

NEW WHEAT EXPORT MARKETING ARRANGEMENTS

DISCLAIMER

The following notes provide a non-technical guide to the proposed *Wheat Export Marketing Bill 2008* and *Wheat Export Marketing (Repeal and Consequential Amendments) Bill 2008* in plain English. They are produced to assist in the understanding of the legislation for those without legal or legislative knowledge. In no way are these notes to be taken as Explanatory Memoranda and they have no effect in law.

INTRODUCTION

The draft *Wheat Export Marketing Bill 2008* proposes to implement reforms to Australia's export wheat marketing arrangements. It will establish a statutory entity, Wheat Exports Australia (WEA), to regulate the export of bulk wheat from Australia through a wheat export accreditation scheme.

If the proposed Bill is enacted it will create the need to amend other existing laws. These proposed changes to other laws are detailed in the *Wheat Export Marketing (Repeal and Consequential Amendments) Bill 2008*.

The Bills create WEA and give it the powers necessary to develop an accreditation scheme to assess the suitability of companies to be exporters. They also give WEA the power to suspend and revoke accreditation as well as place conditions on an accreditation granted to an exporter. WEA will be required to report regularly to growers.

A Bill is simply a document which proposes a law. It is constructed in the same format as an Act and presented to Parliament for approval. Once a Bill is approved by both the lower house (House of Representatives) and upper house (Senate) of Parliament it becomes an Act of Parliament. Once the Act receives Royal Assent it enters into force and becomes binding law on the commencement date specified in the Act.

An Act is divided up into parts, divisions and sections, sections being the smallest of the three that appear in the contents. In these explanatory notes a reference to an 'Item' is a reference to a section. Often there is no need to refer to each individual section and as such these notes will often describe the function and purpose of a division rather than explaining each and every section within that division.

WHEAT EXPORT MARKETING BILL 2008

Part 1 – Introduction

1 Short title

This item provides for the Act to be called the *Wheat Export Marketing Act 2008*.

2 Commencement

This item provides for the Act to commence on 1 July 2008. Royal Assent is a necessary step which gives effect to legislation after it has passed through parliament.

3 Simplified outline

This item provides a brief summary of how the proposed Act will implement new wheat export marketing arrangements.

4 Definitions

This item defines a range of the terms and phrases used in the Act. Of particular note is the definition of ‘port terminal facility’ as this is used in the Access Test for accreditation.

5 Involved in a contravention

This item 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

6 Compliance with wheat export accreditation scheme

This item makes it illegal to export wheat in bulk without being accredited under the wheat export accreditation scheme (the accreditation scheme). Bulk wheat will also remain a prohibited export under the *Customs (Prohibited Exports) Regulations 1958*. Any person who exports bulk wheat without accreditation can be fined up to 600 penalty units. One penalty unit is equivalent to \$110. A corporation can be fined up to five times this amount.

Exports of wheat in bags and containers will remain deregulated and are not affected by the Scheme.

Division 2 – Formulation of the wheat export accreditation scheme

7 Wheat export accreditation scheme

This item permits Wheat Exports Australia (WEA) to develop a scheme, by way of a legislative instrument, to manage accreditation of companies to export bulk wheat.

Legislative instruments do not require approval by Parliament before they come into force. They do, however, have to be tabled in Parliament and there is scope for Parliament to ‘disallow’ the instrument.

Under the *Legislative Instruments Act 2003*, consultation on developing legislative instruments is mandatory. Consultation with exporters, growers and other potentially affected parties will be undertaken by the Export Wheat Commission and begin as soon as possible so that the accreditation scheme is ready by 1 July 2008.

While WEA will have the power to develop the scheme, it will do so in accordance with the key provisions for controlling bulk exports that will be included as part of this Act.

8 Administrative decisions under the wheat export accreditation scheme

This item gives WEA the power under the scheme to make administrative decisions such as granting, suspending, cancelling or varying the conditions of accreditation.

9 Application fees

This item gives WEA the power to charge an application fee for export accreditation. The amount will be determined by WEA on a cost recovery basis.

10 Accreditation is not transferable

This item provides that when WEA formulates the accreditation scheme it must include a provision which prohibits the transfer of accreditation from one company to another. This eliminates the risk that a company could avoid the accreditation process by acquiring an accreditation from another company.

Division 3 – Eligibility for accreditation

11 Eligibility for accreditation

This item provides the criteria that WEA must apply in developing the accreditation scheme. It includes a list of checks and balances to screen applicants and only those that pass the screening tests will be accredited. For example, accreditation may only be granted to applicants with demonstrable financial capacity and reputation.

WEA must examine the general financial strength and business record of the company, its risk management strategies and criminal record. It must also take into account the company’s record in meeting importing countries’ sanitary and phytosanitary requirements.

Severe penalties will apply to anyone who provides false or misleading information to the WEA. The *Criminal Code Act 1995* will be amended by the *Wheat Export Marketing (Repeal and Consequential Amendments) Bill 2008* so that an officer of an applicant company can face up to 12 months imprisonment for giving false or misleading information.

Access to port facilities has been raised as an area of concern. If a company applying for accreditation is the provider of a port terminal service (as defined in item 4 of the Bill) the WEA must not grant it accreditation unless it passes the access test. This means that unless the company agrees to give other accredited companies access to its port terminal services, the company will be refused accreditation. For further detail regarding the access test see item 20 below.

Division 4 – Conditions of accreditation

12 Conditions of accreditation

This item provides that accreditation is subject to certain conditions imposed under the accreditation scheme. Specific conditions include a requirement to provide relevant information to WEA. Failure to comply with the conditions of accreditation may result in the accreditation being revoked.

13 Condition – annual export report

This item requires an accredited company to give WEA an annual export report. The company will report details of its wheat exports during the year, including the quantity, grade and country of destination. It will also report on the terms and conditions given to growers when buying their wheat. This will allow WEA to maintain scrutiny over the purchasing practices of accredited exporters. The company must verify that the content of the report is correct.

14 Condition – annual compliance report

This item requires an accredited company to provide an annual report to WEA on its compliance with Australian and foreign laws. It also provides that the company must verify that the content of the report is correct.

15 Condition – report about notifiable matters

This item requires an accredited company to report to WEA any changes to the company that may affect its accreditation. It places the onus on the company to inform WEA of any such changes.

16 Compliance with conditions of accreditation

This item makes it illegal to export bulk wheat outside the conditions of a company's accreditation. This is punishable by a fine of up to 600 penalty units (one penalty unit is equivalent to \$110).

Division 5 – Cancellation of accreditation

17 Cancellation of accreditation

This item sets out the conditions under which WEA can cancel the accreditation of a company. These conditions/tests are similar to those considered in the application process.

A notable difference is the way companies in administration are treated. A company in administration is ineligible for accreditation. However, if a company that is accredited enters administration then WEA will have the discretion as to whether the accreditation should be terminated. This will allow it to assess whether the best interests of growers may be served by allowing the administrator to trade out of the situation. Mandatory revocation of accreditation in this situation may not be in the best interests of growers.

Division 6 – Surrender of accreditation

18 Surrender of accreditation

This item allows a company to hand back its accreditation but makes clear that if it does so it must still provide its final export and compliance reports to the WEA.

Division 7 – Register of accredited wheat exporters

19 Register of accredited exporters

This item provides that WEA must maintain a register of accredited wheat exporters and make it available on the Internet. This will allow growers to check whether a company seeking to buy their wheat is an accredited exporter.

Division 8 – Access Test

20 Access Test

Bulk handlers currently provide port terminal access to other exporters. However, some industry stakeholders have raised the possibility of these bulk handlers limiting access to their port terminal facilities by other exporters and thereby risking regional monopolies developing under the new arrangements.

The intent of this item is to guarantee port terminal access to all accredited exporters while at the same time not restricting the ability of port terminal operators to function in a commercial environment.

It sets out the access conditions that exporters who also operate grain storage and handling facilities at ports have to agree to before being accredited. If the port terminals are not already covered by an effective access regime as certified by the National Competition Council then the following arrangements apply.

For the period until 1 October 2009, they must agree to provide access to accredited exporters and publish the terms and conditions for access to other exporters on their internet site before they can be accredited.

For the period after 1 October 2009, they must enter into an access undertaking agreeing to provide access to accredited exporters. The undertaking must be approved by the Australian Competition and Consumer Commission (ACCC).

The reason for the different conditions before and after 1 October 2009 is that it is not possible for the ACCC to receive, process and approve all of the access undertakings in time for the 2008-2009 marketing season. The *Trade Practices Act 1974* specifies that certain public processes must be observed by the ACCC in considering an access undertaking and these necessitate the additional time.

Part 3 – Information-gathering and auditing powers

This part provides WEA with the powers to meet its monitoring responsibilities. It describes the powers that WEA will have to obtain information, including powers to require an audit of accredited companies. Other than the power to require an audit, they are the same as those currently available to the Export Wheat Commission under the current *Wheat Marketing Act 1989*.

Division 1 – WEA may obtain information and documents from accredited wheat exporters

This Division allows WEA to demand information from accredited exporters that it considers relevant to the performance of its functions. It details the processes used including compensation that is available to companies to meet the cost of complying with providing copies of documents. These are similar to the powers held currently under the existing *Wheat Marketing Act 1989*.

If an accredited exporter fails to provide the information required then it will be in breach of a mandatory condition of accreditation and its accreditation can be revoked by WEA.

Division 2 – WEA’s other information-gathering powers

This Division provides WEA with the power to request information or reports from a person if WEA has reasonable grounds to believe this information is relevant to the performance of WEA functions. This is the same power held under the existing *Wheat Marketing Act 1989*.

This division uses the wider term of ‘person’ so as not to limit WEA from asking for information from anyone.

Division 3 – External audits of accredited wheat exporters

This Division provides WEA with the right to appoint an independent auditor to audit an accredited company. It also gives it the power to make the accredited company

appoint an independent auditor to conduct the audit. Additionally, it sets out what can be covered by the audit and the reporting requirements.

It is better that WEA has the power to appoint an independent auditor rather than complete the audit itself. To have an auditor reside in WEA permanently would increase its ongoing costs by necessitating it employ specialist auditors. It will be more cost effective to contract out this function.

Part 4 - Investigations

This Part provides the Minister with the power to direct the WEA to investigate and report on matters relating to any of its other functions including the operation of the wheat export accreditation scheme. The same power is held under the existing *Wheat Marketing Act 1989*.

Part 5 – Wheat Exports Australia

This Part deals with the establishment of WEA and includes standard provisions that are needed when establishing a regulatory body.

It also contains details of the governance arrangements that will underpin the operation of WEA. These include the process of appointment of members to WEA, the conduct of meetings, the creation of a special account for funding, staffing arrangements and planning and reporting obligations.

Division 1 – WEA’s establishment, functions, powers and liabilities

This Division provides for the formation of Wheat Exports Australia. It gives WEA necessary legal powers, such as being able to enter into contracts, and enable WEA to perform its functions under the Act.

The Export Wheat Commission members will not be transferred to WEA [see schedule 3 item 3 of the *Wheat Export Marketing (Repeal and Consequential Amendments) Bill 2008*]. However, permanent staff of the Export Wheat Commission will be transferred to WEA.

Division 2 – WEA’s constitution and membership

This Division describes the structure under which the WEA will operate. It also provides details of the membership of WEA, which will not exceed six in number, and details the essential skills and experience required of members. It also sets out the process under which appointments are made by the Minister for Agriculture, Fisheries and Forestry.

As a standard administrative practice, a selection committee will be used to provide the Minister with nominations for appointment to WEA. It is not necessary to expressly include this in the Bill.

Division 3 – Terms and conditions for WEA members

This Division describes the process that will be used for determining the fees and allowances paid to members. It also requires members to disclose any conflict of interest they may have in the performance of their duty and deals with issues such as a member's leave of absence, resignation or termination of appointment

Division 4 – Decision-making by WEA

This Division describes how members of WEA will conduct their meetings, including the voting process for decision making and the requirements for a quorum (which is at least three members).

Division 5 – Delegation

This Division describes how WEA will be able to delegate its powers and functions and the limits that apply to these delegations. Importantly, the WEA cannot delegate powers relating to the making of the accreditation scheme.

Division 6 – Wheat Exports Australia Special Account

This Division establishes the financial management arrangements for WEA. These are standard arrangements for entities that operate under the *Financial Management and Accountability Act 1997* and are the same as those that currently apply to the Export Wheat Commission.

This Division also allows for the Wheat Export Charge to be paid into the Special Account to fund the operations of WEA.

The use of a Special Account ensures that revenue generated by the Wheat Export Charge is used to fund WEA. The Wheat Export Charge is currently set at 22 cents per tonne of wheat exported.

Division 7 – WEA Staff etc.

This Division provides that staff of WEA will be employed under the *Public Service Act 1999*. This is the current situation.

Division 8 – Planning and Reporting Obligations

This Division requires WEA to prepare an annual operational plan, a three year corporate plan and an annual report. It also requires WEA to publish an annual report for growers on the operation of the wheat export accreditation scheme.

Division 9 – Other matters

This Division specifies that the WEA Chair must comply with the conditions of the *Financial Management and Accountability Act 1997* and the *Public Service Act 1999* and cannot be directed on these matters by the WEA.

Part 6 – Review of decisions

The Part provides a transparent and effective process for applicants to appeal decisions made by WEA. It outlines the review process for decisions under the wheat export accreditation scheme.

Applicants unhappy with a decision will be able to request WEA to reconsider its decision. The WEA must, within 30 days, give the applicant a written notice stating its re-considered decision and the reasons for its decision.

Applicants who are still unhappy with the decision will be able apply to the Administrative Appeals Tribunal to review the decision.

Part 7- Protection of confidential information

This part provides that information relating to the commercial activities of an applicant for accreditation is protected confidential information. It cannot be disclosed, unless the consent of the person who gave the information is obtained, or the disclosure is needed by a court order. Penalties for breaking these requirements are also set out in this part. These are the same as in the current *Wheat Marketing Act 1989*.

Part 8 – Miscellaneous

This part deals with various miscellaneous issues of the Act and how they will apply.

It includes giving the Governor-General the power to make regulations on matters required, permitted or necessary for carrying out this Act.