

Bills Digest
No. 93 2000–01

Pig Industry Bill 2000

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INFORMATION AND RESEARCH SERVICES

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No. 93 2000–01

Pig Industry Bill 2000

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Pig Industry Bill 2000

Date Introduced: 30 November 2000

House: House of Representatives

Portfolio: Agriculture, Fisheries and Forestry

Commencement: Royal Assent. Schedule 1 commences after the 'transfer time', a day specified by the Minister. Item 3 of Schedule 1 has a commencement date that is dealt with in the Main Provisions section of this Digest.

Purpose

To merge and privatise the Australian Pork Corporation and the Pig Research and Development Corporation.

Background

The Final Report of the joint industry/government Working Party on Pork Industry Restructure,¹ released in March 2000, recommended streamlining the industry's management through the amalgamation of the existing pork industry bodies into a single producer controlled organisation. The report was endorsed unanimously by delegates to the Pork Council of Australia's annual meeting in March 2000.² On 29 August 2000 the Minister for Agriculture, Fisheries and Forestry, Hon Warren Truss, announced that the Government had given the go ahead for a new company, Australian Pork Limited (APL) to take over the functions of the three existing industry and statutory bodies. He said at the time that 'the evolution of a single organisation will remove inefficient duplication in servicing industry needs and provide a single point of contact for pork producers as well as our domestic and international trading partners'.³

Existing Pork Industry Organisations

Currently three organisations, the Pork Council of Australia (PCA), the Pig Research and Development Corporation (PRDC), and the Australian Pork Corporation (APC), manage the separate tasks of policy, research and development, marketing and promotion, and export development in the Australian pig industry.

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The **Australian Pork Corporation** (APC) is the statutory marketing authority for pork produced in Australia. It was established under the *Pig Industry Act 1986*. The APC is funded by a promotion levy of \$1.65 per pig slaughtered, payable by producers. In 1999-2000 the revenue raised from the levy was \$8.24 million.⁴ The APC plans and implements marketing and sales programs for the pork industry in Australia and overseas, under the brand name of 'New Fashioned Australian Pork'. It also provides a central information resource for the industry through a library and a statistical service that analyses international and domestic trends in pork production and marketing. The APC worked closely with the National Pork Industry Development Program (NPIDP) to establish and fund the Confederation of Australian Pork Exporters (CAPE) in 1998-1999. It currently administers the National Networks and Alliances Program (NNAP) which is also funded through the NPIDP.⁵

The **Pig Research and Development Corporation** (PRDC) was established on 2 July 1990 under the *Primary Industries and Energy Research and Development Act 1989*. It invests and manages research and development funds on behalf of the Australian pig industry and the Commonwealth government with the aim of improving the performance and sustainability of the Australian pig industry and increasing its global competitiveness. The PRDC supports over 100 research and development projects ranging from long term research on pig breeding and health, to the provision of industry information and training packages on topics such as pig housing, management, health and handling.⁶

PRDC income is derived from two main sources, Australian pig producers and the Commonwealth government. Under the *Primary Industries (Excise) Levies Act 1999*, pig producers pay a research levy on pigs slaughtered for human consumption. The levy rate is approved by the Minister for Agriculture, Fisheries and Forestry after taking into account the view of the Pork Council of Australia (PCA) and the recommendation of the PRDC. In 1999-2000 the rate was 70 cents per pig which has been unchanged since 1992-93. For each dollar of research levy, the Commonwealth government provides another dollar up to 0.5 per cent of the gross value of production. In 1999-2000 levy receipts totalled \$3.48 million and Commonwealth government contributed \$3.65 million.⁷

The **Pork Council of Australia** (PCA) is the peak representative body of the Australian pork industry. It began in 1992 and now represents about 75 per cent of pork producers across Australia.⁸ It was established by producers, to represent producers' interests with government and industry, and is funded by voluntary membership. The PCA is a non-profit company controlled by a board of eight Directors who are chosen by industry delegates. Delegates are nominated to represent a group of producers who have combined their herds into a 'cell' of 7000 sows.⁹ This structure allows individual large producers as well as organisations to be directly represented.¹⁰ From 1 January 2000 the cost of voluntary membership of the PCA was \$1.50 per breeding sow.¹¹

The PCA has a statutory obligation as the recognised national representative body for Australian pork producers to monitor how pork producers' statutory levy funds are used.¹² It also provides advice to government on the expenditure of funds to benefit the industry.

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The PCA also acts as a lobby group with government and other industries on behalf of pork producers. For example, the PCA has lobbied the Federal government for increased access to overseas markets through the removal of barriers to trade, and through the provision of export development funds.¹³ It is currently lobbying to ensure a more reliable supply of feed grain at internationally competitive prices.¹⁴

In the past, not all members of the PCA have agreed with the political activities of the organisation. In 1998 there was disagreement between the NSW Farmers' Association, which represents about 220 mostly small-scale NSW pork producers and the PCA over the PCA's decision to campaign against the Government in ten Coalition held seats in the October 1998 election. The NSW Farmers' Association which had 4 of the 34 delegates at PCA meetings, withdrew in protest, but has since rejoined the PCA.¹⁵

Working Party on Pork Industry Restructure

The Working Party had been established following a unanimous directive from delegates of the Pork Council of Australia in May 1999 that:

PCA establish a joint industry/government task force to prepare a report defining the options available for the industry to have a single industry body including R&D and marketing functions.¹⁶

The Working Party consisted of nine members and was chaired by the President of the Pork Council of Australia, Mr Ron Pollard.¹⁷ The Working Party released an options paper in October 1999 setting out three alternatives for the industry to achieve a single industry organisation that incorporated policy, research and development, and marketing functions.

The option recommended by the Working Party proposed:

- full integration of the three existing bodies, involving one board of Directors responsible for all industry policy and service delivery functions
- the board of Directors to have a majority of producers, with the balance of Directors appointed on the basis of their commercial skills
- statutory levies paid by pork producers for research and development and marketing to continue
- matching government funds for research and development to continue
- public policy activities of a political nature, presently undertaken by the Pork Council of Australia to be funded voluntarily by pork producers
- industry delegates, similar to the current PCA system, to provide a formal mechanism for electing Directors and communicating policy.

Following consultations with pork producers, the Working Party reported that there was no interest from the industry in continuing the current arrangements involving three

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national industry bodies. Instead, there was overwhelming support from the industry for amalgamating the three organisations into one body incorporated as a non-profit company controlled by producers.¹⁸

The Australian Pig Industry

The Australian pig industry is experiencing considerable pressure to change as a result of a range of factors including a stable or declining domestic market for pig meat, declining returns to producers, competition from imports, and a small export sector.

The consumption of pigmeat by Australian consumers has remained stable since 1994.¹⁹ Price competition from other meats, such as beef, has effected the consumption of pork, while food safety concerns over smallgoods have also had an impact. Approximately 20% of all pigmeat produced in Australia is used in the manufacture of smallgoods while a further 35–40% is used in the manufacture of ham and bacon.²⁰ In addition, returns to producers, based on Australian pigmeat prices, have been falling in real terms since the early 1970s, as has been the case for other livestock industries.

Unlike most other Australian agricultural industries where approximately 75% of production is exported, the pig industry has, until recently, focused almost exclusively on the domestic market.²¹ The main export markets for Australian pigmeat are Singapore and Japan. Exports of pigmeat to Singapore in 1998-99 were valued at \$149 million, up from \$57 million the previous year. Over the same period, pigmeat exports to Japan increased by \$10 million to \$36 million.²²

The problems of the pig industry were summed up by the then Minister for Primary Industries and Energy, Hon John Anderson, during the 1998 federal election campaign. He was reported in *The Land* as saying:

The industry needs to address its own future, as every other rural industry in this country has done.

Its leadership needs to tell the producers they've got to get real about getting Australians to eat more pork, they've got to get real about exports, they've got to get real about processing costs, they've got to stop misinterpreting academic studies that show that quite clearly the cumulative effects of factors other than imports have to be grappled with if the industry is to have any future.

When they look to divert attention away from the real issues that have to be addressed that is a failure of leadership and I hope the industry moves very quickly to address that failure.²³

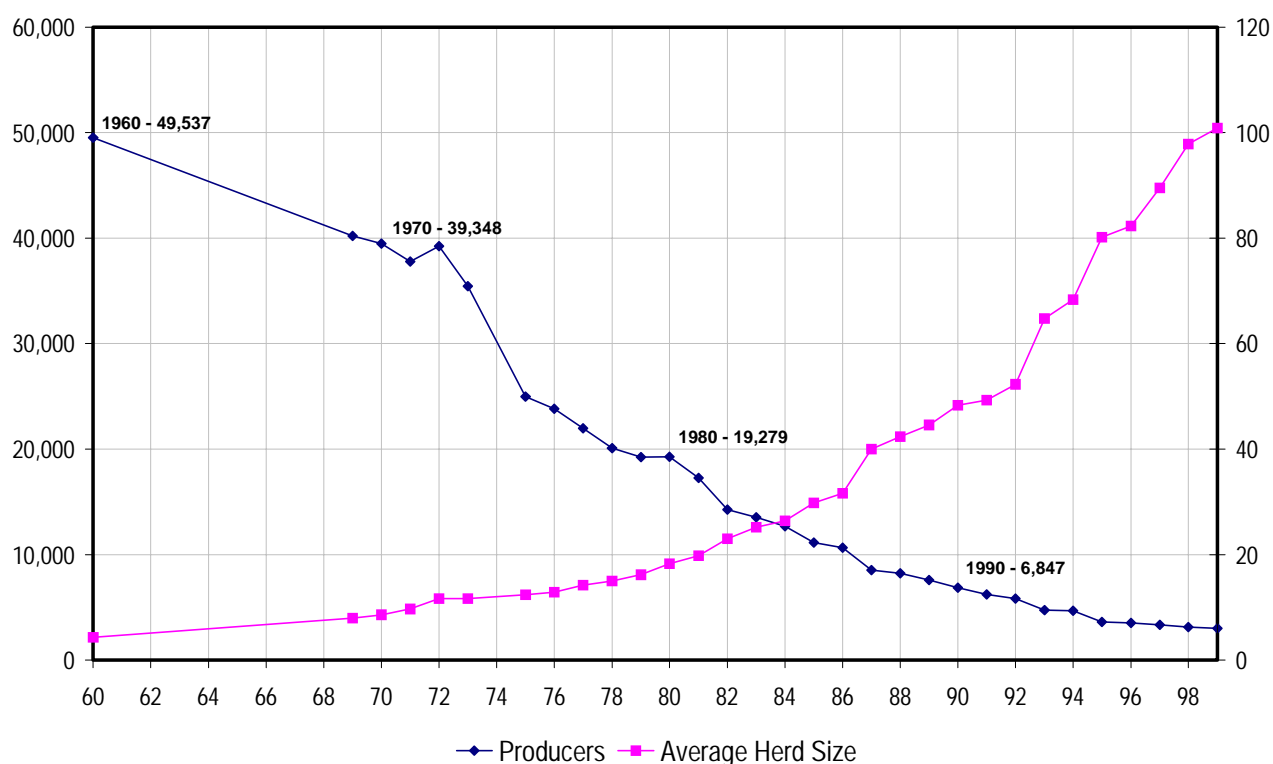
The pig farming and pigmeat processing industries have been undergoing substantial structural change for several decades. Between 1960 and 1999, the number of pig producers has fallen from almost 50 000 to just over 3 000. At the same time, the average herd size and productivity in the industries has increased significantly, with pigmeat production almost doubling (see Figure 1).²⁴

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Figure 1: Number of Pig Producers and Average Herd Size 1960-1999²⁵



Pig herds are concentrated in Australia's major grain growing areas. In 1998-99, New South Wales had the largest number of breeding sows, followed by Queensland and Victoria. Queensland and Victoria had the highest number of large producers (over 400 sows per herd) including 10 with over 1000 sows (see Table 1). Despite ongoing rationalisation in the industry, there remain a large number of small non-specialist producers with fewer than 100 sows.

Table 1: Distribution of Pig Farms by State – June 1999²⁶

<i>State</i>	<i>Herds</i>	<i>Sows</i>
New South Wales	922	91395
Queensland	567	65095
South Australia	625	48159
Western Australia	436	35879
Victoria	389	60936
Tasmania	76	2827
Northern Territory	3	344

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Government's financial contribution program to the pork industry

The Federal Government is providing a \$24 million business grants program for the pork industry in order to help the industry meet the challenges of becoming more competitive in a global market.²⁷ The components of the business grants program are shown in Table 2.

Table 2: Components of the Business Grants Program

<i>Program</i>	<i>\$</i>	<i>Description</i>
National Pork Industry Development Program (NPIDP)	\$9m	To assist eligible industry participants to improve their competitive advantage and the overall competitiveness of the industry; identify market opportunities and market development; and/or enhance skills and industry infrastructure. The \$1.5m National Networks Alliance Program (NNAP) is funded from the NPIDP, and managed by the Australian Pork Corporation. ²⁸ The Confederation of Australian Pork Exporters (CAPE) was also funded by \$2.7m under NPIDP.
Singapore Pork Market Alliance Program	\$2.6m	This new program is aimed at increasing exports of Australian pork to the Singapore market. The program is managed by the Australian Pork Corporation.
Pigmeat Processing Grants Program (PPGP)	\$8m	Targets projects that improve the international competitiveness of the pork slaughterhouse/boning room and processing sector by funding new capital investments.
FarmBis Training Initiative for Pork Producers – Pork Biz	\$1m	To improve business management practices, including business planning, and financial, human and natural resources management. The Government, in consultation with the PCA, chose a consortium of consultants to deliver a training initiative nationally in pork producing regions from mid 1999 until 31 December 2000.
Pork Producer Exit Program	\$3.4m	Now concluded, the Government provided grants to 74 pork producers who were unable to access commercial finance, to exit the industry. ²⁹

Australian Pork Limited (APL)

As indicated above, the Government has announced the go ahead for a new company to take over the functions of the three existing bodies. The new company will have a Board of nine Directors, five of whom are to be elected by pig producers, three appointed on the basis of their skills, and a Managing Director.³⁰ On 28 March 2000 delegates to the Annual General Meeting of the Pork Council of Australia elected five 'directors designate'

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of APL. Three of the newly elected directors, including their interim Chairman, Mr Ron Pollard, were formerly directors of PCA.³¹ Nominations for the three specialist directors closed on 15 December 2000. The Board of APL has appointed Mr Brian Ramsay who headed the PCA for the past five years, as the new Chief Executive Officer of APL.³²

The constitution of APL is not yet available. The Final Report of the Working Party on Pork Industry Restructure recommended that there be two classes of membership in the new company. It recommended that producers who choose to pay only the statutory levies for research and development and marketing activities, but who do not pay the voluntary levy used to fund political lobbying activities, would have limited rights in the company. They would have a say in future proposals to vary the statutory levy rate, and rights to attend, ask questions and be heard at APL general meetings, and to receive certain company information contained in financial, Directors' and annual reports. Producers who pay both the statutory and voluntary levies would have additional rights to participate in the appointment of delegates to represent and vote at general meetings of APL, and voting rights to remove Directors, call a special meeting and to amend the APL constitution.³³

Privatisation of R&D Bodies in the AFFA Portfolio

This Bill follows two sets of Acts passed in 2000 which deal with privatisation or corporatisation in the Agriculture, Fisheries and Forestry Portfolio. These are:

- the *Wool Industry Privatisation Act 2000* (the Wool Act), and
- the *Horticulture Marketing and Research and Development Services Act 2000* and *Horticulture Marketing and Research and Development Services (Repeals and Consequential Provisions) Act 2000* (the Horticulture Acts).

Both of these Acts seek to transfer control over marketing and research and development activities from government to industry participants. They provide for private control in relation to the use of participant levies whilst retaining an element of public control in relation to the use of government subsidies. Where relevant they are discussed below. More detail appears in [Bills Digest No. 52 1999-2000](#) and [Bills Digest No. 58 1999-2000](#). For a comparative table showing the key similarities and differences among these Acts and this Bill see Appendix 1 - Comparison of 'Privatisation' Measures in AFFA Portfolio.

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Main Provisions

Part 1 – Preliminary

Part 1 gives the Bill an extremely wide extraterritorial application. It will extend to all the external Territories (**proposed section 5**). It will also extend to 'acts, omissions and other things outside Australia, whether or not in a foreign country' (**proposed section 6**). (Given that the Bill only deals with the privatisation of two statutory authorities and the rights, interest and obligations which this affects, it is difficult to see why this is necessary.)

Part 2 – Interpretation

Part 2 contains definitions of key terms used in the Bill.

Part 3 – Provision of Pig Industry Services

Division 1 – Transitional Functions

The Australian Pork Corporation and the Pig Research and Development Corporation (the statutory authorities') must facilitate their own privatisation and assist other entities in meeting associated expenses (**proposed section 8**). The Minister may give written directions which the statutory authorities must follow (**proposed subsection 8(3)**). The directions must be tabled in Parliament within 15 sitting days (**proposed subsection 8(4)**).

Divisions 2 & 3 – Funding Contract and Industry Services Body

The Minister for Agriculture, Fisheries and Forestry may enter into a contract with an 'eligible body' involving payments for marketing and research and development activities (**proposed section 9**). The Minister must be satisfied that the contract makes adequate provision to ensure that each payment is spent on relevant activities (see Table 3). Once a contract has been made, the Minister may declare the eligible body to be the 'industry services body' for the purposes of the Bill (**proposed section 11**).

The Minister may give written directions to the industry services body if s/he is satisfied that the direction is in the national interest 'because of exceptional and urgent circumstances' (**proposed section 12**). The directions are binding and must be tabled in Parliament within 15 sitting days, unless doing so would be likely to prejudice the national interest or the commercial interests of the body (**proposed subsection 12(3)**). Despite these powers, the Minister is not taken to be a director of, or to be in a position to exercise control over, the industry services body (**proposed subsections 12(4) and 12(5)**).

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Table 3: Commonwealth funding for 'eligible body'

<i>Payment</i>	<i>activities</i>	<i>for the benefit of</i>	<i>financial source</i>	<i>total limit</i>	<i>annual limit</i>
<i>marketing payments</i>	marketing, promotion, strategic policy, other activities	Australian pig industry	marketing levy (plus penalties) ³⁴	total marketing levy after 30/06/2000	N/A
<i>R&D payments</i>	R&D only	Australian pig industry	R&D levy (plus penalties) ³⁵	total R&D levy after 30/06/2000	N/A
<i>R&D payments</i>	R&D only	Australian pig industry & Australian community	R&D levy (less penalties)	total R&D levy (less penalties)	lesser of: <ul style="list-style-type: none"> • 0.5 % of the gross value of pig meat production in Australia³⁶ • 50% of the eligible body's annual expenditure on R&D

Division 4 – Transfer of Assets and Liabilities

The Bill provides exemptions from certain legal conveyance procedures.

The Minister may, by written declaration, transfer assets, contractual rights and obligations, liabilities and rights, titles or interests in land held by a statutory authority. S/he may also substitute the inaugural industry services body (the 'successor body') in respect of related instruments and succession. A declaration has effect immediately and according to its terms. It has effect irrespective of any particular formal transfer, conveyance or assignment (**proposed sections 15 and 16**). In addition, provision is made for certificates which will allow declarations in relation to asset and land transfers to be registered under State and Territory law. A certificate signed by the Minister and lodged with a State or Territory official may have the same effect as an instrument prepared and lodged in accordance with State or Territory law (**proposed sections 18 and 19**).

Every declaration must be published in the *Gazette* (**proposed section 42**).

The Bill also enables the direct transfer of assets and liabilities from the statutory authorities to the Commonwealth. It empowers the Commonwealth to sell any resulting assets (**proposed subsection 15(4)**). With the resulting assets, derived income or proceeds

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of sale the Commonwealth may make adjustments payments to the successor body (**proposed section 17**) and may make payments for any expenses associated with the abolition of the statutory authorities and implementation of the Bill (**proposed section 45**). The Consolidated Revenue Fund (CRF) is appropriated for these purposes to the limit of the value of the transferred assets, derived income or proceeds of sale, less the value of the adjustment and implementation payments (**proposed subsections 17(3)** and **45(2)**).

The CRF is separately appropriated to provide for the discharge of any liabilities (**proposed subsection 16(4)**). The Bill does not impose any limits on this appropriation.

There is a blanket exemption from stamp duty or other tax payable under State or Territory laws for 'exempt matters' (**proposed section 20**). These include:

- the transfer or sale of an asset to the successor body or the Commonwealth
- the transfer of a liability to the successor body or the Commonwealth, and
- the discharge by the Commonwealth.

The Bill sets up a mechanism to protect the successor body from GST liability. The transfer of assets to the successor body is a 'taxable supply' for the purposes of the GST law. The entry by the successor body into obligations under the funding contract is also a 'taxable supply'. Thus, the successor body would pay GST to the Commonwealth (*for the transfer*) and the Commonwealth would pay GST to the successor body (*for the act of entering into obligations under the contract*) and each would remit the GST to the Australian Tax Office. However, because each body is involved in some form of 'business' activity, each is entitled to an input tax credit which it can use to offset its GST.

The problem is that the value of the assets will far exceed the value of the obligations under the funding contract. Thus, the input tax credit available to the successor body in respect of the contract is far less than the GST liability it has in relation to the transfer. The transfer of assets is therefore deemed by the Bill to be consideration paid by the Commonwealth for the successor body's entry into the funding contract (**proposed section 21**). Effectively, the Bill ties the value of the assets to the value of the obligations. Thus, the successor body is entitled to receive an input tax credit corresponding to the full GST liability in relation to the transfer. The Commonwealth has an equivalent entitlement.

In this respect the *Explanatory Memorandum* appears to be misleading. It states that **proposed section 21** will 'ensure that the Commonwealth is entitled to receive an input tax credit corresponding to the full GST liability of the industry services body for taxable supplies arising under the contract'.³⁷ Given the inequality between the value of the transfer and the value of the obligations, this statement belies the fact that the real purpose of **proposed section 21** is to protect the successor body and not the Commonwealth. A similar provision appears in one of the Horticulture Acts.³⁸ It was inserted by an amendment during Consideration in Detail. Its purpose was to 'ensure that the new company is able to receive an input tax credit to meet its GST liabilities when the assets of

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the existing statutory corporation are transferred to it'. Ultimately the amendment would ensure that the new corporation was not 'disadvantaged by the assets transfer'.³⁹

Moreover, the Commonwealth's input tax credit will not correspond to the *full* GST liability of the industry services body, from time to time declared, for *all* taxable supplies provided by the body under the contract from year to year. It will only correspond to the GST liability in respect of the initial entry into the contract by the successor body. Thus, the Commonwealth may not use the GST for the transfer to offset future GST liabilities under the contract (for R&D, marketing and matching payments in subsequent years).

Division 5 – Transferring Employees of Statutory Authorities

The successor body must recognise the service given by transferring employees of the statutory authorities. Thus, employment service is taken to be continuous, and equivalent entitlements to long service, recreation and sickness leave are to accrue. The successor body must also give equivalent recognition to years of service. That is, the successor body must recognise long service given to the statutory authorities in relation to any entitlements for long service provided by the successor body (**proposed section 22**).

The *Safety, Rehabilitation and Compensation Act 1988* continues to apply to injuries, etc to employees of statutory authorities before the transfer time (**proposed section 24**). Section 128A liabilities⁴⁰ are transferred to the Commonwealth (**proposed section 25**). The industry services body must also cooperate with the Commonwealth for the purposes of rehabilitation services for transferring employees. Specifically, it must provide suitable employment and must provide documents on request to Comcare (**proposed section 26**).

Provision is made for refund of any excess premiums paid by the statutory authorities. If excess premiums have been paid, for example on the basis that the transition has taken effect mid-year, the Minister may direct that an equivalent amount is to be refunded to the industry services body out of the Consolidated Revenue Fund (**proposed section 27**).

The *Defence Force Retirement and Death Benefits Act 1973* also continues to apply. Specifically, service to the industry services body is deemed to be 'public employment' for the purposes of that Act, effectively preserving transferring employees' entitlements to deferred benefits under Division 3 of Part IX of that Act (**proposed section 28**).⁴¹

The *Maternity Leave (Commonwealth Employees) Act 1973* continues to apply to employees who were on maternity leave before the transfer time or would be entitled to maternity leave within 9 months after the transfer time (**proposed sections 29 and 30**).

The *Long Service Leave (Commonwealth Employees) Act 1973* applies.

- Those employees whose period of service⁴² before the transfer time was 10 years or more have their accrued rights preserved (**proposed section 36**). Thus, the industry services body may grant the employee long service leave on full pay, or twice that

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period of leave on half pay.⁴³ If the person ceases to be an employee, the industry services body *must* pay the salary corresponding to the long service leave period.⁴⁴

- Those employees whose period of service was less than 10 years have their accrued rights preserved *but do not accrue any further rights under the Act through their service to the industry services body*. Thus, if the employee completes his or her 10 years of service, the industry services body may grant the employee leave as above but only up to the employee's 'long service leave credit' (**proposed subsection 32(3)**). Likewise, if the person ceases to be an employee after 10 years of service, the industry services body *must* pay the employee salary as above but only up to the employee's 'long service leave credit' (**proposed subsection 33(3)**). If the person has completed one year of service but ceases to be an employee before completing 10 years of service, because they retire or are retrenched the industry services may grant leave and must pay salary on similar terms (**proposed subsections 32(4) and 33(4)**). The 'long service leave credit' is the long service leave credit that the person had as an employee of a statutory authority immediately before the transfer time (**proposed section 35**).

These provisions do not affect any long service leave entitlements that a person would independently acquire as an employee of the industry services body under an award, determination, industrial agreement, etc (**proposed section 37**).

Strictly speaking, the employment of transferring employees by the statutory authorities is terminated by the operation of the Bill. However, employees are generally not entitled to receive any payment or benefit merely as a consequence of this fact unless, on the whole, the new terms and conditions of employment offered the industry services body are not equivalent to those that were offered by the statutory authorities (**proposed section 39**). The question of whether the terms and conditions are equivalent is to be determined by the Minister, subject to review before the Administrative Appeals Tribunal.

Part 4 – Miscellaneous

The Consolidated Revenue Fund is appropriated to allow the Commonwealth to pay for any expenses or liabilities incurred by the Commonwealth or another body in relation to the implementation of the Bill (**proposed section 45**). The limit of the appropriation is effectively the income to the Commonwealth from the sale of assets held by the statutory authorities, less the value of adjustment and implementation payments (discussed above in Division 4 – Transfer of Assets and Liabilities). Thus, the statutory authorities and the industry services body meet all the expenses and liabilities associated with the restructure.

Schedule 1

Part 1 amends related Acts,

- removing a reference to the Australian Pork Corporation in Division 1 of Part 2 of Schedule 2⁴⁵ of the *Freedom of Information Act 1982*,

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- replacing references to the Australian Pork Corporation with references to the industry services body in Schedule 22⁴⁶ of the *Primary Industries (Excise) Levies Act 1999*, and
- removing the Australian Pork Corporation from the list of prescribed Commonwealth authorities in section 128A⁴⁷ of the *Safety, Rehabilitation and Compensation Act 1988*.

It also seeks to amend the Act that will result from the Bill in order to reflect the changes proposed in the Administrative Review Tribunal Bill 2000 (**item 3**). Among other things, this Bill will change the name of the Administrative Appeals Tribunal to the Administrative Review Tribunal. This impacts upon **proposed section 39** which is discussed above. As a result, item 3 will not commence until the relevant provisions of the Administrative Review Tribunal Bill 2000 have commenced.

Part 2 repeals the Pig Research and Development Corporation Regulations.

Part 3 contains transitional provisions relating to the annual report for the statutory authorities for financial year or part financial year ending at the transfer time.

Concluding Comments

Accountability

Once established, APL will be a company which receives the bulk of its income from a compulsory levy and public funding. It will perform a public function for the pork industry and the wider community. It might be expected to have special accountability obligations. However, as in the Wool Act and Horticulture Act, the Bill says little about accountability.

In his Second Reading Speech the Minister stated that accountability arrangements 'will be detailed in the company constitution and the contract with the Commonwealth'.⁴⁸ This statement is significant because it is an acknowledgment: despite being privatised, public accountability is still an issue for the new body. It is also significant because it is prospective: neither the constitution nor the contract are publicly available. Moreover, it is significant because it demonstrates a transformation in the vehicle(s) of accountability. Clearly, the statutory authorities are accountable to the Executive and to Parliament. APL will be to the general public via the Corporations Law, to the stakeholder group via the constitution and to the Executive via the funding contract. But, it will not be accountable to Parliament. This is not unusual in the privatisation context. It reflects a compromise resolving a tension between private sector structure and public sector accountability.⁴⁹ But, it would seem to be unusual given the history of the pig industry and the level of government regulation of research and development in the AFFA portfolio.

To the extent that accountability is an issue, and given that neither the constitution nor the funding contract are publicly available, attention is squarely focused on:

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- *the declaration*: the power to make and revoke declarations
- *the funding contract*: the remedies for breach and the power of variation, and
- *the constitution*: the level of stakeholder participation and decision making control.

Precedents

As indicated, this Bill may be loosely compared or contrasted with two other sets of Acts in the Agriculture, Fisheries and Forestry Portfolio which deal with privatisation:

- *Wool Industry Privatisation Act 2000* (the Wool Act)
- *Horticulture Marketing and Research and Development Services Act 2000* and the *Horticulture Marketing and Research and Development Services (Repeals and Consequential Provisions) Act 2000* (the Horticulture Acts)

There are a number of similarities and differences among the approaches and provisions adopted by these Acts and this Bill. Some of the key similarities and differences are illustrated in Appendix 1 - Comparison of 'Privatisation' Measures in AFFA Portfolio.

Declaration of Industry Services Body

Under the Horticulture Acts, in order to be declared as an industry services body, the Minister must have considered whether a company's constitution is 'appropriate for a body performing the functions of an industry services body'.⁵⁰ The Acts also make specific provision for the revocation of a declaration where, among other things, the industry services body has engaged in 'actionable conduct' or failed to comply with its constitution. The Minister may also revoke a declaration if the constitution is 'no longer appropriate'.⁵¹

Similarly, under the Wool Act, the proposed company cannot be registered with ASIC unless its constitution has been approved in writing by the Minister.⁵² However, there are no conditions placed on declarations relating to the constitution, etc.

There are no similar provisions in this Bill. However, in the Second Reading Speech the Minister indicated that if the industry services body changed its constitution 'in a way considered unacceptable by government' he would be able to 'temporarily suspend or terminate the payment of statutory levies to the company or rescind his declaration'.⁵³ The power to revoke the declaration derives from the *Acts Interpretation Act 1901*.⁵⁴

It is unclear whether the approach in the Bill will be as effective as the approach in the Horticulture Acts. For example, whereas the requirements regarding the constitution are express in the Horticulture Acts, they are only implicit in this Bill. As indicated, they rely on an implication from the *Acts Interpretation Act 1901*. But the implication carries the caveat that the power to revoke a declaration is 'exercisable in the like manner and subject to the like conditions' as the power to make the declaration. As there are no conditions

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relating to the initial declaration, except for the existence of a funding contract, it may be difficult to establish the width and/or limits of the power to revoke the declaration.

The Funding Contract

In the Second Reading Speech the Minister also indicated that the remedies could also be applied to a breach of the funding contract. While it may be reasonable to assume that the funding contract would include provision for suspension or termination of the statutory levies, the power to rescind the declaration would appear to come, as above, from the *Acts Interpretation Act 1901* and may therefore be subject to any concerns raised above.

A similar issue arises in relation to variation of the funding contract. Under the Horticulture Acts, the deed of agreement may be amended by written agreement between the parties.⁵⁵ The Minister may revoke a declaration if the industry services body does not agree to the variation within 3 months.⁵⁶ No such provisions exist in this Bill. It is reasonable to assume that the funding contract would provide for variation and dispute resolution but this might not automatically be backed by a power to revoke the declaration.

The Constitution

In the Wool Act, the resulting company is limited by shares. Moreover, the allocation of these shares is closely regulated by the Act. Thus, the Wool Act requires a 'list of eligible woolgrowers' to be prepared from which the shareholders of the company are drawn.⁵⁷ By contrast in the Horticulture Acts and this Bill the relevant companies are limited by guarantee. There are no provisions which directly control company membership.

The key difference between companies limited by shares and companies limited by guarantee relates to admission to membership, voting rights, etc. In the former, these issues are determined by reference to shareholding and the company's constitution but in the latter they are determined only in accordance with the terms of the constitution. Thus, in companies limited by guarantee, there is no guarantee that each of the members will have equal voting rights, or indeed *any* voting rights, in common with the other members.

Various factors might have influenced the choice of a company limited by guarantee. It is at least possible that the choice of corporate form reflects the level of homogeneity within the stakeholder group and the perceived need to protect individual stakeholders and their proportional right to participate in the running of the company. Thus, it may be significant that in the consultations surrounding privatisation of the relevant wool body, there were some general indications of differing factions or views among some stakeholders. To the extent that such a divergence of opinions exists among stakeholders in the pig industry, it might be reasonable to expect the company to be limited by shares, not by guarantee.

It is worth noting that, while the constitution of APL is not yet publicly available, as indicated above, it has been suggested that the current PCA arrangements might continue. That is, there may be two classes of membership in the new company based on the

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payment of a voluntary levy or contribution to fund political lobbying activities. As noted above, only those who pay the voluntary levy will have voting rights to:

- appoint delegates to represent and vote at general meetings, or
- remove Directors, call special meetings and amend the APL constitution.

Thus, voting rights of members will not be direct but will be attenuated by a voluntary levy. In addition, assuming that the 'cell' system is retained, voting rights will be further attenuated by the need for members to combine their herds into a 'cell' of 7000 sows.

It might be argued that these features undermine the accountability of APL. While producers make a direct contribution for APL's marketing and research and development functions, they may not have a right to participate in setting directions and priorities. Given the reliance of small to medium producers on external representative groups, even if they do pay the voluntary levy they will only be able to exercise that right indirectly. Also, given the connection between the voluntary levy and the political lobbying function, this right may inadvertently be lost if there is a split among the (representative) members: their interest in commercial issues may be vulnerable to political considerations.

Marketing and Research and Development

It is perhaps significant that the Horticulture Acts define what is meant by 'marketing' and 'research and development'. These concepts are not defined in this Bill. Nor are they defined in the Wool Act. However, in consultations leading to the privatisation of the relevant wool body it seemed that some stakeholders were concerned about the prospect of levies being used for poorly defined and poorly directed marketing activities. The definition of these terms may address such fears. It may also provide a framework for managing the funding contract which has more certainty and parliamentary accountability.

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Appendix 1 - Comparison of 'Privatisation' Measures in AFFA Portfolio

<i>Provision</i>	<i>This Bill</i>	<i>Horticulture Act</i>	<i>Wool Act</i>
Agreement and declaration for levies funding:			
• body must be registered as a company	✓	✓ ⁵⁸	✓ ⁵⁹
• body must have appropriate constitution	✗	✓ ⁶⁰	✓ ⁶¹
• body must be limited by ...	guarantee	guarantee	shares ⁶²
• prescribed members/shareholders	✗	✗	✓ ⁶³
• declaration precedes or follows contract	follows	follows ⁶⁴	precedes
• 'marketing' and 'R&D' defined in Act	✗	✓ ⁶⁵	✗
• provision for revocation of declaration	✗	✓ ⁶⁶	✗
Public v Private aspects:			
• Minister may give directions, but ...	✓	✓ ⁶⁷	✗
– Minister is not a director, etc	✓	✓ ⁶⁸	✗
– body is not a statutory authority	✗	✗	✓ ⁶⁹
• body performs a public statutory function	✗	export licences ⁷⁰	levy setting ⁷¹
• public access to contract/agreement	✗	✓ ⁷²	✗
Flexible restructuring environment:			
• flexible transfer by ... of	declaration	legislation ⁷³	declaration
– assets and liabilities	✓	✓ ⁷⁴	✓ ⁷⁵
– contractual rights and obligations	✗	✓ ⁷⁶	✓ ⁷⁷
• exemption from conveyance procedures ⁷⁸	✓	✓	✓
• exemption from stamp duty for:			
– transfers to principal	✓	✓	✓
– transfers to subsidiaries, etc	✗	✗	✓ ⁷⁹
• exemptions for Capital Gains Tax	✗	✗	✓ ⁸⁰
• exemptions for Goods and Services Tax	✓	✓ ⁸¹	✗
Power for the Commonwealth to:			
• acquire assets and liabilities	✓	✗	✗
• sell assets and discharge liabilities	✓	✗	✗
Body liable for restructure expenses	✓	✗	✗
Provision for transfer of employees	✓	✓ ⁸²	✗

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Endnotes

- 1 *A New National Organisation for the Pork Industry: Final Report*, Working Party on Pork Industry Restructure, March 2000.
- 2 Austin, Peter, 'Pork cuts fat at the top in merger move', *The Land*, 6 April 2000, p. 14.
- 3 Hon Warren Truss MP, 'New pork industry company gets the go-ahead', *Media release*, 29 August 2000, AFFA00/161WT.
- 4 Australian Pork Corporation, *Annual report 1999-2000*, p. 45.
- 5 *ibid.*
- 6 *PigStats98: Australian Pig Industry Handbook*, edited by Hilda Meo and Gordon Cleary, Pig Research and Development Corporation [and] Australian Pork Corporation, March 1999, p. 2.
- 7 Pig Research and Development Corporation, *Annual report 1999-2000*, p. 59, 69.
- 8 Pork Council of Australia, *Who is PCA?* Web site www.pca.org.au (6 February 2001).
- 9 Pork Council of Australia, *PCA Structure*, Web site www.pca.org.au (6 February 2001). 'Each delegate represents a group, or "cell" of 7000 breeding sows. A delegate is nominated by a PCA member, such as a state representative body, who has combined their sow numbers to create a cell. Every 7000 breeding sows represented equals one vote.' See also the description of the 'Existing PCA Delegate System' in *A New National Organisation for the Pork Industry: Final Report*, Working Party on Pork Industry Restructure, March 2000, p. 15.
- 10 Dick, Alan, 'Rift over pork poll campaign', *The Land*, 23 October 1998.
- 11 Pork Council of Australia, *PCA Structure*, *op cit.*
- 12 *Primary Industries (Excise) Levies Act 1999*. Schedule 22 subclause 5(4).
- 13 Pork Council of Australia, *What does PCA do?* Web site www.pca.org.au (6 February 2001).
- 14 'Pig producers taking on wheat monopoly', *AAP*, 23 August 2000. According to the AAP report 'the pig industry showed in the last election through a series of biting television commercials it is not afraid to campaign against the government when upset by a decision'.
- 15 'Pork farmers threaten seats in funds fight', *Weekend Australian*, 29 August 1998, p. 9; 'The twist in the pig tail', by Nick Hordern, *Australian Financial Review*, 18 September 1998.
- 16 *A New National Organisation for the Pork Industry: Final Report*, Working Party on Pork Industry Restructure, March 2000, p. 8.
- 17 Details of the Terms of Reference and membership of the Working Party are to be found in *A New National Organisation for the Pork Industry: Final Report*, Working Party on Pork Industry Restructure, March 2000, p. 18.
- 18 *A New National Organisation for the Pork Industry: Final Report*, Working Party on Pork Industry Restructure, March 2000, p. 5.
- 19 *PigStats99: Australian Pig Industry Handbook*, edited by Hilda Meo and Gordon Cleary, Pig Research and development Corporation [and] Australian Pork Corporation, p. 136.

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- 20 Hon Tim Fischer MP [and] Hon John Anderson MP, 'Government announces pig industry assistance', *Joint media release*, 10 June 1998.
- 21 Hon Tim Fischer MP [and] Hon John Anderson MP, 'Government announces pig industry assistance', *Joint media release*, 10 June 1998.
- 22 'Pork figures', *The Land*, 3 August 2000, p. 8; Wahlquist, Asa, 'Market turnaround for pork', *Weekend Australian*, 30 September 2000.
- 23 'Salvo for Pork Council', *The Land*, 24 September 1998.
- 24 *PigStats99: Australian Pig Industry Handbook*, op cit, 'Pigmeat Production in Australia', p. 81; and 'Number of Producers and Number of Sows 1960-1999', p. 13.
- 25 Source: *PigStats99: Australian Pig Industry Handbook*
<http://www.pork.gov.au/Pigstats/14.pdf>
- 26 Source: *PigStats99: Australian Pig Industry Handbook*
<http://www.pork.gov.au/Pigstats/11.pdf>.
- 27 Hon Tim Fischer MP [and] Hon John Anderson MP, 'Government announces pig industry assistance', *Joint media release*, 10 June 1998; Hon Mark Vaile MP [and] Hon Tim Fischer MP, 'Pork industry assistance package reaches \$24 million', *Joint statement*, 22 January 1999, AFFA99/9VJ.
- 28 Hon Warren Truss MP, '\$1.5 million boost for pork industry alliances', *Media release*, 31 August 1999, AFFA99/23WT.
- 29 *National Pork Industry Development Program*, Agriculture, Fisheries and Forestry – Australia web site www.affa.gov.au/agriculture_industry/meat_livestock/pork/index.html (6 February 2001)
- 30 *A New National Organisation for the Pork Industry: Final Report*, Working Party on Pork Industry Restructure, March 2000, p 11.
- 31 The 5 'directors designate' of APL elected on 28 March 2000 are Mr Ron Pollard, Mr Nigel Smith, Dr Paul Higgins, Mr Brian Street, Mr Bruce Lockwood. Messrs Pollard, Smith and Lockwood were Directors of APC in 1999-2000. ('Australian Pork Limited', Pork Council of Australia, *Media Release*, 29 March 2000.
- 32 *Pork Council of Australia, 'Ramsay to head Australian Pork Ltd'*, *Media release 8/8/2000*
- 33 *A New National Organisation for the Pork Industry: Final Report*, Working Party on Pork Industry Restructure, March 2000, p. 14.
- 34 New and old levies and penalties.
- 35 New and old levies and penalties.
- 36 The gross value of 'pig meat production' in Australia is to be determined by the Minister. The way in which its value is to be determined will be dealt with in regulations (**proposed section 9**).
- 37 *Explanatory Memorandum*, p. 7.

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- 38 *Horticulture Marketing and Research and Development Services (Repeals and Consequential Provisions) Act 2000*, section 19A
- 39 Warren Truss, *Horticulture Marketing and Research and Development Services (Repeals and Consequential Provisions) Bill 2000*, consideration in detail, House of Representatives, *Debates*, 1 November 2000, p. 21943.
- 40 Section 128A of the *Safety, Rehabilitation and Compensation Act 1988* provides that any liability owed by Comcare for injuries, loss or damage before 1 July 1989 to employees of certain statutory authorities, including the Australian Pork Corporation, is to be covered by the relevant statutory authority.
- 41 Where a person has made contributions under the *Defence Force Retirement and Death Benefits Act 1973* but has ceased to serve as a full time member of the Defence Force (and is not entitled to a pension or invalidity benefit) s/he may make an election under the Act (section 76). One effect of the election is that, provided s/he remains in public employment, s/he is entitled to the deferred benefits after 20 years, on retirement or following incapacity (section 78).
- 42 That is 'the period during which [the person] has been employed continuously in Government Service': *Long Service Leave (Commonwealth Employees) Act 1973*, subsection 11(1).
- 43 *Ibid*, subsections 16(2) and (3).
- 44 *Ibid*, subsection 16(4).
- 45 This Division relates to partial exemptions from the *Freedom of Information Act 1982*. The Australian Pork Corporation is exempt 'in relation to documents in respect of its commercial activities'.
- 46 This Act authorises the imposition of levies which are excises. Schedule 22 sets the rates and describes liabilities and exemptions in relation to pig slaughter.
- 47 Section 128A of the *Safety, Rehabilitation and Compensation Act 1988* provides that any liability owed by Comcare for injuries, loss or damage before 1 July 1989 to employees of certain statutory authorities, including the Australian Pork Corporation, is to be covered by the relevant statutory authority.
- 48 The Hon. Warren Truss, MP, *Pig Industry Bill 2000*, Second Reading Speech, House of Representatives, *Debates*, 30 November 2000, p. 23136. It might also be added that public accountability will be exercised via financial reporting obligations, etc under the Corporations Law.
- 49 On the issue of accountability of public sector companies see generally: Stephen Bottomley, 'Government Business Enterprises and Public Accountability through Parliament', *Research Paper No 18 1999-2000*, at <http://www.apc.gov.au/library/pubs/rp/1999-2000/2000rp18.htm> [10/10/00].
- 50 *Horticulture Marketing and Research and Development Services Act 2000*, paragraph 9(1)(c).
- 51 *Horticulture Marketing and Research and Development Services Act 2000*, subsection 10(2).
- 52 *Wool Industry Privatisation Act 2000*, section 8.

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- 53 The Hon. Warren Truss, MP, Pig Industry Bill 2000, Second Reading Speech, House of Representatives, *Debates*, 30 November 2000, p 23136.
- 54 Subsection 33(3) of the *Acts Interpretation Act 1901* provides that the power to make declaration, etc carries with it the power to revoke declarations.
- 55 *Horticulture Marketing and Research and Development Services Act 2000*, section 13.
- 56 *Ibid*, paragraph 10(2)(h).
- 57 *Wool Industry Privatisation Act 2000*, Division 5 of Part 2.
- 58 *Horticulture Marketing and Research and Development Services Act 2000*, section 9 (declaration of 'industry services body'), section 12 (entering into deeds of agreement).
- 59 *Wool Industry Privatisation Act 2000*, section 30 (declaration of 'research body'), section 31 (funding contract with the research body).
- 60 *Horticulture Marketing and Research and Development Services Act 2000*, paragraph 9(1)(c).
- 61 There is no requirement that the constitution be 'appropriate' to the performance of its duties under the funding agreement, the Minister must approve the constitution of 'HoldCo/'Australian Wool Services' before the company is registered by ASIC: *Wool Industry Privatisation Act 2000*, section 8.
- 62 The Minister may enter into a contract with a body provided it is registered as a company under the Corporations Law. There is no requirement that the company be limited by shares or by guarantee. However, it is intended that the contract will be with 'Australian Wool Innovation Limited', a company established under the control of 'Australian Wool Services' a company established pursuant to the Act, registered under the Corporations Law and limited by shares: see 'Proposed Company Structure: October 2000' in [Bills Digest No. 52 1999-2000](#).
- 63 Provision is made for determining a 'list of eligible woolgrowers' from which the shareholders of Australian Wool Services are drawn: *Wool Industry Privatisation Act 2000*, Division 5 of Part 2.
- 64 While a deed of agreement with a body may precede its declaration as the 'industry services body', the deed must be with a body which is proposed to be the industry services body: *Horticulture Marketing and Research and Development Services Act 2000*, subsection 12(1). One benefit of being able to enter into a deed of agreement before a declaration is that the deed may prescribe conditions on the transfer of assets, etc which is otherwise dealt with by legislation (see below in relation to flexible transfer by legislation of assets, etc).
- 65 See *Horticulture Marketing and Research and Development Services Act 2000*, section 4 (definitions of 'marketing' and 'research and development').
- 66 *Horticulture Marketing and Research and Development Services Act 2000*, section 10 and 11.
- 67 *Horticulture Marketing and Research and Development Services Act 2000*, section 29.
- 68 *Horticulture Marketing and Research and Development Services Act 2000*, subsection 29(4).
- 69 *Wool Industry Privatisation Act 2000*, section 33.

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- 70 *Horticulture Marketing and Research and Development Services Act 2000*, sections 22 and 23.
- 71 *Wool Industry Privatisation Act 2000*, section 32.
- 72 *Horticulture Marketing and Research and Development Services Act 2000*, section 14.
- 73 *Horticulture Marketing and Research and Development Services (Repeals and Consequential Provisions) Act 2000*, Division 3 of Part 2. Note that the transfers can be made subject to conditions in a Deed of Agreement between the Minister and the (proposed) industry services body: section 15 (deeds of agreement are dealt with in the *Horticulture Marketing and Research and Development Services Act 2000*, Division 3 of Part 2).
- 74 *Horticulture Marketing and Research and Development Services (Repeals and Consequential Provisions) Act 2000*, Division 3 of Part 2.
- 75 *Wool Services Privatisation Act 2000*, Division 3 of Part 2.
- 76 The industry services body is substituted in any instrument which relates to the statutory authority: *Horticulture Marketing and Research and Development Services (Repeals and Consequential Provisions) Act 2000*, section 20. In addition, there is a provision relating to pending proceedings by which the industry services body becomes the successor in relation to any asset, liability, right, benefit or obligation involved: section 18.
- 77 *Wool Services Privatisation Act 2000*, Division 3 of Part 2.
- 78 That is, the ability to transfer assets without any conveyance, transfer or assignment.
- 79 Following the establishment of 'HoldCo'/'Australian Wool Services', the Minister may certify the transfer of assets or liabilities between restructuring bodies (eg subsidiaries established by 'HoldCo'/'Australian Wool Services') as 'exempt matters': *Wool Services Privatisation Act 2000*, section 24.
- 80 *Wool Services Privatisation Act 2000*, sections 28 and 29.
- 81 *Horticulture Marketing and Research and Development Services (Repeals and Consequential Provisions) Act 2000*, section 19A.
- 82 *Horticulture Marketing and Research and Development Services (Repeals and Consequential Provisions) Act 2000*, Division 4 of Part 2.

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