



# Wheat Export Marketing Amendment Bill

## Overview

- 2.1 This chapter has two main sections:
- discussion of the Bill's key provisions; and
  - background information relating to the Bill.

## Key provisions of the Bill

- 2.2 The Bill would amend the *Wheat Export Marketing Act 2008* (the principal Act) primarily by:
- the abolition of the *Wheat Export Accreditation Scheme 2008*. Repeal of the enabling provisions in the principal Act causes the legislative instrument to automatically lapse;<sup>1</sup>
  - winding up Wheat Export Australia (WEA) and transferring certain responsibilities to the Department of Agriculture, Fisheries and Forestry;
  - creating a new Wheat Industry Special Account (under the control of the Minister) for unspent funds gathered through industry levies and service fees (no longer required to fund WEA); and
  - removing the 'access test' rules, conditional upon a voluntary code of conduct being agreed to and approved by the Minister.

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1 'Wheat Export Marketing Amendment Bill 2012: Explanatory Memorandum', p.6.

## Abolition of the *Wheat Export Accreditation Scheme 2008*, the Wheat Export Charge, the Special Account and Wheat Exports Australia

- 2.3 Currently, WEA is responsible for the accreditation of bulk wheat exporters. In general terms, eligibility for accreditation is based upon whether a company is 'fit and proper' (depending on whether the company or its executive officers have breached laws or committed offences); passing the 'access test'; and providing WEA with an annual export report and an annual compliance report.<sup>2</sup>
- 2.4 As at 30 June 2011, twenty-six companies were accredited bulk wheat exporters in accordance with the *Wheat Export Accreditation Scheme 2008* (the Scheme).<sup>3</sup> WEA's annual report explains the purpose of the Scheme:
- The objective of WEA is to regulate the export of bulk wheat (i.e. other than in bags and containers) from Australia through the [Scheme] and to inform Government, growers, accredited bulk wheat exporters and industry stakeholders of outcomes ... The wheat marketing arrangements under the Scheme are intended to increase competition in the bulk wheat export market. The arrangements provide for WEA to accredit exporters which meet the specified 'fit and proper' criteria and for WEA to exercise monitoring and enforcement powers to ensure that a competitive wheat marketing regime is achieved and maintained.<sup>4</sup>
- 2.5 WEA's accreditation responsibilities are funded through the Wheat Export Charge (WEC) and a cost recovery fee regime. The *Primary Industries (Customs) Charges Regulations 2000* current impose a rate of charge of 22 cents per tonne of wheat ('chargeable wheat').<sup>5</sup> Exporters must also lodge a monthly return stating the total amount of wheat exported and the total amount of charge payable for the wheat.<sup>6</sup> An application to grant accreditation as a bulk wheat exporter presently costs \$13,299,<sup>7</sup> which has incidentally 'proved to be insufficient to cover actual costs,' according to WEA.<sup>8</sup> Proceeds are then credited to the WEA Special Account, which WEA uses to fund its work (principal Act clause 59 and 60).

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2 *Wheat Export Marketing Act 2008*, ss. 13-18;

3 WEA Annual Report 2010-11, p.13.; Submission 11, Wheat Exports Australia, p.2.

4 WEA Annual Report 2010-11, p.8.

5 *Primary Industries (Customs) Charges Regulations 2000*, Schedule 14 s. 5.2; *Primary Industries Levies and Charges Collection Regulations 1991*, Schedule 34 ss. 2.2 and 2.4.

6 *Primary Industries Levies and Charges Collection Regulations 1991*, Schedule 34 s. 2.12.

7 *Wheat Export Accreditation Scheme 2008*, Schedule 1.

8 WEA Annual Report 2010-11, p.13.

- 2.6 If the Bill is passed, the Scheme would cease, along with WEA's accreditation function. As such, the need to raise revenue through fees and charges also becomes unnecessary; the explanatory memorandum indicates that the Wheat Export Charge will be abolished 'through amending or repealing' the above-mentioned regulations.<sup>9</sup> In addition, the Bill would repeal provisions relating to the WEA Special Account (Schedule 2 clause 15), although its funds will be transferred to a new account of a similar nature.
- 2.7 The existing WEA Special Account will be 'continued in existence as the Wheat Industry Special Account' to fund measures or programs 'to assist the wheat export industry or a sector of that industry' subject to the Minister's approval (Schedule 2 clause 15). The account will be administered by DAFF in place of WEA (Schedule 2 clause 36).
- 2.8 Divisions 1 to 5 of Part 5 of the Principal Act, pertaining to WEA's establishment, functions, powers and liabilities would be repealed (Schedule 2 clause 14). Schedule 2 of the Bill, which would commence on 1 January 2013, will have the effect of winding up WEA on 31 December 2012. Clauses 23 to 39 of Schedule 2 contain transitional provisions for succession purposes, such as in relation to WEA's assets and liabilities.<sup>10</sup>

## The 'access test' and code of conduct

- 2.9 Currently, eligibility for accreditation as a bulk wheat exporter, in the case of a company or associated entity that is the provider of one or more port terminal services (as defined<sup>11</sup>), is *inter alia* dependent upon passing the 'access test' to the satisfaction of WEA (principal Act clause 13(e)). Part 6 of the principal Act provides that a decision by WEA regarding accreditation may be reviewed by the Administrative Appeals Tribunal. The current access test would be repealed and replaced with a new 'access test', with revised but essentially similar rules.
- 2.10 The purpose of the current and revised 'access test' is outlined in the Bill's explanatory memorandum:

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9 'Wheat Export Marketing Amendment Bill 2012: Explanatory Memorandum', p.18.

10 'Wheat Export Marketing Amendment Bill 2012: Explanatory Memorandum', p.17.

11 Port terminal service is defined in s. 5 of the principal Act as 'A service (within the meaning of Part IIIA of the Trade Practices Act 1974) provided by means of a port terminal facility, and includes the use of a port terminal facility'; A provider, in the context of a port terminal service, is defined as 'the entity that is the owner or operator of the port terminal facility that is used (or is to be used) to provide the service.'

This section is intended to ensure that owners, operators or controllers of port terminal facilities that also export bulk wheat, or have associated entities that do, provide fair and transparent access to their facilities to other exporters. The access test aims to avoid regional monopolies unfairly controlling infrastructure necessary to export wheat in bulk quantities, to the detriment of other bulk wheat exporters. All bulk wheat exporters should have access to these facilities while allowing the operators of the facility to function in a commercial environment.<sup>12</sup>

- 2.11 The revised access test will operate until at least 1 October 2014. After this date, a code of conduct (if approved by the Minister) will take the place of the revised access test and the entire Act would be repealed pursuant to Schedule 3. However, repeal of the Act, along with the revised access test, will not occur unless a code of conduct is approved.
- 2.12 A notable aspect of the revised access test relates to enforcement mechanisms. Whereas the current access test is enforced passively through denial of accreditation (principal Act clause 13(1)(e)), the revised access test relies upon active enforcement via the *Customs Act 1901*. Bulk wheat exports made whilst an exporter is in breach of the access test could be deemed 'prohibited exports' and, under the *Customs Act 1901*, could become liable to forfeiture if an attempt to export them is made.<sup>13</sup> However, a range of lesser regulatory interventions would presumably be pursued before forfeiture was considered, remaining as a last resort.
- 2.13 The Bill stipulates the overall terms that a voluntary code of conduct would need to address and satisfy, as follows (schedule 1 clause 12):
- (1) The Minister may, by notice published in the *Gazette*, approve a code of conduct for the purposes of this section.
  - (2) The Minister must not approve a code of conduct under subsection (1) unless the Minister is satisfied that the code of conduct:
    - (a) deals with the fair and transparent provision to wheat exporters of access to port terminal services by the providers of port terminal services; and
    - (b) requires providers of port terminal services to comply with continuous disclosure rules; and

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12 'Wheat Export Marketing Amendment Bill 2012: Explanatory Memorandum', p.6.

13 *Customs Act 1901*, ss. 112 and 229(1)(n).

(c) is consistent with the operation of an efficient and profitable wheat export marketing industry that supports the competitiveness of all sectors through the supply chain; and

(d) is consistent with any guidelines made by the [Australian Competition and Consumer Commission – ACCC] relating to voluntary industry codes of conduct.

- 2.14 Unless satisfied that the above criteria have been met, the Minister may not proceed to approve the code of conduct (schedule 1 clause 12).

## Changes to the special account

- 2.15 Clauses 58 to 60 of the principal Act established a special account for depositing fees and levies raised from the industry for the purpose of funding WEA. The explanatory memorandum states that at 31 December 2012:

...the balance of the WEA special account will be transferred to a new Wheat Industry Special Account to be administered by the Department of Agriculture, Fisheries and Forestry.<sup>14</sup>

- 2.16 The purpose of the new special account would be for ‘funding a measure or program’ to ‘assist the wheat export industry, or a sector of that industry’ (schedule 2 clause 60). It is not currently clear how much money would be transferred into the new special account.

## Repeal of the whole Act

- 2.17 The explanatory memorandum states that if the Minister approves the code, ‘the market will move to full deregulation’.<sup>15</sup> If the Minister has approved a voluntary industry code of conduct covering grain export terminal operators, by publishing notice in the *Gazette*, on or before 1 October 2014 (new clause 12),<sup>16</sup> the whole of the principal Act will be repealed. Otherwise, the Act as amended by the Bill will continue in force; albeit unless a future amendment is separately made to change the timing of Schedule 3.

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14 Wheat Export Marketing Amendment Bill 2012: Explanatory Memorandum’, p.17.

15 ‘Wheat Export Marketing Amendment Bill 2012: Explanatory Memorandum’, p.2.

16 ‘Wheat Export Marketing Amendment Bill 2012: Explanatory Memorandum’, p.22.

## Background to the Bill

2.18 Typically, 60% to 70% of Australian grown wheat is exported, mostly from South Australia and Western Australia. Over the ten years prior to 2010-11, Australia has produced on average 20.3 million tonnes of wheat per year. Together, Indonesia, Vietnam, South Korea, Japan and Yemen generally account for 50% to 55% of Australia's bulk wheat exports.<sup>17</sup> Wheat is sold by grade. Most exported wheat is either Australian Premium White (APW) or Australian Standard White (ASW).<sup>18</sup> Eventual uses for Australian wheat include breads, cakes, biscuits, baked goods and noodles.<sup>19</sup> According to Wheat Exports Australia (WEA):

Australian wheat is traditionally well regarded in international markets because it typically has very low screenings, low moisture content and produces white flour. Generally these characteristics produce a higher yield of flour than the red-grained wheats of the northern hemisphere which typically have a higher moisture content.<sup>20</sup>

2.19 Regarding the future for Australian wheat, the Australian Bureau of Agricultural and Resource Economics and Sciences (ABARES) March quarter commodities outlook estimated:

- High rates of global production will likely lead to a fall in average wheat prices in 2012-13;
- Australian wheat exports are forecast to 'remain relatively high compared to historical averages', although export value is predicted to fall by 9 per cent;
- Over the medium-term, 'Australian production of wheat is expected to increase 1 per cent per year between 2012-13 and 2016-17 to around 26 million tonnes' and 'wheat exports are projected to remain around 20 million tonnes up to 2016-17'; and
- Lastly, ABARES made the general observation that trends for wheat plantation are dependent on prices for other grain crops.<sup>21</sup>

2.20 Until 2008, Australian wheat exports were handled through a 'single desk' arrangement, whereby wheat was centrally marketed and pooled for sale

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17 Wheat Export Australia, 'Report for Growers 2010-11', p.5.

18 Wheat Export Australia, 'Report for Growers 2010-11', p.6.

19 Wheat Export Australia, 'Report for Growers 2010-11', p.16.

20 Wheat Export Australia, 'Report for Growers 2010-11', p.5.

21 ABARES, 'Agricultural Commodities: March Quarter 2012', p.28; p.38; p.46.

through the Australian Wheat Board (AWB). This model was in place since 1948, though progressively revised (such as by de-regulating the domestic market), and was intended to ensure stable returns to growers. In 2008, the *Wheat Marketing Act 1989* was repealed and replaced with the *Wheat Export Marketing Act 2008*, which partially de-regulated wheat exports. The Bill would amend the latter Act (the principal Act) to gradually remove the last tenets of regulation in 2014.<sup>22</sup> Dismantling of the 'single desk' model was the topic of much public debate as the legislation proceeded through the Parliament during winter 2008.<sup>23</sup>

- 2.21 In 2010, the Productivity Commission (PC) produced a report examining the operation of Australia's partially deregulated wheat export marketing arrangements. Clause 89 of the principal Act required the review to commence by 1 January 2010 and the report to be completed by 1 July 2010. The Productivity Commission's report recommended abolition of the *Wheat Export Accreditation Scheme 2008*, Wheat Exports Australia and the Wheat Export Charge from 30 September 2011, discontinuation of the 'access test' from 30 September 2014 and, in its place, utilisation of general competition law and a voluntary code of conduct.<sup>24</sup>
- 2.22 The Government's response accepted these recommendations in-principle, with the exception of delaying the process by one year to 2012. The Government proposed 'a three-stage approach', which it believed would be 'a more effective transition to full market deregulation'. The first stage involved changes to the *Wheat Export Accreditation Scheme 2008*; the second and third stages - which relate to WEA, the WEC, the 'access test' and developing a voluntary code of conduct - are encapsulated in the Bill.<sup>25</sup>
- 2.23 In anticipation of the forthcoming changes, two informal studies have probed the views of Australia's wheat buyers.
- 2.24 Australian Grain Growers Ltd (Grain Growers) consulted with foreign buyers to gauge their views in April 2011. Whilst the findings noted buyers have reasons for valuing Australian wheat (better suited to certain end uses and having low moisture content), areas of concern were found, including:

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22 Wheat Export Australia, 'Report for Growers 2010-11', pp.18-19.

23 *Australian*, 'Angry Farmers Rally to Battle Wheat Sales Law', 17 June 2008, p.6; *Canberra Times*, 'Farmers Rally to Save the Single Desk', 17 June 2008, p.6.

24 Productivity Commission, 'Wheat Export Marketing Arrangements', Inquiry Report No.51, 1 July 2010, pp.27-33.

25 DAFF, 'Australian Government Response to the Productivity Commission Recommendations on Wheat Export Marketing Arrangements', September 2011

- consistency of supply, related to food security concerns;
  - levels of screening required to detect foreign objects, 'seen to be increasing';
  - preference for North American wheat to make bread in Asia;
  - inadequate crop information;
  - issues surrounding grade and quality, 'threatening the overall reputation of Australian wheat' and the lack of a single point of contact to direct complaints and concerns; and
  - insufficient technical support to processors compared to that provided by the USA and Canada.<sup>26</sup>
- 2.25 In general, Grain Growers found that 'across Asian and Middle-Eastern markets Australian standards appear to be slipping.'<sup>27</sup>
- 2.26 During September 2011, Wheat Exports Australia conducted a similar process and reported its findings in the 2010-11 Report to Growers. Similar themes were raised with WEA as were raised with Grain Growers:
- shipping and handling costs and delays;
  - a preference to source wheat from countries with official wheat export standards, such as Argentina, Canada and the US;
  - compromised flour and dough performance due to the blending of wheat varieties to meet ASW or APW grade;
  - improved access to general information about Australian wheat stock levels; and
  - a 'substantial gap in technical support provided by Australia compared to the USA and Canada'. WEA observed that the USA has been offering technical services to mills receiving Australian wheat, 'a clear example of the USA seeking to increase its market share.'<sup>28</sup>
- 2.27 The Senate Standing Committee on Rural and Regional Affairs and Transport also reported on *Operational Issues in Grain Export Networks* in April 2012. Findings of the Committee included:

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26 Australian Grain Growers Ltd, 'What the World Wants from Australian Wheat', April 2011, p.4.

27 Australian Grain Growers Ltd, 'What the World Wants from Australian Wheat', April 2011, p.5.

28 Wheat Export Australia, 'Report for Growers 2010-11', p.17; Submission 11, Wheat Exports Australia, Attachment B.



- Following the discontinuation of the single desk model, 'the industry was left with natural monopolies or near monopolies centred on different geographical areas';<sup>29</sup>
- Uncertainty surrounding the development of a future voluntary code of conduct, in terms of its adequacy and scope, based on evidence provided by the ACCC;<sup>30</sup>
- Evidence from Viterra, which pointed out that a shortage of transport infrastructure at peak times 'has meant an escalation in road freight prices as marketers endeavour to get grain from up-country to port';<sup>31</sup>
- Variation of storage costs charged by exporters, which some witnesses attributed to concentrated market power.<sup>32</sup>

2.28 The Senate Committee also raised the idea of appointing an industry ombudsman.<sup>33</sup>

2.29 A South Australian parliamentary committee is currently inquiring into the grain handling industry. In its submission to this Committee, Chairman Geoff Brock MP stated that although the committee had yet settled upon recommendations, 'the principles that underpin deregulation of wheat export markets are generally supported'. However, the submission also stated that evidence indicates support for retaining WEA and 'we are not convinced that the proposed legislation provides sufficient control of access to port facilities and services.'<sup>34</sup>

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29 Senate Standing Committee on Rural and Regional Affairs and Transport, 'Operational Issues in Export Grain Networks', April 2012, p.35.

30 Senate Standing Committee on Rural and Regional Affairs and Transport, 'Operational Issues in Export Grain Networks', April 2012, p.43.

31 Senate Standing Committee on Rural and Regional Affairs and Transport, 'Operational Issues in Export Grain Networks', April 2012, p.70.

32 Senate Standing Committee on Rural and Regional Affairs and Transport, 'Operational Issues in Export Grain Networks', April 2012, pp.80-81.

33 Senate Standing Committee on Rural and Regional Affairs and Transport, 'Operational Issues in Export Grain Networks', April 2012, p.xi

34 Submission 3, Select Committee on the Grain Handling Industry, p.1 and p.3.

