**

#### **Clause 8: Wheat export accreditation scheme**

8. This clause provides that WEA may, by legislative instrument, develop a scheme regarding the accreditation of wheat exporters and matters ancillary or incidental to such accreditation. This is to be known as the ‘wheat export accreditation scheme’.

WEA also has the power to repeal, rescind, revoke, amend or vary the legislative instrument creating the scheme [see section 33(3) of the *Acts Interpretation Act 1901*].

A legislative instrument has been used to enable WEA to easily and quickly amend the scheme as it becomes necessary, without the need to amend the Act itself. This gives WEA increased regulatory power and flexibility. However, several clauses, particularly 13 and 19, impose important requirements on WEA regarding what must be in the scheme including conditions related to the circumstances in which a company shall not be accredited, or when their accreditation shall be cancelled.

While the utilisation of a legislative instrument provides flexibility, it maintains important checks and balances as it must be tabled in Parliament and may therefore be disallowed.

## **Clause 9: Administrative decisions under the wheat export accreditation scheme**

9. This clause allows the scheme to grant WEA the authority to make administrative decisions in relation to the wheat export accreditation scheme such as granting, renewing, suspending and cancelling accreditation as well as the imposition and variation of accreditation conditions.

The specific decisions listed in this clause should not be construed as limiting the scheme's ability to confer general administrative powers on WEA. The scheme may also refer to powers conferred on WEA by a class or type of power [this is provided by section 13(3) of the *Legislative Instruments Act 2003*]. WEA has the discretion to exercise these powers in accordance with the scheme including in particular circumstances from time to time as occasion requires [see section 13(1) of the *Legislative Instruments Act 2003* and sections 33(1) and 33(2A) of the *Acts Interpretation Act 1901*].

This clause is intended to give WEA as wide powers as are reasonably necessary to make any and all decisions related to its duties as the regulator of bulk wheat exports.

To ensure continuity of accreditation, it is envisaged that exporters may apply for renewal of accreditation prior to the expiry of their existing accreditation and that the time period for doing so will be stated in the scheme. WEA will apply the same criteria as it would with any application for accreditation. However, as WEA will already hold significant information relating to the applicant, the process should be less onerous.

This clause also requires WEA to consult an accredited exporter before making a decision to refuse, cancel, suspend or vary its accreditation. This consultation is also required prior to WEA making a decision to impose, revoke or vary a condition of an exporter's accreditation. This ensures procedural fairness for participants under the wheat export accreditation scheme.

The consultation requirement of WEA does not apply to imposition of accreditation conditions which WEA is bound under the legislation, or the scheme, to impose (for example, the need to comply with an audit). Nor does it impose a consultation process on WEA involving specific time limits and requirements. This is to allow WEA to respond to rapid developments. If there is no urgency surrounding the proposed changes then reasonable time in the circumstances should be allowed for the consultation process.

## **Clause 10: Application fees**

10. This clause provides for the charging of an application fee to be specified in the scheme. This may be applied to any application made to WEA and includes but is not limited to applications for accreditation, renewal or surrender of accreditation, or the variation, addition or cancellation of conditions of

accreditation. The fee must be charged on a cost recovery basis and not amount to taxation.

WEA may require that a fee accompanies a request for the variation or revocation of a condition of accreditation, but this must also be cost based.

WEA will not charge a fee where a variation is initiated by WEA.

It should be noted that there is no annual fee for accreditation as the Wheat Export Charge will provide funding for the ongoing operation of WEA.

#### **Clause 11: Accreditation is not transferable**

11. This clause provides that accreditation is not transferable.

The probity and performance test involved in the accreditation process to ensure sound and responsible wheat export marketing would be subverted if a company could acquire accreditation through transfer, without going through the accreditation process.

#### **Clause 12: Duration of Accreditation**

12. This clause requires WEA to specify in an instrument of accreditation the length of time the accreditation will run for. This flexibility allows WEA to deal with a range of applicants with different export proposals and levels of experience, providing different lengths of accreditation for them accordingly. It also allows WEA to stagger applications for renewal throughout the year. This will contribute to the efficient operation of the scheme.

This clause does not prevent WEA suspending, cancelling, renewing or allowing the surrender of an accreditation.

### **Division 3 – Eligibility for accreditation**

#### **Clause 13: Eligibility for accreditation**

13. This clause sets out the eligibility criteria WEA must consider in assessing applications for accreditation. These criteria fall into three categories. Those which must be strictly fulfilled by an applicant; those which WEA must consider in deciding if an applicant is fit and proper, but which individually may not lead to an application for accreditation being rejected; and those which must be fulfilled to the satisfaction of WEA.

Paragraphs 13(1)(a)-(b) require an applicant to be registered as a company in Australia under the *Corporations Act 2001* or be a co-operative, and be a trading corporation within the meaning of s51(xx) of the Constitution. These must be strictly fulfilled by applicants to obtain accreditation and failure to meet either one will mean the application is rejected.

Paragraph 13(1)(c) sets out criteria to which WEA must have regard in deciding whether it is satisfied that an applicant is fit and proper to carry out its proposed export of bulk wheat. WEA must be satisfied that the applicant meets these criteria to a standard appropriate for the purposes of its specific export proposal. WEA must make a judgment as to whether failure to meet one or more of these criteria will impact on the applicant's ability to fulfil its obligations as an accredited exporter. WEA has the flexibility to make this decision based on the applicant's particular circumstances and proposed export arrangements.

The breadth of paragraph 13(1)(c) is not intended to place an excessive investigatory burden on WEA. It is not intended that WEA exhaustively examine every aspect of a matter relating to these criteria when requiring information from, or examining, applicants. WEA would aim to undertake such an appropriate level of examination in relation to an applicant as would enable it to be satisfied whether the applicant is fit and proper.

It is intended that WEA have absolute discretion in the weight it gives to each factor in paragraph 13(1)(c) when considering an application. WEA is open to grant accreditation to applicants which do not fulfil all of the criteria listed in paragraph 13(1)(c) provided it is satisfied that failure to do so will not affect the applicant's performance as an accredited exporter. WEA must exercise its judgement and be satisfied that the applicant is fit and proper to undertake the proposed export arrangements contained in its application for accreditation. This may include, but is not limited to, the demonstration by an applicant that previous conduct, events or circumstances which preclude the satisfaction of a criterion are unlikely to be repeated.

WEA is open to formulate in the accreditation scheme the extent, and manner in which, it informs itself regarding the criteria for accreditation set out under paragraph 13(1)(c). This may include, but is not limited to, utilising information gathered by other government or non-government agencies, requiring the provision of statutory declarations, or engaging other organisations to undertake assessments or enquiries. WEA has the discretion to define the standards which must be met in relation to this clause. This discretion includes the level of enquiry and extent of information required by WEA in relation to these standards.

Subparagraph 13(1)(c)(i) relates to the financial resources available to an applicant. When considering whether an applicant is fit and proper to undertake its export proposal, WEA may also have regard to the financial resources available to a related body corporate and the support this can provide to the applicant in carrying out its export proposal. This should only be considered in favour of the applicant where WEA is satisfied that the resources of the related body corporate are and will continue to be available to the applicant through binding legal arrangements between the entities. For example a parent company could provide a written assurance that the parent company will honour all financial commitments of the subsidiary seeking accreditation. 'Related body corporate' here should be given the same meaning as in clause 5 of the Bill. This

means WEA may need to assess the financial resources of any holding company or subsidiary of an applicant when assessing its application.

Subparagraphs 13(1)(c)(viii), (ix) and (xvi) relate to past contraventions of Australian or foreign laws by applicants or their executive officers. Generally, WEA should consider a contravention as a conviction, resulting from the conduct, in a court of competent jurisdiction domestically or internationally. WEA has discretion in the extent of its investigations into whether any such contraventions have occurred. It is not intended that WEA consider matters beyond those which have been the subject of a court conviction. It is also not intended that WEA investigate whether applicants have committed such breaches in relation to all foreign countries. It is only expected to act on publicly available or known information that might affect Australia's trading reputation.

Subparagraph 13(1)(c)(xiv) relates to the applicant's involvement in contraventions of designated sanitary or phytosanitary measures. WEA should exercise judgment in determining whether any apparent contraventions by an applicant are proven breaches or merely spurious claims made by importers for commercial reasons. WEA has a discretion under paragraph 13(1)(c) to apply appropriate weighting to this consideration accordingly. The definition of 'designated sanitary or phytosanitary measure' in clause 5 limits WEA's consideration to contraventions relating to barley, canola, lupins, oats or wheat.

Subparagraph 13(1)(c)(xvii) allows WEA to have regard to any other matters it considers relevant when determining whether an applicant is fit and proper for the purposes of this clause. This may include, but is not limited to, such factors as bringing Australian wheat trading into disrepute, an applicant's record in meeting their legal obligations in relation to the payment of end point royalties for plant breeding, truth of pricing at silo or the reputation and conduct of major shareholders of an applicant. By virtue of subclause 13(7), the range of matters which WEA may consider under subparagraph 13(1)(c)(xvii) is not limited by the context of other subparagraphs under paragraph 13(1)(c).

Subparagraph 13(1)(c)(xvii) contributes significantly to the flexibility given to WEA regarding its ability to accredit a range of applicants with a range of proposals. It enables WEA to consider a vast number of factors which may contribute to its determination of whether an applicant is fit and proper to export wheat in bulk. The open-ended nature of potential considerations does not place a burden on WEA to consider all possible factors which may be relevant to an applicant. It instead gives WEA the flexibility to take into consideration specific factors relevant to a particular applicant with a specific export proposal.

For example, an applicant wanting to export small or niche quantities of bulk wheat may have an export proposal for which the applicant is fit and proper, despite not having comparable financial resources to other accredited exporters. The flexibility given to WEA allows it to provide accreditation to such an applicant, while requiring evidence of significant financial resources from applicants with significant export proposals.



For the majority of applicants it will be appropriate for WEA to look only, or mainly, to the specific indicators of whether an applicant is fit and proper contained in subparagraphs 13(1)(c)(i)-(xvi) rather than consider whether there may be circumstances relevant to subparagraph 13(1)(c)(xvii).

Paragraphs 13(1)(d)-(e) are tests relating to solvency and port terminal access. Paragraph 13(1)(f) relates to any other criteria WEA may set out in the scheme. These criteria must be fulfilled by an applicant to the satisfaction of WEA. Failure to meet any one of them will lead to an application being rejected. However, WEA has some discretion because the test for these criteria is whether WEA is satisfied that each is met.

Paragraph 13(1)(e) relates to the access test provided in clause 24. WEA should consider this criterion to have been met where the Australian Competition and Consumer Commission (ACCC) has approved an access undertaking of the kind outlined in clause 24. Similarly, WEA should consider this criterion to be met where a state access regime has been certified effective under the *Trade Practices Act 1974* as outlined in clause 24. However, where an applicant is reliant upon an effective access regime to satisfy paragraph 13(1)(e), WEA must be satisfied that the effective access regime covers port terminal facility access.

Prior to 1 October 2009, in relation to ‘port terminal facilities’, paragraph 13(1)(e) is met where WEA is satisfied that an applicant has published appropriate terms and conditions of access to such facilities which they operate, as outlined in clause 24. Such terms and conditions must satisfy WEA that the applicant will provide open and transparent access, while allowing operators of the facilities to continue operating in a commercial environment. ‘Port terminal facility’ is defined in clause 5 of the Bill.

Subclause 13(2) provides that, when considering whether an applicant is fit and proper under paragraph 13(1)(c), WEA may only take into account an applicant’s conduct in the 5 years immediately prior to the applicant first becoming accredited. Where the applicant has never been accredited, the relevant five (5) year period is the period immediately prior to the application for accreditation being received by WEA. A five year period is considered adequate to demonstrate the current conduct of a potential applicant and the type of conduct that is likely to continue without punishing it for conduct that occurred a considerable time ago.

Subclauses 13(3)-(5) relate to the conduct or record of executive officers of applicants for the purpose of paragraphs 13(1)(c) in satisfying WEA that the applicant is fit and proper. These subclauses provide that such conduct or record is relevant regardless of whether it occurred before or after the person became an executive officer of the applicant.

Subclause 13(6) relates to any matter relevant to the satisfaction of WEA that an applicant is fit and proper under subparagraph 13(1)(c). It provides that such matters are relevant regardless of whether they occurred or existed before or

after the enactment of clause 13(1)(c). This does not, however, effect the operation of the 5 year limit provided by subclause 13(2).

Subclause 13(7) provides that neither the scope nor operation of subparagraph 13(1)(c)(xvii) is limited in any way by other provisions under paragraph 13(1)(c).

Subclause 13(8) provides that matters relevant to an application for accreditation under clause 13 extend to those which have occurred or exist outside Australia.

Subclause 13(9) provides for the continued operation of Part VIIC of the *Crimes Act 1914* in relation to clause 13. This means that where a person has been relieved of the requirement to disclose information about convictions by virtue of Part VIIC of the *Crimes Act 1914*, the person is not obliged to disclose this information to WEA, and WEA must disregard such information.

Throughout clause 13 the term ‘executive officer’ is used and should be given the meaning provided in clause 5. WEA has discretion to determine the extent of information required from an applicant regarding its executive officers for the purpose of assessing applications for accreditation. WEA may also highlight to applicants the scope of the definition of ‘executive officer’ and the need to provide WEA with information relating to those officers who *act* as directors as well as those holding the official title of director.

## **Division 4 – Conditions of accreditation**

### **Clause 14: Conditions of accreditation**

14. This clause provides that the accreditation must include certain conditions. There will be some mandatory conditions as set out in other clauses of the Bill. All accreditations are subject to the applicant agreeing to comply with the information gathering and audit requirements of subclauses 25(2) and 31(1), the provision of annual export and compliance reports under clauses 15-16, and the requirements of notification under clause 17. They must also comply with any conditions specified in the scheme or applied under the discretion of WEA.

WEA has the flexibility necessary to impose conditions it considers appropriate to the activities of a particular exporter. For example WEA may require an applicant to participate in the National Residue Survey where it considers the applicant to be inexperienced but otherwise demonstrably capable of undertaking its export proposal. Similarly, WEA may grant accreditation for a shorter period of time for inexperienced applicants. However, WEA may not impose conditions limiting tonnage or market destinations unless the application specifically proposes export arrangements on those bases.

As co-operatives do not fall under the jurisdiction of the Australian Securities and Investment Commission, WEA may impose additional conditions if it deems this necessary.

### **Clause 15: Condition – annual export report**

15. This clause requires an accredited exporter to provide WEA with an annual report on its operations for the previous marketing year in relation to its exports of bulk wheat. This must be done within 30 days of the end of the marketing year unless WEA agrees to another time period. ‘Marketing year’ is defined in clause 5 of the Bill as a 12-month period beginning on 1 October.

The report is primarily required to provide transparency to growers and WEA regarding the specification and quantities of bulk wheat exported, the price terms and conditions offered to growers, and the results of export activities in relation to such terms and conditions. The maximum civil penalty for breaching this condition under clause 18 is 1000 penalty units, which is equivalent to \$110 000.

It is also a criminal offence under the *Criminal Code Act 1995* to provide WEA with false or misleading information in connection with an application for accreditation. This includes the information contained in annual export reports. This is provided by schedule 2, items 1-5 of the Wheat Export Marketing (Repeal and Consequential Amendments) Bill 2008.

The term ‘specification’ used in paragraph 15(1)(c) has the meaning generally accepted in the industry. The term ‘acquired wheat from growers’ in paragraph 15(1)(d) relates to wheat supplied directly from the grower to the exporter.

### **Clause 16: Condition – annual compliance report**

16. This clause requires an accredited exporter to provide WEA with an annual report on its compliance with its accreditation conditions, applicable Australian and foreign laws and applicable United Nations sanctions provisions.

This must be done in writing within 30 days of the end of the marketing year unless WEA agrees to another time period. The maximum penalty for breaching this condition under clause 18 is 1000 penalty units which is equivalent to \$110 000.

### **Clause 17: Condition – report about notifiable matters**

17. This clause requires accredited exporters to provide a report to WEA where an event occurs, or the exporter’s circumstances change, such that the event or change in circumstances could have a material impact upon the accreditation of the exporter. This condition includes the obligation to report significant changes with respect to a related body corporate of the accredited exporter. This is particularly important where, for example, a parent company has provided, or agreed to provide, financial support to an accredited subsidiary and that parent company undergoes significant financial changes or restructuring.

This must be done in writing within 14 days of the event. The maximum penalty for breaching this condition under clause 18 is 1500 penalty units which is equivalent to \$165 000.

It is the responsibility of accredited exporters, not WEA, to track and report on notifiable matters under this clause.

### **Clause 18: Compliance with conditions of accreditation**

18. This clause provides that accredited exporters must comply with conditions of accreditation in the scheme or imposed under the scheme, and those relating to annual export and compliance reports [see clauses 14-16]. A lack of compliance with any of these conditions constitutes a breach of civil penalty provisions.

The maximum civil penalty for non-compliance with a condition of accreditation to report certain matters is 1500 penalty units under subclause 18(3), which is equivalent to \$165 000, or 300 penalty units for a person other than a body corporate under subclause 18(4), which is equivalent to \$33 000.

The maximum civil penalty for non-compliance with requirements for annual reporting, compliance reporting, or any additional conditions imposed by WEA is 1000 penalty units under subclause 18(1), which is equivalent to \$110 000 or 200 penalty units for a person other than a body corporate under subclause 18(2) which is equivalent to \$22 000.

Details of civil penalty orders for these breaches, including lesser penalties for lesser breaches or for individuals other than corporations, are set out in part 8 of the Bill.

A contravention of a condition of accreditation is also grounds for cancellation of accreditation under subparagraph 19(1)(c)(xi) if WEA considers the exporter to no longer be fit and proper as a result of the contravention. This extends to being involved in a contravention (as defined in clause 5) under subparagraph 19(1)(c)(xii).

WEA also has the power to cancel an accreditation under paragraph 19(2)(b) due to a lack of compliance with a condition of accreditation, regardless of whether the accredited exporter is considered by WEA to be fit and proper under paragraph 19(1)(c).

## **Division 5 – Cancellation of accreditation**

### **Clause 19: Cancellation of accreditation**

19. This clause provides for the cancellation of accreditation where WEA finds the accredited exporter no longer to be an appropriate entity to export Australian wheat in bulk. The clause mirrors clause 13. As such, the same criteria apply and WEA holds the same discretions such that a reason for denying an applicant accreditation under clause 13 has the same effect and weight as towards the

cancellation of accreditation under this clause where that factor applies to an accredited exporter. Criteria which must be strictly fulfilled to become accredited require mandatory cancellation of accreditation under clause 19 if they are no longer met. Similarly, the discretionary criteria which require judgment by WEA under clause 13 are grounds for cancellation under clause 19. For example, WEA must use the same judgment in considering whether an exporter is no longer fit and proper to hold accreditation as WEA would if the exporter was an applicant under clause 13.

The main differences between clauses 13 and 19 are that WEA has certain discretionary grounds for the cancellation of accreditation under subclause 19(2). Paragraph 19(2)(a) is the discretionary equivalent of paragraph 13(1)(d). It provides that WEA may cancel an accreditation where the exporter has become an externally administered body corporate as opposed to clause 13 which does not allow the accreditation of an externally administered body corporate at all. This means an accredited exporter under administration may be allowed the opportunity to improve its financial position. This may be appropriate in certain circumstances rather than cancelling an accreditation which could prevent any financial resurrection and cause financial loss or detriment to third parties including growers.

WEA has the same discretion with regard to an accredited exporter which has not complied with its conditions of accreditation under paragraph 19(2)(b). The accreditation may be cancelled as a result of the breach but WEA is not bound to cancel the accreditation. It should be noted however that under clause 9 WEA has the option of suspending an accreditation. Also, any such breaches of conditions will be taken into account by WEA in considering whether to renew an accreditation where it receives an application to do so.

Paragraph 19(1)(d) allows WEA to cancel the accreditation of an accredited exporter which has failed to provide sufficient access to port terminal facilities to other accredited exporters. This is only where the access test under clause 24 applies to the exporter.

It needs to be noted that compliance with the access test requirements does not guarantee that every access seeker will be able to secure access. Where the capacity of a facility is fully allocated in accordance with the access procedures then another accredited exporter seeking access will not be able to be accommodated. The accreditation of the service provider will not be cancelled in such a situation if it has complied with the access test requirements.

During the period 1 July 2008 to 30 September 2009 in which service providers must agree to provide access and publish the terms and conditions for access, WEA may cancel their accreditation if they do not provide access to others where it is feasible to do so. In this period, the failure to provide access, where it is reasonably feasible to do so on the published terms and conditions, would mean the service provider was no longer passing the access test as required under clause 13.

Paragraph 19(2)(c) allows WEA to include in the scheme any other discretionary grounds for cancellation which would allow cancellation of accreditation but not require it.

Before making a decision to suspend or cancel an accreditation WEA is required under clause 9 to consult the accredited exporter.

In addition, an appeal process is provided in part 6 of the Bill whereby WEA can be required to reconsider a decision. Following the reconsideration, part 6 allows the matter to be referred to the Administrative Appeals Tribunal.

### **Clause 20: Civil penalty orders and cancellation**

20. This clause provides that civil penalties for breaching accreditation conditions are independent from the cancellation of accreditation resulting from the same breach. An accredited exporter's liability under a civil penalty provision does not affect the ability of WEA to cancel its accreditation on the same grounds. Equally, the cancellation of accreditation by WEA does not affect the operation of the civil penalty provisions and an accredited exporter may be penalised for a breach even though its accreditation has been cancelled as a result of that same breach.

### **Clause 21: Post-cancellation reports**

21. This clause provides that where WEA cancels an accreditation, the exporter in question must provide WEA with export and compliance reports similar to those required under clauses 15 and 16. These reports are required in relation to the period from the start of the marketing year in which the accreditation is cancelled and the date of notification of the cancellation.

Failure to comply with this requirement is a breach of a civil penalty provision under part 8, attracting a penalty of up to 1000 penalty units which is the equivalent to \$110 000.

## **Division 6 – Surrender of accreditation**

### **Clause 22: Surrender of accreditation**

22. This clause provides that an accredited exporter can surrender its accreditation and attaches certain conditions and requirements to the surrender. WEA will not consent to the surrender until the accredited exporter has provided export and compliance reports for the period that has elapsed since the end of the previous marketing year. These reports are the same as required by clauses 15 and 16 except they reflect only the portion of the marketing year up to the date of application for surrender.

This clause is intended to prevent accredited exporters from avoiding their reporting obligations and accountability by surrendering their accreditation.

## **Division 7 – Register of accredited wheat exporters**

### **Clause 23: Register of accredited wheat exporters**

23. This clause provides that a Register of all accredited exporters must be kept and maintained on the internet by WEA.

The register will contain each exporter's conditions of accreditation and contributes to the transparency of the wheat marketing accreditation scheme.

## **Division 8 – Access test**

### **Clause 24: Access test – port terminal service**

24. This clause is intended to ensure that accredited exporters that own, operate or control port terminal facilities provide fair and transparent access to their facilities to other accredited exporters. The test aims to avoid regional monopolies unfairly controlling infrastructure necessary to export wheat in bulk quantities, to the detriment of other accredited exporters. All accredited exporters should have access to these facilities while allowing the operators of the facility to function in a commercial environment. 'Port terminal facility' is defined in clause 5.

Before 1 October 2009 it is a condition of accreditation that such accredited exporters publish a statement on their website outlining the terms and conditions on which they will allow other accredited exporters access to their port terminal facilities. This aims to ensure access to other exporters in the interim prior to a formal access undertaking being lodged and approved through the ACCC.

Following 1 October 2009 such accredited exporters will be required to have a formal access undertaking accepted by the ACCC. The access undertaking is, for the purposes of this clause, in force as of the date the ACCC publishes its decision to accept it. Where the ACCC has not published a decision to accept an access undertaking by 1 October 2009 the accredited exporter will have its accreditation cancelled under clause 19 or, where the accredited exporter has not yet received accreditation, be refused accreditation under clause 13.

This access test may also be satisfied where a state access regime in relation to port access has been declared to be effective under the *Trade Practices Act 1974*. However, WEA must be satisfied that the regime declared to be effective covers port terminal access.

Subclause 24(3) clarifies that the ACCC's decision to accept an access undertaking is sufficient to pass the access test. This contrasts with section 44ZZBA of the *Trade Practices Act 1974* which provides for appeal processes before an undertaking comes into force. Subclause 24(3) of the Bill does not prevent appeals against the ACCC's decisions from taking place, but means that the access test is passed once the ACCC approves an undertaking. This has been done to eliminate the possibility of a third party delaying the accreditation of a

port terminal service provider through vexatious use of the legal process. A port terminal service provider should not be disadvantaged by such appeals if it has acted in good faith and provided an access undertaking that is satisfactory to the ACCC. This subclause does not prevent the Australian Competition Tribunal from amending the access undertaking on appeal.

This clause also provides that, both before and after 1 October 2009, accredited exporters must publish procedures for managing the demand for port terminal services including vessel nomination and acceptance rules. The requirements include information relating to the schedule of vessels to use the bulk terminal facility (ie those that have been nominated by exporters and accepted into the queue according to the rules), the amount to be loaded into each vessel and the estimated date of loading into each vessel to be published on the internet and updated daily.

## **Part 3 – Information-gathering and audit powers**

### **Division 1 – WEA may obtain information and documents from accredited wheat exporters etc.**

#### **Clause 25: WEA may obtain information and documents from accredited wheat exporters etc.**

25. This clause provides WEA with the power to require the provision of information, documents or copies of documents relevant to the functions or powers of WEA from accredited exporters.

WEA must provide written notice and specify the form and timing for the provision of documents and information. The specified timing must allow at least 14 days for the accredited exporter to provide the information or documents requested.

The maximum civil penalty for not providing the information of document requested by WEA is 1500 penalty units, which is equivalent to \$165 000, or 300 penalty units for a person other than a body corporate, which is equivalent to \$33 000.

Under clause 14(a), it is a condition of accreditation that accredited exporters comply with any requests under clause 25. As such, WEA may cancel an exporter's accreditation where it does not comply with a request under clause 25 as the contravention of a condition of accreditation is a ground for WEA to find that the accredited exporter is not fit and proper under clause 19(1)(c).



### **Clause 26: Copying documents – compensation**

26. This clause provides that an accredited exporter which complies with a request for copies of documents under clause 25(2)(c) is entitled to reasonable compensation from WEA for the cost of copying the documents.

### **Clause 27: Copies of documents**

27. This clause gives WEA the power to inspect, copy and retain copies of documents produced through a properly conducted requisition executed under subclause 25(2).

### **Clause 28: WEA may retain documents**

28. This clause allows WEA to retain possession of a document obtained through a requisition of information or documents under clause 25 for as long as necessary. As soon as practicable after taking possession, WEA must provide the accredited exporter from which the documents came with certified copies of the documents, and allow the accredited exporter access to the documents until this time.

WEA has the discretion to determine how long it is necessary for it to retain possession of such documents.

## **Division 2 – WEA’s other information-gathering powers**

### **Clause 29: Power to request information and documents**

29. This clause allows WEA to request information from non-accredited persons provided it believes those persons have such information or documents in their possession which are relevant to WEA powers and functions. WEA must have reasonable grounds for this belief. That is, there must be some objective evidence of the existence and relevance of documents and information for such a request to be within the powers of WEA under this clause.

These requests may be directed at any person but cannot be enforced. There is no penalty for lack of compliance under this clause.

The reason this clause contains no provision for enforcement or penalty for lack of compliance is that a request under this clause can be directed at any person at all. This Bill regulates bulk wheat exports and it would be inappropriate to give WEA powers which allowed for the penalisation of persons other than accredited bulk wheat exporters, or seek to override other legislation and rights.

This clause does not apply to accredited exporters who must comply with similar requests under clause 25.

### **Clause 30: Power to request a report**

30. This clause enables WEA to request a written report from any person in the same circumstances as requesting information and documents under clause 29.

WEA must believe on reasonable grounds that the person to whom the request is made is capable of using the information or documents to prepare a report that is relevant to the function or powers of WEA.

Again, this clause has no penalty for non-compliance.

## **Division 3 – External audits of accredited wheat exporters**

### **Clause 31: WEA may direct external audit**

31. This clause provides WEA with the power to direct an accredited wheat exporter to arrange for an external auditor to carry out an external audit and to provide WEA with a written report setting out the results of the audit.

The request must be in writing and specify the matters to be covered by the audit, the form of the audit report, the kind of details it is to contain and the deadline for providing the audit report. Paragraph 31(1)(b) outlines the type of matters that may be the subject of an audit.

Subclause 31(3) outlines the matters which need to be covered by the audit if the audit relates to the compliance of an accredited exporter with the conditions of accreditation. Subclause 31(5) specifies eligibility criteria for an appointment as an external auditor.

Subclause 31(6) requires WEA to reimburse an accredited exporter for reasonable costs associated with an audit required under clause 31(1).

Failure to comply with requirements under clause 31 may result in cancellation of accreditation as specified under subclause 14(a). The maximum civil penalty for failure to comply with a direction under this clause is 1500 penalty units, which is equivalent to \$165 000 or 300 penalty units for a person other than a body corporate, which is equivalent to \$33 000.

This clause works in conjunction with clauses 15-16 to provide WEA with the ability to regularly review the financial conditions and activities of accredited exporters. In particular it allows WEA to investigate the activities and financial circumstances of accredited exporters where a breach of conditions or generally unscrupulous conduct is suspected. The clause also allows WEA to conduct random audits of accredited exporters, as part of its ongoing monitoring activities.

It is not intended that WEA act as an investigatory body continuously. However, it is important that these significant powers exist to allow WEA to regulate

effectively and, when necessary, strongly and actively enforce provisions of the Bill.

#### **Clause 32: External auditors**

32. This clause empowers WEA to authorise a specific individual or body to be an external auditor under this Bill. The authorisation must be in writing. WEA may also identify who is authorised under this clause to act as an auditor by reference to a class or classes of individuals or bodies [see subsection 46(3) of the *Acts Interpretation Act 1901*]. WEA may also vary or remove such an authorisation [see subsection 33(3) of the *Acts Interpretation Act 1901*].

An accredited exporter's external auditor is eligible for use by WEA where WEA considers that the auditor's familiarity with the exporter is an advantage.

Subclause 32(2) is included to assist readers. It simply highlights that a written authorisation under subclause 32(1) does not fall under the definition of 'legislative instrument' under section 5 of the *Legislative Instruments Act 2003*. It is in no way purporting to exempt the clause from the *Legislative Instruments Act 2003*.

## **Part 4 – Investigations**

#### **Clause 33: Minister may direct investigations**

33. This clause enables the Minister to direct WEA to investigate various matters where the Minister considers such an investigation to be in the public interest. For a matter to be the subject of an investigation, it must involve a suspected or alleged contravention of either a condition of accreditation of this Bill, or be a matter relating to a function or power conferred on WEA.

This clause enables the Minister to compel WEA to investigate important matters relating to the bulk export of wheat in circumstances where WEA may not have otherwise done so.

#### **Clause 34: Report on investigation**

34. This clause sets out requirements following an investigation under clause 33. WEA must, following the investigation, prepare a written report setting out its findings, the evidence relied on, and any other matters WEA thinks fit or the Minister directs.

This clause also sets out the requirements for distribution of the report. These involve giving a copy to the Minister, as well as to certain other agencies where the report involves a suspected or alleged contravention of an Australian law.

The report must also be provided to a person where the report relates to that person's affairs to a 'material extent'. A material extent is more than mere mention but need not require a potential for detriment or loss. A report relates to

a person's affairs if it creates a connection to a personal concern or function of theirs to a significant or detrimental extent.

The clause also gives the Minister the power to publish the report provided the disclosure of information in the report doesn't cause financial loss or detriment to a person.

## **Part 5 – Wheat Exports Australia**

### **Division 1 – WEA's establishment, functions, powers and liabilities**

#### **Clause 35: Wheat Exports Australia**

35. This clause provides for the establishment of Wheat Exports Australia. Wheat Exports Australia replaces the Export Wheat Commission and will operate under the *Financial Management and Accountability Act 1997*.

#### **Clause 36: WEA's functions**

36. This clause provides that WEA's functions will be those conferred on it by this Act together with those entailed in the wheat export accreditation scheme. WEA may also undertake other supplementary tasks related to these primary functions.

WEA does not hold an unfettered discretion here. A function must be ancillary to the powers given by this Act and a legislative instrument purporting to give WEA powers beyond these functions may be disallowed.

#### **Clause 37: WEA's powers**

37. This clause gives WEA the powers necessary to perform its functions under clause 36. These powers include, but are not limited to, the power to enter into contracts, to buy, hold or sell real and personal property, or lease the whole or any part of any land or building.

WEA may exercise these powers only on behalf of the Commonwealth. Any real or personal property held, or money received, by WEA is done so on behalf of the Commonwealth. As it is an agency under the *Financial Management and Accountability Act 1997*, the Chief Executive of WEA must manage WEA's affairs in a way that promotes efficient, effective and ethical use of the Commonwealth resources

The right to sue is not counted as personal property for the purposes of subclause 37(4). This means that WEA is able to exercise its rights to sue (or be sued) in connection with its statutory functions.

### **Clause 38: WEA's financial liabilities are Commonwealth liabilities**

38. This clause provides that any financial liabilities of WEA will be taken to be liabilities of the Commonwealth. 'Financial liability' is defined in subclause 38(2) to mean a liability to pay to a person an amount, where the amount, or the method for working out the amount, has been determined. This clause is consistent with the operation of an agency under the *Financial Management and Accountability Act 1997*.

## **Division 2 – WEA's constitution and membership**

### **Clause 39: WEA's constitution**

39. This clause provides that WEA is a body corporate and must have a common seal and may sue and be sued in its corporate name. The seal of WEA must be kept by WEA and must not be used except as authorised by WEA.

It also provides that WEA may acquire, hold and dispose of real and personal property.

Subclause 39(3) states that all courts, judges and persons acting in the law must take legal note of the imprint of WEA's company signature appearing on a document and presume that the document was appropriately sealed.

### **Clause 40: WEA's membership**

40. This clause provides that WEA will consist of a chair person and at least 3 but not more than 5 other members.

### **Clause 41: Appointment of WEA members**

41. This clause provides that members of WEA will be appointed by the Minister by written instrument. This extends to re-appointment by virtue of section 33(4A) of the *Acts Interpretation Act 1901*.

Paragraphs 41(2)(a)–(n) set out the skills base to be considered when determining appointments. Members of WEA will be required to have substantial experience or relevant knowledge and significant authority in either international trade, international marketing, commodity trading, economics, foreign exchange handling, finance, regulation, public policy, business, law, grain production or grain handling so that they can contribute to the operations of WEA.

Appointments will be made on a part-time basis.

### **Clause 42: Period of appointment for WEA members**

42. The term of appointment for WEA members is for the time specified in a written instrument of appointment. The term is not to exceed 5 years.

‘Appointment’ includes re-appointment by virtue of section 33(4A) of the *Acts Interpretation Act 1901*.

#### **Clause 43: Acting WEA chair**

43. This clause outlines the circumstances in which the Minister may appoint another person to act as the WEA Chair. These circumstances may include when the office of Chair is vacant or when the chair is away from duty or not in Australia or is unable to perform the duties of the office.

A person is not eligible for appointment to act as Chair unless the person meets the criteria for appointment to WEA under subclause 41(2).

Subclause 43(3) provides that minor administrative errors in the appointment of an acting WEA Chair will not invalidate action taken by the acting Chair.

Section 20 of the *Acts Interpretation Act 1901* provides that a person performing the duties of WEA Chair is included in a reference to WEA Chair under the Bill.

Section 33A of the *Acts Interpretation Act 1901* provides other administrative and procedural requirements relating to the appointment of an acting Chair.

### **Division 3 – Terms and conditions for WEA members**

#### **Clause 44: Remuneration**

44. This clause provides that a WEA member is to be paid remuneration determined by the Remuneration Tribunal. If there is no appropriate determination, a member is to be paid the remuneration as prescribed by the regulations.

WEA members will also be paid allowances that are set by the Remuneration Tribunal or in the regulations.

The Remuneration Tribunal is required to determine remuneration for positions that meet the definition of ‘public office’ in subsection 3(4) of the *Remuneration Tribunal Act 1973*. This definition includes all positions established under statute.

#### **Clause 45: Disclosure of interests to the Minister**

45. This clause provides that WEA members must declare to the Minister any interest, pecuniary or otherwise, that conflicts, or could conflict with the proper performance of their duties. The member must inform the Minister of these interests in writing.

Given the large private sector membership of WEA, it is important that members make the Minister fully aware of any interests, pecuniary or otherwise.

#### **Clause 46: Disclosure of interests to WEA**

46. This clause requires WEA members to disclose their interests in matters under consideration by WEA so that WEA can manage any potential conflicts.

A WEA member with a potential conflict of interest must not perform their duties in the area of the potential conflict until they have informed a meeting of WEA of their interests and other WEA members have made a determination to allow the particular member to participate in deliberations and decision-making with respect to the matter. The disclosures of interests and relevant WEA determinations must be made as soon as possible and recorded in the minutes of the WEA meeting.

#### **Clause 47: Leave of absence**

47. This clause provides that the Minister may grant leave of absence for the Chair on terms and conditions determined by the Minister.

The clause also provides that the Chair may grant leave of absence for the members on terms and conditions determined by the Chair.

#### **Clause 48: Resignation**

48. This clause outlines the formal arrangements for the resignation of members. Members must provide written notice to the Minister. The resignation will take effect on the day it is received by the Minister or a later date specified in the resignation.

#### **Clause 49: Termination of appointment**

49. This clause sets out the conditions under which the Minister may terminate the appointment of a WEA member.

These include bankruptcy, failure to disclose relevant interests and continued absence from meetings.

#### **Clause 50: Other terms and conditions**

50. This clause gives the Minister the power to apply terms and conditions of office, not otherwise provided for in the Act, to members of WEA.

### **Division 4 – Decision-making by WEA**

#### **Clause 51: Holding of meetings**

51. This clause outlines the provisions relating to the holding of meetings of WEA and allows the Chair to convene a meeting of WEA should he or she determine it necessary.

### **Clause 52: Presiding at meetings**

52. This clause provides that the Chair must preside at meetings. If this is not possible, members must appoint one of themselves to act as the presiding member for the purposes of that meeting.

### **Clause 53: Quorum**

53. This clause provides that 3 members must be present to form a quorum for a meeting to proceed.

### **Clause 54: Voting at meetings etc.**

54. This clause provides that questions are decided by the majority of votes of members who are present. It also provides that the person presiding has the casting vote, if required.

### **Clause 55: Conduct of meetings**

55. This clause allows WEA to establish rules for the conduct of its meetings. This includes the participation of members by telephone, by virtue of section 33B of the *Acts Interpretation Act 1901*.

### **Clause 56: Minutes**

56. This clause requires WEA to keep minutes of meetings.

## **Division 5 - Delegation**

### **Clause 57: Delegation by WEA**

57. This clause provides that WEA may delegate all or any of its functions and powers to a member of WEA staff who is an SES employee or acting SES employee.

‘SES employee’ and ‘acting SES employee’ have the same meaning here as given in the *Public Service Act 1999*.

The delegation does not apply to the power conferred by clause 8 of the Bill relating to the development of the wheat export accreditation scheme or the power conferred by paragraph 69(2)(c) to specify the fee to accompany applications for reconsideration of a decision by WEA.

The delegate must comply with the written directions of WEA.



## **Division 6 – Wheat Exports Australia Special Account**

### **Clause 58: Wheat Exports Australia Special Account**

58. This clause establishes the Wheat Exports Australia Special Account. This account will be established in accordance with regulations in the *Financial Management and Accountability Act 1997*.

### **Clause 59: Credits of amounts to the Wheat Exports Australia Special Account**

59. Wheat Exports Australia will not collect any monies. All monies raised from the Wheat Export Charge and from application fees will be paid to the Commonwealth and an equivalent amount will then be credited to the Wheat Exports Special Account.

A special account is desired so that revenue raised from the Wheat Export Charge and from application fees will be clearly identifiable to the wheat industry.

### **Clause 60: Purposes of the Wheat Exports Australia Special Account**

60. This clause provides that funds credited to the Special Account will be used to fund the operations of WEA, including remuneration and allowances of WEA members, remuneration and other employment-related costs and expenses of WEA staff, the reimbursement of accredited exporters for the cost of audits requested by WEA under clause 31, and paying compensation under clause 26.

Section 21 of the *Financial Management and Accountability Act 1997* provides that funds in the Special Account are for the above purposes, being the purposes for which they are appropriated. Additionally it provides that notional payments may be made under certain circumstances.

## **Division 7 – WEA staff etc.**

### **Clause 61: Staff**

61. This clause provides that staff employed by WEA will be employed under the *Public Service Act 1999*.

### **Clause 62: Persons assisting WEA**

62. This clause provides that WEA may be assisted by officers (within the meaning of *the Public Service Act 1999*) and employees from other Commonwealth agencies in the performance of its functions.

## **Division 8 – Planning and reporting obligations**

### **Clause 63: Corporate plan**

63. This clause requires WEA to prepare a Corporate Plan setting out its objectives and the strategies and policies that are to be followed by WEA in order to achieve its objectives.

WEA will need to provide the Minister with a plan at least once each 3-year period. WEA will be also required to advise the Minister about any changes to the plan and matters that might impact on its ability to perform its functions according to plan.

Subclause 63(5) permits the Minister to give the WEA Chair written guidelines to assist WEA in deciding which other matters should be included in the plan and in determining what matters may significantly affect WEA's performance.

Subclause 63(6) is included to assist readers. It simply highlights that a written guideline under subclause 63(5) does not fall under the definition of 'legislative instrument' under section 5 of the *Legislative Instruments Act 2003*. It is in no way purporting to exempt the clause from the *Legislative Instruments Act 2003*.

### **Clause 64: Annual report**

64. This clause requires WEA to report to Parliament through the Minister each year on its activities.

The report must be provided to the Minister as soon as practicable after the end of each financial year but within 6 months by virtue of section 34C of the *Acts Interpretation Act 1901*. The Minister must present the report to Parliament within 15 sitting days of receiving it.

### **Clause 65: Report for growers**

65. This clause requires WEA to prepare and publish a report for growers each marketing year in relation to the operation of the wheat export accreditation scheme during that year.

This report will be a concise summary of exports and the operation of the scheme, including the compliance of exporters with their conditions of accreditation and details of any action taken by WEA in relation to this.

The report is not a Performance Management Review as was produced under previous arrangements. Details of the commercial operations of accredited exporters will not be contained in the report.

WEA must publish the report on or before 31 December in the next marketing year. This requirement does not apply to the marketing year starting on 1 October 2007.

It should be noted that the report required under clause 65 is separate to the report by WEA on the performance of AWB International Ltd in managing the 2007-2008 pool required under schedule 3, item 10 of the Wheat Export Marketing (Repeal and Consequential Amendments) Bill 2008. WEA will finalise the report on AWB International Ltd on behalf of the Export Wheat Commission. It is required to be published within six months of the finalisation of the 2007-2008 pool.

## **Division 9 – Other matters**

### **Clause 66: WEA Chair not subject to direction by WEA on certain matters**

66. This item provides that the WEA Chair must comply with the conditions of the *Financial Management and Accountability Act 1997* and the *Public Service Act 1999* and will not be directed on these matters by the other members of WEA.

## **Part 6 – Review of decisions**

### **Clause 67: Simplified outline**

67. This clause gives a simple outline of the process for reviewing decisions made by WEA. A person affected by a decision [see clause 69] may apply to WEA to have the decision reviewed. Only where the decision is varied or affirmed upon reconsideration by WEA can an application may be made to the Administrative Appeals Tribunal for review of the decision. This can be made in accordance with the *Administrative Appeals Tribunal Act 1975*.

The intent of this part is to provide a transparent and effective process for applicants to appeal decisions made by WEA.

### **Clause 68: Decisions that may be subject to reconsideration by WEA**

68. This clause provides that applicants will be able to request WEA to reconsider a decision relating to the operation of the wheat accreditation scheme.

### **Clause 69: Applications for reconsideration of decisions**

69. This clause provides that a person affected by a decision may make a written application to WEA to reconsider a decision setting out the reasons on which the request is based. It must be made in a written form within 28 days of notification of the decision unless WEA allows further time. WEA may require this application to be accompanied by a fee. Any fee must be imposed on a cost recovery basis. The authority for the fee will be provided via a disallowable legislative instrument.

The approved form of application by WEA may allow the provision of statements in the application to be verified by statutory declaration.

A 'person affected', for the purposes of this clause, is limited to those who are substantially and adversely affected by a decision. This effect must be real or certain. The potential for, or speculative expectation of, detriment does not by itself constitute the necessary effect to be a 'person affected'.

The intent of the legislation is to promote competition and increase choice for growers. The mere fact that a person is a commercial competitor of the person to which a decision of WEA relates is not sufficient to allow such a competitor to appeal to WEA for a reconsideration of that decision under this clause. A decision by WEA to allow a commercial activity that has the potential to commercially or competitively affect another party is not intended to render that party an 'affected person' for the purpose of this clause.

#### **Clause 70: Reconsideration by WEA**

70. This clause requires WEA to give the applicant a written notice stating the outcome of its reconsideration. Unless WEA is satisfied that there are exceptional circumstances, it may only consider information before it at the time of the original decision.

WEA must provide the applicant with a written notice stating its reconsidered decision. WEA must also provide the applicant with reasons for the reconsidered decision within 28 days of making its decision.

The reconsidered decision will have the same legal effect as an original decision made under the accreditation scheme.

#### **Clause 71: Deadline for reconsideration**

71. This clause requires WEA to make a decision within 30 days of receiving the application. Where WEA does not inform an applicant of its decision within this timeframe, WEA is taken to have made a decision affirming its original decision. WEA must then provide reasons for the affirmation to the applicant within 28 days of the end of the 30 day period referred to in this clause.

#### **Clause 72: Review by the Administrative Appeals Tribunal**

72. This clause provides applicants who are still unhappy with the reconsidered decision with a right to apply to the Administrative Appeals Tribunal for a further review. This review by the Administrative Appeals Tribunal is a merits review. This means the Administrative Appeals Tribunal will examine the merits of the decision by WEA, not simply the legality of the decision.

### **Part 7 – Protection of confidential information**

#### **Clause 73: Protected confidential information**

73. This clause specifies what information must be treated as confidential and protected.

It includes information provided to WEA on a commercial-in-confidence basis in meeting obligations under the Bill that, if released, could cause financial loss or detriment to the provider of the information or related body corporate, or benefit a direct competitor of the provider or related body corporate.

#### **Clause 74: Protection of confidential information**

74. This clause sets out who is an entrusted public official and restricts what they may do with protected confidential information.

Subclause 74(3) specifies circumstances when the limitation on disclosing protected confidential information does not apply. This includes the provision of information to certain enforcement agencies such as the federal police, the Australian Taxation Office and the Australian Securities and Investments Commission.

It should be noted that other legislation or common law may require WEA to provide information regardless of whether it is confidential under this Bill. This clause does not limit the operation of those other laws.

### **Part 8 – Civil penalty orders**

This part details the operation of civil penalty orders, which underpin the Bill. Civil penalties are adopted as they are more appropriate than criminal offences for the regulation of the commercial activities involved in the export of wheat in bulk. The aim is to ensure WEA has the ability to regulate effectively and to undertake enforcement responsibilities. The use of civil penalty orders is proportionate to the nature of the harm involved.

An application for a civil penalty order only requires action on behalf of WEA rather than the Director of Public Prosecutions. In addition, the civil standard of proof on the balance of probabilities applies rather than the criminal standard of proof of beyond reasonable doubt. Enforcement of a civil penalty does not require the same onerous evidential requirements relating to intention or knowledge. This means the procedure is expedited and increases WEA's ability to manage exporters who neglect their responsibilities under the Bill.

It is a criminal offence under the *Criminal Code Act 1995* to provide WEA with false or misleading information. This is provided by schedule 2, items 1-5 of the Wheat Export Marketing (Repeal and Consequential Amendments) Bill 2008.

#### **Clause 75: Simplified outline**

75. This clause provides a simple summary of part 8 of the Bill. Part 8 provides for monetary penalties to be applied, and enforced by the Federal Court, where civil penalty provisions in the Bill are contravened.

### **Clause 76: Civil penalty orders**

76. This clause outlines the circumstances in which the Federal Court may make a civil penalty order. This compels a person to pay the Commonwealth an amount of money determined by the Federal Court.

This clause outlines the matters which the Federal Court shall take into account when determining the penalty in any particular case. These factors include the nature and extent of the contravention and the loss or damage it caused, the circumstances surrounding the contravention, and whether the person has been found by a court to have been involved in a similar contravention in the past either under this Bill or under the *Customs Act 1901*.

The clause also sets maximum penalties for the contravention of each civil penalty provision in the Bill. The maximum penalties vary between penalty provisions depending on the seriousness of the offence and there is a separate scale of reduced penalties where a natural person is the subject of a civil penalty order as opposed to a body corporate.

### **Clause 77: Who may apply for a civil penalty order**

77. This clause only allows WEA to apply to the Federal Court for a civil penalty order. However, the clause specifically does not exclude the Director of Public Prosecutions from taking action on behalf of WEA under the *Director of Public Prosecutions Act 1983*. This is provided for by subsection 6(1) of the *Director of Public Prosecutions Act 1983*.

### **Clause 78: 2 or more proceedings may be heard together**

78. This clause provides that two or more applications for civil penalty orders may be heard together where the Federal Court considers it appropriate. This is likely in the event that a person contravenes more than one penalty provision as a result of the same conduct or course of conduct.

### **Clause 79: Time limit for application for an order**

79. This clause provides that the WEA may only apply to the Federal Court for a civil penalty order within 6 years of the contravention.

### **Clause 80: Civil evidence and procedure rules for civil penalty orders**

80. This clause confirms that the Federal Court must apply the same rules of evidence and procedure when hearing applications for civil penalty orders as it does when hearing any other civil matter.

### **Clause 81: Civil proceedings after criminal proceedings**

81. This clause restricts the Federal Court from making a civil penalty order where the person has already been convicted of a criminal offence as a result of substantially the same conduct.

### **Clause 82: Criminal proceedings during civil proceedings**

82. This clause provides that an application for a civil penalty order will be suspended where substantially the same conduct has attracted criminal proceedings since the initiation of the application. The proceedings in relation to the civil penalty order can only be resumed if the person is not convicted of the criminal offence.

### **Clause 83: Criminal proceedings after civil proceedings**

83. This clause allows criminal proceedings to be instituted after proceedings against the same person for a civil penalty order have concluded even where they both relate to substantially the same conduct. This can be done regardless of whether a civil penalty order was actually made against the person.

### **Clause 84: Evidence given in proceedings for a civil penalty order not admissible in criminal proceedings**

84. This clause provides that evidence of information given, or documents produced, by a person, is not admissible in criminal proceedings against that person if the person gave the evidence or produced the documents in civil penalty proceedings and the conduct alleged to constitute the offence is substantially the same as the conduct that was claimed to constitute the civil penalty contravention.

This does not apply to criminal proceedings in respect of the falsity of the evidence given by the person in the civil penalty proceedings.

### **Clause 85: Mistake of fact**

85. This clause provides a person with the defence of mistake of fact for contraventions of a civil penalty provision. The mistake of fact defence provision in clause 85 is modelled on the mistake of fact provision in clause 9.2 of the *Criminal Code Act 1995*.

Accordingly, a person is not liable to have a civil penalty order made against them for a contravention of a civil penalty provision if, at or before the time of the conduct constituting the contravention, the person considered whether or not facts existed, and was under a mistaken (but reasonable) belief about those facts, and had those facts existed, the conduct would not have constituted a contravention of the civil penalty provision.

Subclause 85(2) deals with whether a person may be regarded as having considered whether or not facts existed. This will be where the person has considered on a previous occasion that certain facts existed in certain circumstances and holds an honest and reasonable belief that the present circumstances are substantially the same as those which they previously considered.

Subclause 85(3) provides that a person who wishes to rely on subclauses 85(1) or (2) in civil proceedings bears an evidential burden in relation to that matter.

### **Clause 86: State of mind**

86. This clause provides that a person can have a civil penalty order made against them irrespective of their state of mind at the time of the conduct which is the subject of the order. This applies only to those civil penalty provisions listed in clause 86 which are subclauses 7(1) – relating to export of bulk wheat by a person, 18(1) – relating to actions of an accredited wheat exporter, 18(3) – relating to actions of an accredited wheat exporter, 21(6) – relating to actions of a company, 25(5) – relating to actions of a company, and 31(7) – relating to actions of an accredited wheat exporter.

This clause does not affect the operation of clause 85 allowing a person to defend themselves on the basis of mistake of fact [see 85 above].

## **Part 9 – Miscellaneous**

### **Clause 87: Sharing information**

87. This clause allows Australian Quarantine and Inspection Service employees and Customs officers to provide WEA with information which is relevant to the functions and powers of WEA. Paragraphs 74(3)(g) and (h) allow the provision of information from WEA to Australian Quarantine and Inspection Service employees and Customs officers.

### **Clause 88: Compensation for acquisition of property**

88. This clause reinforces the Bill's adherence to subsection 51(xxxi) of the Constitution. Where there is an acquisition of property within the meaning of subsection 51(xxxi) of the Constitution resulting from the operation of the Bill, the wheat export accreditation scheme, compensation must be provided by the Commonwealth so that the acquisition is on 'just terms' within the meaning of subsection 51(xxxi) of the Constitution.

Where the Commonwealth and the person do not agree on the appropriate amount of compensation, the person may institute proceedings in the Federal Court to recover an amount of compensation which the court determines to fulfil the meaning of an acquisition on just terms.



**Clause 89: Review of Act etc.**

89. This item provides that the Productivity Commission must conduct a review of this Bill and the wheat export accreditation scheme. The review must be commenced in 2010 and provide a report in relation to the matters set out in a written notice from the Minister. These matters must include the costs and benefits of the legislation and the wheat export accreditation scheme. The Minister must then table the report within 15 days of receiving it from the Productivity Commission.

Subclause 89(3) is included to assist readers. It simply highlights that a written notice under subclause 89(1) does not fall under the definition of 'legislative instrument' under section 5 of the *Legislative Instruments Act 2003*. It is in no way purporting to exempt the clause from the *Legislative Instruments Act 2003*.

**Clause 90: Regulations**

90. This clause is a formal provision allowing the Governor-General to make regulations for the purposes of carrying out or giving effect to the provisions of the Bill.