



Wheat Export Marketing Bill 2008

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Law and Bills Digest Section

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Wheat Export Marketing Bill 2008

Date introduced: 29 May 2008

House: House of Representatives

Portfolio: Agriculture, Fisheries and Forestry

Commencement: Sections 1 and 2 on the day of the Royal Assent; sections 3 to 90 on 1 July 2008.

Links: The [relevant links](#) to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at ComLaw, which is at <http://www.comlaw.gov.au/>.

Purpose

The purpose of the Bill is to establish a system for regulating the export of bulk wheat by companies which are accredited by Wheat Exports Australia (WEA) under the wheat exporter accreditation scheme (the Scheme).

Background

The agricultural policy landscape at both State and Federal level was once well populated by statutory trading monopolies and other legislated arrangements for the marketing of farm products. However, reforms in both agricultural policy and the broader economic agenda over the last couple of decades have transformed agricultural marketing in Australia to the point where the monopoly over wheat exports is the only remaining such arrangement effective at the national level.

Currently the Australian domestic and export wheat markets operate very differently. The Australian **domestic** wheat market was completely deregulated in 1989, and has operated free of specific government regulation since that time. Growers are able to directly sell their wheat to domestic traders and consumers, or to deliver their wheat into 'pools'.

The Australian **export** wheat market is directed through a single exporter of bulk wheat – Australian Wheat Board International Limited (AWB International). This is known as the 'single desk'. The statutory regulator, the Export Wheat Commission, manages the export of non-bulk wheat (that is, bagged or container wheat).

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The *Wheat Marketing Amendment Act 2006*, which was passed in December 2006, gave effect to temporary changes to the *Wheat Marketing Act 1989*. The changes transferred the right to veto bulk wheat export applications from AWB International to the Minister for Agriculture, Fisheries and Forestry until 30 June 2007. Further background to the temporary arrangements including a short history of Australian wheat marketing is provided in the [Bills Digest](#) prepared for the *Wheat Marketing Amendment Act 2006* which was enacted as a result of the [Volker report](#) into the UN Oil-for-food program and the subsequent [Cole inquiry](#) instituted by the Commonwealth Government.

The *Wheat Marketing Amendment Act 2007*, provided, amongst other things, that the temporary transfer of the power of veto over bulk wheat from AWB International to the Minister would be extended to 30 June 2008. That power of veto is due to end shortly.

This Bill sets out proposed major changes to the manner in which bulk wheat is to be exported.

This Bills Digest should be read in conjunction with the [Bills Digest](#) for the Wheat Export Marketing (Repeal and Consequential Amendments) Bill 2008.

Committee consideration

Exposure Drafts of the Wheat Export Marketing Bill 2008 and the Wheat Export Marketing (Repeal and Consequential Amendments) Bill 2008 (the bills) were tabled in the Senate on 11 March 2008.

On 12 March 2008 the Bills were referred to the Senate Standing Committee on Rural and Regional Affairs and Transport (the Senate Committee) for inquiry and report by 11 April 2008. On 13 March 2008, the Senate moved to extend the reporting date for the inquiry to 24 April 2008.

The inquiry was widely advertised in metropolitan and rural newspapers. In addition the Senate Committee wrote to a number of individual growers, grower groups and peak bodies inviting written comment. The Senate Committee received 48 [written submissions](#) in relation to the inquiry.

The [final report](#) was issued on 30 April 2008.

Final report

The Senate Committee made three recommendations. The major recommendation suggested amendments be made as follows:

- clarification of WEA's objectives

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- clarification and guidance in relation to the powers and discretions available to WEA
- clarification and guidance in relation to the process for renewal of accreditation
- clarification of the process for review of decisions and
- legislative provision for review of the legislation.¹

Additional comments

Additional comments to the formal report were provided by Liberal Senators.² The Liberal Senators concluded from discussions and meetings with all industry players that there is an acceptance and anticipation, albeit a reluctant one by some, that a multi-licensing system in one form or another will be introduced.³

The Liberal Senators expressed the view that the proposed Bills should be supported with amendments which would ensure that the legislation operates to produce optimal outcomes for wheat growers.⁴ In addition to those recommendations made in the main body of the report by the Senate Committee, the Liberal Senators proposed the following:

- that individual wheat growers who wish to directly export their own wheat to a third party should be exempted from the provisions of the Act⁵
- that minimum standard trading terms should be established⁶
- a mechanism to improve the position of wheat growers as unsecured creditors in relation to pool products⁷
- the application of the access test to ‘up country’ storage facilities either under Part IIIA of the Trade Practices Act 1974 or by way of mandatory industry code⁸
- the provision of timely information about grain stocks⁹ and

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1. Senate Standing Committee on Rural and Regional Affairs and Transport, ‘Exposure Drafts on the Wheat Export Marketing Bill 2008 and the Wheat Export Marketing (Repeal and Consequential Amendments) Bill 2008’, April, 2008, p. 57
 2. Senator the Hon Bill Heffernan, Senator Julian McGauran, Senator Judith Adams, Senator Mary Jo Fisher and Senator Mathias Cormann.
 3. Senate Standing Committee on Rural and Regional Affairs and Transport, op. cit., p. 59.
 4. *ibid.*, p. 60.
 5. *ibid.*, p. 61.
 6. *ibid.*, p. 62.
 7. *ibid.*
 8. *ibid.*, p. 63.
 9. *ibid.*, p. 64.

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- clarification of the external audits which can be undertaken by WEA.¹⁰

Dissenting report

A dissenting report was lodged by the Nationals' Senators.¹¹ They made two recommendations. The major recommendation was that the legislation be withdrawn on the grounds that the draft bills have not taken into consideration that the majority of Australian wheat growers want the retention of a grower owned and controlled wheat marketing system.¹² The second recommendation was that the AWBI maintain the management of the single desk for the forthcoming year with power of veto to remain with the Minister. In the meantime the Bills should be redrafted to include a number of matters which would fully address the concerns which had been expressed in the written and oral submissions to the Senate Committee.¹³

Opposition to the Bill

Whilst there appears to be general support for the Bill by the Liberal party¹⁴ there is strong resistance to the dismantling of the single desk wheat exporting arrangements by the Nationals. Senator Ron Boswell contends that:

Growers will no longer have the relationship that they currently enjoy with the single desk entity and there is nothing to compel a licence holder to develop markets, provide price and market information or even pay them.¹⁵

John Forrest MP summarised the Nationals' concerns about the Bill as follows:

The Bill has many weaknesses apart from scuttling the single desk. It does not recognise the need for a national pool subject to prudential requirements; it does not provide for a buyer of last resort; it provides no regulatory restrictions against predatory practices in the export market place; and provides no arrangements on quality control (which has been Australia's huge advantage); and there is no veto on the issuing of export licences to any company which has a bad reputation in the market place.

10. *ibid.*

11. Senator Barnaby Joyce, Senator Fiona Nash and Senator Nigel Scullion.

12. Senate Standing Committee on Rural and Regional Affairs and Transport, *op. cit.*, p. 67.

13. *ibid.*, p. 72.

14. Lucy Skuthorp, 'Single desk shootout: High noon showdown turns feisty', *The Land*, 24 April, 2008, p. 5.

15. Senator Ron Boswell, 'Boswell urges Rudd to "Calm down" on Wheat Deregulation', *Media Release*, 6 March, 2008.

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In addition, there is no regulatory measures [sic] in place to police anti competitive behaviour in transport and handling in ports.¹⁶

It has been reported that the Liberals and Nationals have publicly split over wheat export policy and appear set to vote against each other on the new laws.¹⁷ The substance of the debate on the Bill in the House of Representatives on 3 June 2008 confirmed the differing views of the opposition parties on the matter of the demise of the single desk. Of the ten 'no' votes for the second and third reading of the Bill, eight were by Nationals members. The other two 'no' votes were by Independent members.¹⁸

It remains to be seen whether the same voting pattern will apply in the Senate in relation to the amendments which have been foreshadowed by the Hon. Dr. Nelson, Leader of the Opposition which are addressed in the body of this digest.

Financial implications

Funding of WEA will be provided through application fees under the Scheme as well as the Wheat Export Charge. Funds currently held by the Export Wheat Commission will be transferred to WEA.

The government has stated that it will provide up to \$9.37 million for transitional measures to aid implementation of the new arrangements. Up to \$4.37 million of this cost will be offset from the funding appropriated to the Department of Agriculture, Fisheries and Forestry.¹⁹

Key issues

There are two key issues arising from the Bill:

- whether individual farmers should be permitted to sell their own wheat without having to become accredited wheat exporters and

16. John Forrest MP, 'Wheat Bill exposes growers to the law of the jungle', *Media Release*, 1 May 2008.

17. Cathy Alexander, 'Wheat issue splits Coalition', *Courier Mail*, 1 May, 2008, p. 2 and Sophie Morris, 'Rift over wheat sales', *Australian Financial Review*, 30 April, 2008, p 11.

18. House of Representatives, *Votes and Proceedings No. 25*, 4 June 2008, pp. 336-337.

19. Explanatory Memorandum, p, 3.

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- the requirement that an accredited wheat exporter which is also the owner or port terminal facilities must have in place formal access arrangements for those facilities under Part IIIA of the *Trade Practices Act 1974* (TPA).

Individual farmers

The exposure draft bill contained a requirement that an accredited wheat export be a 'trading corporation' under the *Corporations Act 2001*. The Senate Committee received evidence in support of the accreditation of co-operatives and of individual growers who wish to bulk export wheat grown on their properties.²⁰

The Senate Committee did support the inclusion of co-operatives in the legislation, but stopped short of recommending that individual farmers should be allowed an exemption from the new legislative scheme.²¹

The Government does not believe it is necessary to extend accreditation rights to individuals, as prudent managers would operate as a company to reduce their exposure to risks associated with shipping what are expected to be high-value tonnages.²²

However the Hon. Dr Nelson, Leader of the Opposition, has stated that the Liberals 'would be moving an amendment to allow individual wheat growers who wish to directly bulk export their wheat to an international purchaser to be exempt from the system'.²³

Formal access

One of the key issues is the requirement for a formal access regime in respect of port terminal facilities. Currently bulk handling and storage facilities are owned and controlled by a very small number of companies. Concerns were raised before the Senate Committee that, in the event that some or all of these companies became accredited exporters under the proposed legislation, they may be in a position to limit access to these facilities by other exporters.²⁴ For example, the submission by the NSW Farmers Association states:

The Association believes fair and open access to port facilities is an essential requirement for wheat export marketing ... If this access is not closely scrutinised it

20. Senate Standing Committee on Rural and Regional Affairs and Transport, op. cit., p. 27.

21. *ibid.*, p. 29.

22. Hon. Tony Burke, Minister for Agriculture, Fisheries and Forestry, 'Second reading speech: Wheat Export Marketing Bill 2008', *House Hansard*, 29 May 2008, p. 73.

23. Hon. Dr Brendan Nelson, Leader of the Opposition, *House Hansard*, 3 June 2008, p. 93.

24. Senate Standing Committee on Rural and Regional Affairs and Transport, op. cit., p. 37.

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will provide an unfair advantage in an environment which is attempting to stimulate competition.²⁵

Similarly, the submission by the Institute of Public Affairs states:

The draft bills mandate an access regime for port infrastructure owners who also want to become accredited wheat exporters. The ostensible reason for this is to prevent port infrastructure owners from acting as monopolists to the disadvantage of potential competing exporters. The apparent fear embodied in the draft bills is that Graincorp, CBH and ABB will deny other exporters equal access to their bulk handling port facilities.²⁶

The proposed access regime

Clause 24 of the Bill provides for an access test in respect of two periods. The first period will operate up to and including 30 September 2009. The second period will operate after 1 October 2009, at which time formal access under either Division 2A or Division 6 of Part IIIA of the *Trade Practices Act 1974* (TPA) will have to be in place.

How does Division 2A of Part IIIA work?

States and Territories are entitled to proclaim their own access regimes for essential facilities if they wish to do so. Section 44M of the TPA sets out the process by which **States and Territories** can ascertain whether or not an access regime they introduce is an effective regime for the purposes of the TPA.

The practical consequence of a State or Territory regime being regarded as an effective regime is that the National Competition Council (NCC) cannot make a recommendation that a service be 'declared' under Division 2 of Part IIIA if that service is already the subject of an effective regime.

The process is a relatively simple one:

- the State or Territory prepares an access regime which will normally be given effect by specific legislation
- the regime is submitted to the NCC by the responsible State or Territory Minister

25. NSW Farmers Association, *Submission No.35*, April 2008, p. 4.

26. Institute of Public Affairs, *Submission No. 22*, April 2008, p. 5.

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- the NCC reviews the regime in a public process by which it seeks and considers submissions made by the State or Territory as well as by interested members of the public
- the NCC publishes a draft report and invites and considers submissions on it
- the NCC forwards a final report to the federal Treasurer with a recommendation on whether or not, in its opinion, the regime is an effective one and
- the federal Treasurer then makes a decision on the recommendation and publishes that decision.

The NCC has made a number of access [declarations](#) in respect of state gas, electricity and rail access regimes.

The tests used by the NCC in determining whether an access regime is an 'effective regime' are those set out in the [Competition Principles Agreement](#).

How does Division 6 of Part IIIA work?

An alternative method of achieving the same result is for the **facility owner** to lodge an 'access undertaking' with the Australian Competition and Consumer Commission (ACCC). This is dealt with by section 44ZZA of the TPA which enables the ACCC to accept access undertakings from any person who owns infrastructure to which a third party might seek access.

The process to be followed by the ACCC in assessing proposed undertakings is essentially a public process:

- on receipt of an application the ACCC publishes the application and seeks submissions on it
- once the submissions have been assessed the ACCC will prepare and publish a draft decision. The ACCC often retains experts in the particular area to assist it in its consideration of the matter. Any one affected by the matter is entitled to make a submission on the draft decision.
- the ACCC considers all the submissions and makes a final decision.

In considering whether or not to accept an undertaking, the ACCC takes into account a number of matters including any pricing principles promulgated by the Minister. The disadvantage of using this model is that the issue of 'price' looms large in any consideration. The submission by the Institute of Public Affairs to the Standing Committee states:

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the imposition of an access regime is by definition designed to force infrastructure owners to provide access at lower prices than would occur through voluntary contract.²⁷

What if there was no access regime?

The Independent Committee of Inquiry into National Competition (known as the Hilmer Report after the Chairman, Fred Hilmer) recommended the implementation of a national competition policy for Australia.²⁸ Amendments to the TPA²⁹ which came into effect in 1995 established 'a new legal regime under which firms could be given a right of access to 'essential facilities'³⁰ owned by another firm, when the provision of such a right meets certain public interest criteria.'³¹ That regime is contained in Part IIIA of the TPA.

It does appear that the system of access regimes, so strongly endorsed by the Hilmer report, has been in operation in Australia for over a decade. It has been the cornerstone of the deregulation of the electricity and gas industries. As the possibility that some industry stakeholders may limit access to their port terminal facilities by other exporters was raised before the Senate Committee, the requirement for formal access arrangements will go some way to assuage these concerns.

Code of Conduct

As an alternative to a formal access regime Graincorp, CBH and ABB suggested that a Supply Chain Code of Conduct would provide a commercially based solution to guaranteeing new bulk wheat exporters access to both port terminals and upcountry grain accumulation facilities. The companies proposed that the Code would become an integral part of the accreditation scheme, would be enacted with the agreement of all signatories and subject to the final approval of the Minister.³²

27. Institute of Public Affairs, op. cit., p. 5.

28. The Independent Committee of Inquiry, *National Competition Policy*, Australian Government Publishing Service, Canberra, August, 1993

29. Made by the enactment of the *Competition Policy Reform Act 1995*.

30. The Independent Committee of Inquiry defined an 'essential facility' as 'a monopoly, permitting the owner to reduce output and/or service and charge monopoly prices, to the detriment of users and the economy as a whole. In addition, where the owner of the facility is also competing in markets that are dependent on access to the facility, the owner can restrict access to the facility to eliminate or reduce competition in the dependent markets.' The Independent Committee of Inquiry, op. cit, p. 239.

31. *ibid*.

32. Senate Standing Committee on Rural and Regional Affairs and Transport, op. cit., p. 48.

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In response, the Standing Committee considered that a Code of Conduct could be an affective alternative to the question of access, subject to the following qualifications:

- The legislation should be amended to require exporting companies to comply with an ‘industry code’ as a requirement of accreditation. Industry would be given a set period of time to come up with such a code
- The Code would apply to those companies which have obligations under the Code and would not be limited to Bulk Handling Companies
- The Code would be registered by the ACCC under the TPA and subject to acceptance by WEA.³³

The Bill does not make any provision for a Code of Conduct as an alternative to formal access.

However, the Government has signalled that if any problems are identified in relation to access to up country storage facilities, it will take steps to remedy the situation, including by way of the development of a Code of Conduct.³⁴

Some more information about Part IIIA of the TPA

Part IIIA of the TPA establishes a national legislative regime to facilitate third party access to the services of certain facilities of national significance. In addition to the two **voluntary** access regimes in Divisions 2A and 6, it contains a third regime in Division 2 by which a third party may apply to the NCC asking it to recommend that a service be ‘declared’. This part operates when a third party has sought access and that has been denied.

The effect of this is that, in the absence of the formal access regime contained in **clause 24** of the Bill, owners of bulk handling facilities may find themselves the subject of an application for ‘declaration’ under section 44F of the TPA by a party seeking access if access has been denied. This does not mean that such a declaration would be made, just that a facility which is operating as a monopoly **could** be the subject of an application.

33. *ibid.*, p. 51.

34. Hon. Tony Burke, Minister for Agriculture, Fisheries and Forestry, ‘Second reading speech: Wheat Export Marketing Bill 2008’, *House Hansard*, 29 May 2008, p. 73.

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Main provisions

Part 1

Clause 3 contains the objects of the proposed Act as follows:

- to promote the development of a bulk wheat export marketing industry that is efficient, competitive and responsive to the needs of wheat growers
- to provide a regulatory framework in relation to participants in the bulk wheat export marketing industry.

There was no objects clause in the original exposure draft. A number of submitters to the Senate inquiry stated their desire for the objectives of the Bill to be made clear.³⁵

The Senate Committee received a number of submissions in relation to the definitions in the exposure draft. **Clause 5** of the Bill contains relevant definitions, a number of which have been altered. Of particular note are the following:

- **‘Company’** is defined to include co-operatives. As already stated, the definition was expanded in accordance with the Senate Committee recommendations.
- **‘Designated sanitary or phytosanitary measure’** means a measure applied by or under a law of a foreign country to protect human, animal or plant life or health from certain risks or prevent or limit other damage from the entry and/or establishment of pests to the extent to which the measure relates to the importation into the foreign country of barley, canola, lupins, oats or wheat. The Senate Committee received submissions that the requirement should be compliance with the standard imposed by Australian law or, if a higher standard, those expressly required by the terms and conditions of the particular export contract.³⁶ In addition, the Emerald Group believed that provision should be made in the Bill for bulk handling companies to accept contractual or legislative liability for failure to meet the measures.³⁷ However the provision in the Bill is in the same terms as in the exposure draft of the Bill.
- **‘Executive officer of a company’** means director, chief executive officer, chief financial officer or secretary. The definition appears to have been expanded in response to submissions put to the Senate Committee.³⁸
- **‘Port terminal facility’** means a ship loader that is at a port and capable of handling wheat in bulk and includes an intake/receival facility, a grain storage facility, a

35. Senate Standing Committee on Rural and Regional Affairs and Transport, op. cit., p. 24.

36. AWB Limited, *Submission No. 2*, 26 March 2008, p. 2.

37. Emerald Group Australian Pty Ltd, *Answer to Question on Notice*, 23 April 2008, p. 2.

38. Senate Standing Committee on Rural and Regional Affairs and Transport, op. cit., p. 25.

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weighing facility and a shipping belt. According to the Standing Committee report in addition to controlling the nine grain handling ports, over 600 upcountry silos are owned and operated by the three main grain handling companies and a further 22 upcountry silos are owned by AWB.³⁹ None of the upcountry facilities have been included in the definition.

- **‘Port terminal service’** means 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.

Clause 6 defines the term ‘involved in a contravention’ which is used throughout the Bill. It is an expansive term which provides that a person will have been involved in a breach of the Act if they

- aided, abetted, counselled or procured the contravention or
- induced, whether by threats or promises, the contravention
- were, directly or indirectly, knowingly concerned in or party to the contravention
- conspired with other person to effect the contravention.

Part 2

Subclause 7(1) provides that wheat can only be exported by an accredited wheat exporter, unless the wheat is exported in a bag or container that is capable of holding not more than 50 tonnes of wheat. Where a person who is not an accredited wheat exporter breaches this prohibition or where a person is ‘involved in a contravention’ of the prohibition, **subclause 7(5)** provides for civil penalties.⁴⁰

Clause 8 provides that WEA may, by legislative instrument, formulate the wheat export accreditation scheme. Section 5 of the *Legislative Instruments Act 2003* defines a ‘legislative instrument’ as an instrument of a legislative character that is, or was, made under a delegation of power from Parliament’. All legislative instruments must be recorded on the *Federal Register of Legislative Instruments*.⁴¹ The terms of the Scheme will be subject to tabling and disallowance by the Parliament.

Although it is for WEA to establish the Scheme, the framework for the minimum requirements of the Scheme is contained in this part of the Bill.

39. *ibid.*, p. 44.

40. See **Part 8** for details of the amounts of penalties.

41. Section 20 Legislative Instruments Act 2003.

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The Scheme **may** allow WEA to, amongst other things grant, renew, suspend, cancel or consent to the surrender of an accreditation. In addition WEA may impose conditions on the accreditation and, in relevant circumstances revoke or vary the conditions: **subclause 9(2)**.

Subclause 9(4) is one of the minimum requirement provisions which **must** be included in the final form of the Scheme created by WEA under clause 8. It requires that WEA consults a company before making decisions to refuse the company's application for accreditation, or to cancel, suspend accreditation. In addition WEA must consult with a company before imposing conditions on the accreditation, or to revoke or vary an accreditation condition: **subclause 9(4)**. This subclause was not included in the exposure draft of the Bill. Its inclusion may be in response to Senate Committee recommendation that the WEA should not impose new conditions on an accredited exporter without due process.⁴²

Another feature of the wheat export accreditation scheme is that application fees may apply: **clause 10**. According to the Explanatory Memorandum this would include applications for accreditation, renewal or surrender of accreditation, or the variation, addition or cancellation of conditions of accreditation.⁴³ The Senate Scrutiny of Bills Committee has drawn attention to this provision on the grounds that it provides for the rate of a fee or levy to be set by regulation. The Committee noted that the exercise of this power is limited by **proposed subclause 10(2)**.⁴⁴

Once WEA determines that accreditation will be granted it must specify the duration of the accreditation in the instrument of accreditation: **clause 12**. The Bill makes no reference to the period of a grant of accreditation, nor to the process or period of renewal. These details will, presumably, be contained in the legislative instrument referred to in clause 9.

Clause 13 is one of the minimum requirement provisions which **must** be included in the final form of the Scheme created by WEA under clause 8. It sets out the eligibility criteria which WEA must consider in assessing applications for accreditation. According to **clause 13** the Scheme **must** provide that a company is not eligible for accreditation unless **all** of the following are satisfied:

42. Senate Standing Committee on Rural and Regional Affairs and Transport, op. cit., p. 26.

43. Explanatory Memorandum, p. 19.

44. Senate Scrutiny of the Bills Committee, *Alert Digest No. 4 of 2008*, 4 June 2008, p. 81.

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- the company is a registered company under the *Corporations Act 2001* or a co-operative and the company is a trading corporation to which section 51(xx) of the *Constitution* applies⁴⁵
- WEA is satisfied that the company is a fit and proper company having regard to the following matters:⁴⁶
 - the financial resources available to the company: **subparagraph 13(1)(c)(i)**
 - the company's risk management arrangements: **subparagraph 13(1)(c)(ii)**
 - the company's business record: **subparagraph 13(1)(c)(iii)**
 - the company's record in situations requiring trust and candour: **subparagraph 13(1)(c)(iv)**
 - the business record of each executive officer of the company: **subparagraph 13(1)(c)(v)**
 - the experience and ability of the executive officer: **subparagraph 13(1)(c)(vi)**
 - the record in situations requiring trust and candour of each executive officer of the company: **subparagraph 13(1)(c)(vii)**
 - whether the company, or an executive officer of the company, has been convicted of an offence against an Australian law or a foreign law, where the offence relates to dishonest conduct: **subparagraph 13(1)(c)(viii)**
 - whether the company, or an executive officer of the company, has been convicted of an offence against an Australian law or a foreign law, where the offence relates to the conduct of a business: **subparagraph 13(1)(c)(ix)**
 - whether an order for a pecuniary penalty has been made against the company, or an executive officer of the company, under section 1317G of the *Corporations Act 2001*⁴⁷ or section 76 of the TPA:⁴⁸ **subparagraph 13(1)(c)(x)**

45. According to the Explanatory Memorandum, these must be strictly fulfilled and failure to meet either one will mean the application is rejected, p. 20.

46. According to the Second Reading Speech, if a company does not meet one of the criteria to which Wheat Exports Australia is to have regard in determining whether an applicant is fit and proper for accreditation, it does not necessarily mean it will not be accredited. Wheat Exports Australia will need to exercise judgment as to whether the applicant is fit and proper to be accredited even though it may not pass all of the items in clause 13(1)(c).

47. Where a person has been ordered to pay a pecuniary penalty order to the Commonwealth for contravention of one of the provisions listed in section 1317E of the *Corporations Act 2001*.

48. Where a person has been ordered to pay a pecuniary penalty order because of a breach of the TPA.

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- if the company is, or has been, accredited under the Scheme – whether the company has contravened a condition of the company’s accreditation: **subparagraph 13(1)(c)(xi)**
 - whether an executive officer of the company has been involved in a contravention of a condition of an accreditation under the Scheme: **subparagraph 13(1)(c)(xii)**
 - whether the company, or an executive officer of the company, has been convicted of an offence under sections 136.1, 137.1 or 137.2 of the *Criminal Code*:⁴⁹ **subparagraph 13(1)(c)(xiii)**
 - whether the company, or an executive officer of the company, has been involved in repeated contraventions, or a serious contravention, of a designated sanitary or phytosanitary measure: **subparagraph 13(1)(c)(xiv)**
 - whether the company, or an executive officer of the company, has committed or been involved in a contravention of a United Nations sanctions provision:⁵⁰ **subparagraph 13(1)(c)(xv)**
 - whether the company, or an executive officer of the company, has committed or been involved in a contravention of an Australian law or a foreign law, where the contravention relates to trade in barley, canola, lupins, oats or wheat: **subparagraph 13(1)(c)(xvi)**
- WEA is satisfied that the company is not an externally-administered⁵¹ body corporate.
 - If the company, or an associated entity, is the provider of one or more port terminal services – WEA is satisfied that the company or associated entity, as the case may be, passes the access test in relation to each of those services.⁵²
 - If the Scheme specifies one or more other eligibility requirements – WEA is satisfied that those requirements are met.

When WEA is determining whether an applicant company is ‘fit and proper’ under **paragraph 13(1)(c)** it can only take into account the applicant’s conduct in the five years immediately prior to the applicant first becoming accredited. Where the applicant has never been accredited, the five year period is the period immediately prior to the

49. Where a person has been found guilty of providing false or misleading information or documents.

50. The term is defined in **clause 5** of the Bill.

51. Under the *Corporations Act 2001* external administration of a company means that the company has a receiver appointed to it, is under voluntary administration, has executed a deed of arrangement or is being wound up.

52. The access test referred to in this paragraph is passed if access arrangements under **clause 24** of the Bill are in place.

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application for accreditation being received by WEA: **subclause 13(2)**. This means that for applications for accreditation lodged on 1 July 2008, the period will be from 1 July 2003 to 30 June 2008.

Subclauses 13(3) to (5) relate to the conduct or record of executive officers or applicant companies. In deciding the question of ‘fit and proper’ the conduct or record is relevant whether it occurred before or after the person became an executive officer of the applicant company.

Matters relevant to an application for accreditation under clause 13 extend to those which have occurred or exist outside Australia: **subclause 13(8)**.

It is important to note that the Wheat Export Marketing (Repeal and Consequential Amendments) Bill 2008 amends the *Criminal Code Act 1995* to extend the offence of making a false or misleading statement in, or in connection with, an application for accreditation under the Scheme. The maximum penalty for such an offence is 12 months imprisonment.⁵³

Clauses 14 to 18 set out the conditions of accreditation. **Clause 14** is one of the minimum requirement provisions which **must** be included in the final form of the Scheme created by WEA under clause 8. It requires that accreditation as a wheat exporter is subject to:

- compliance with the provisions of clause 25(2)⁵⁴ and clause 31(1)⁵⁵
- conditions under sections 15 to 17⁵⁶ and
- any other conditions specified in the Scheme.

According to **clause 18** civil penalty provisions apply to an accredited wheat exporter who has contravened a condition of accreditation or a person involved in a contravention of a condition of accreditation.⁵⁷

Clauses 19 to 21 deal with the circumstances which could lead to the cancellation of wheat export accreditation.

53. Section 136.1 Criminal Code Act 1995.

54. Relates to the provision of information and documents upon written request by WEA.

55. Relates to the requirement by WEA for external audit.

56. Relates to formal reporting requirements.

57. See **Part 8** for details of the amounts of penalties.

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Clause 19 is one of the minimum requirement provisions which **must** be included in the final form of the Scheme created by WEA under clause 8. It sets out those circumstances under which wheat export accreditation must be cancelled and those where cancellation is discretionary.

Paragraphs 19(1)(a) to (e) are in the same terms as the eligibility criteria in **clause 13**. Essentially if any of the matters which are necessary for eligibility are negated, then wheat export accreditation **must** be cancelled. This particularly applies to an accredited wheat exporter who has failed to provide sufficient access to port terminal facilities. **Subclause 19(4)** of the Bill provides that in determining issues of 'fit and proper' any acts, omissions, matters or things that occurred prior to five years from the date of first accreditation are not taken into account.

Subclause 19(2) provides that WEA has discretion whether to cancel wheat export accreditation of a company where the company comes under external administration at a time after accreditation is granted. However it should be noted that under **clause 9** WEA has the option of suspending accreditation.

Clause 20 provides wheat export accreditation may be cancelled for non-compliance of an accreditation condition, even where a civil penalty order has been made and a civil penalty order can be made even if a company's accreditation has been cancelled.

Clause 22 is one of the minimum requirement provisions which **must** be included in the final form of the Scheme created by WEA under clause 8. **Subclause 22(1)** provides that an accredited wheat exporter may apply to WEA for consent to surrender its accreditation but that WEA may attached certain conditions to the surrender, including the requirement that certain reports are delivered to it.

Clause 24 provides that an accredited wheat exporter which owns, operates or controls port terminal facilities must provide access to those facilities to other accredited wheat exporters. **Subclause 24(1)** sets out the test for the period up to 30 September 2009. A body corporate will pass the access test in this period in one of two ways:

- **either** it publishes its willingness to provide access to accredited wheat exporters on the Internet, along with the terms and conditions of that access **or**
- it is part of a State or Territory access regime in place in accordance with Division 2A of Part IIIA of the TPA.

Subclause 24(2) sets out the access test from 1 October 2009. A body corporate will pass the second period of the access test in relation to a **port terminal service** if:

- **either** it is part of a State or Territory access regime in place in accordance with Division 2A of Part IIIA of the TPA **or**

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- there is in operation, under Division 6 of Part IIIA of the TPA, an access undertaking relating to the provision to accredited wheat exporters of access to the port terminal service for purposes relating to the export of wheat.

The Hon. Dr Nelson, Leader of the Opposition, has foreshadowed that the Liberals will seek to amend the Bill in relation to the issue of access. He stated:

As the legislation stands, bulk-handling companies will operate entirely under their own terms for a period of 16 months in relation to port access. Why should [they] then be subjected to heavy handed regulation under Part IIIA of the Trade Practices Act if no problems have arisen with the system?

The bulk-handling companies should be given the opportunity to prove themselves in the new bulk wheat exporting environment. If no problems arise then there is no need to impose heavy handed regulation upon them, and I ask the government to seriously consider the broad merit of the amendment I foreshadow.⁵⁸

Part 3

Part 3 contains provisions about the information gathering and audit powers of WEA.

Clauses 25 to 28 outline the powers of WEA to obtain information and documents from accredited wheat exporters.

Under **subclause 25(2)**, WEA may give written notice to a company that is, or has been, an accredited wheat exporter requiring it to provide information and/or documents which are relevant to WEA's functions or powers. The period in which the company has to comply with the notice must not be less than 14 days after the notice is given: **subclause 25(3)**. A company must comply with the terms of the notice: **subclause 25(5)**. This is a civil penalty provision.⁵⁹ In addition, the failure to provide information as requested could lead to cancellation of accreditation on the grounds that the company is not 'fit and proper' under **clause 19(1)(c)**.

WEA has the right to retain possession of a document produced under subclause 25(2). According to **subclause 28(2)** the owner of the document is entitled to be provided with a certified true copy of the document. The certified true copy is to be received in all courts and tribunals as evidence as if it were the original: **subclause 28(3)**.

58. Hon. Dr Brendan Nelson, Leader of the Opposition, *House Hansard*, 3 June 2008, p. 93.

59. See **Part 8** for details of the amounts of penalties.

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Clauses 29 and 30 outline the powers of WEA to request information and documents from persons who are not accredited wheat exporters but whom WEA believes on reasonable grounds have information or a document that is relevant to its powers and functions. There is no penalty provision for failure to comply.

Clause 31 sets out the powers of WEA to direct that an external audit of an accredited wheat exporter takes place. The essential features of WEA's power are:

- it can specify which external auditor is to undertake the audit: **paragraph 31(1)(a)**
- it can specify the matters which are to be audited such as the accuracy of information or statements which have been provided by an accredited wheat exporter: **paragraph 31(1)(b)**
- both WEA and the accredited wheat exporter are to be given a copy of the audit report: **paragraphs 31(1)(c) and (d)**
- where an accredited wheat exporter has engaged an external auditor in response to a direction by WEA, then WEA must reimburse any reasonable expenses incurred in complying with the direction: **subclause 31(6)**.
- an accredited wheat exporter which contravenes this clause or a person who is involved in a contravention of this clause will incur a civil penalty⁶⁰: **subclause 31(9)**.

Part 4

Part 4 of the Bill is about the investigations which can be undertaken by WEA at the request of the Minister.⁶¹

According to **clause 33**, where the Minister believes that it is in the public interest,⁶² the Minister can direct WEA to investigate matters which involve a function or power conferred on WEA or a suspected or alleged contravention of a condition of accreditation. In those circumstances, WEA must provide a written report of the investigation to the Minister in the terms set out in **clause 34**.

Under **subclause 34(4)**, if the report, or part of the report, relates to any alleged or suspected contravention of any Australian law, WEA may give a copy of the report, or part of the report, to:

60. See **Part 8** for details of the amounts of penalties.

61. Under section 19A of the *Acts Interpretation Act 1901* the reference is a reference to the Minister for Agriculture, Fisheries and Forestry.

62. This term is not defined in the Bill.

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- the Australia Federal Police
- the police force of a State or Territory
- the Australian Securities and Investments Commission
- the Australian Prudential Regulation Authority
- the Commissioner of Taxation
- the Australian Competition and Consumer Commission or
- a prescribed agency.

Part 5

Part 5 of the Bill provides for the establishment of WEA and its functions, powers and liabilities. According to the Senate Committee report, a number of submitters suggested that the Bill should ‘contain a statement of the broad priorities and objectives of the regulator, including a clear definition of who the regulator is responsible to, who it reports to and what its regulatory priorities are’.⁶³ However the Senate Committee did not support the inclusion of such a provision.

The body corporate known as the Export Wheat Commission is continued in existence under the new name of Wheat Export Australia under **clause 35**. WEA is empowered to do all things necessary and convenient to be done for the performance of its functions, including entering into contracts: **clause 37**. Under **clause 38** any financial liabilities of WEA are taken to be liabilities of the Commonwealth.

WEA consists of a Chair and at least three but not more than five, other members: **clause 40**. Members are appointed by the Minister: **subclause 41(1)**. A person is not eligible for appointment unless the Minister is satisfied that the person has substantial experience or knowledge and significant standing in at least one of the fields of expertise listed in **subclause 41(2)**.

Clause 46 requires a WEA member who has an interest in a matter being considered, or about to be considered by WEA to disclose the nature of the interest at a meeting of WEA. Under **subclause 46(4)** the WEA member must neither be present during any deliberation of the matter nor take part in any decision about the matter, unless WEA determines otherwise.

The Minister may terminate the appointment of a WEA member for the following reasons:

- misbehaviour or for physical or mental incapacity: **subclause 49(1)**

63. Senate Standing Committee on Rural and Regional Affairs and Transport, op. cit., p. 23.

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- bankruptcy or insolvency: **paragraph 49(2)(a)**
- a failure, without reasonable excuse, to provide a written disclosure of interest to the Minister, or a potential conflict of interest to WEA: **paragraph 49(2)(b)**
- absence, without being given formal leave of absence, from three consecutive WEA meetings: **paragraph 49(2)(c)**.

Clause 51 provides that WEA is to hold such meetings as are necessary for the performance of its function.

Clause 57 allows WEA to delegate, in writing, any or all of its functions and powers (other than the powers conferred in **clause 8** and **paragraph 69(2)(c)**)⁶⁴ to a WEA member or a person who is a member of WEA staff, an SES employee or an acting SES employee.

Clause 58 establishes the Wheat Exports Australia Special Account which is a Special Account for the purposes of the *Financial Management and Accountability Act 1997*. The purpose of the account is to meet expenses incurred in connection with the operation of WEA, the payment of remuneration to members and staff, payment for copies of documents⁶⁵ and payment of expenses incurred by an accredited wheat exporter for a WEA audit⁶⁶: **clause 60**.

Clauses 63 to 65 set out the planning and reporting obligations of WEA including the requirement to prepare a corporate plan at least once in each three year period for the Minister and to keep the Minister informed about and changes to the plan. **Clause 64** requires WEA to, prepare and give to the Minister, a report on its operations after the end of each financial year. The Minister presents that report to the Parliament. **Clause 65** requires WEA to prepare and publish a report for growers each marketing year in relation to the operation of the Scheme during that year.

Part 6

Part 6 of the Bill sets out the manner by which a decision of WEA under the Scheme may be reviewed.

A person affected by a WEA decision under the Scheme may make an application to WEA to reconsider the decision: **clause 68**. The application must be made in writing, in an approved form and accompanied by any relevant fee: **subclause 69(2)**. The time limit for

64. **Paragraph 69(2)(c)** relates to the setting of a fee for reconsideration of decisions.

65. Under **clause 26**.

66. Under subclause 31(6).

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seeking reconsideration is 28 days from the date that the applicant was informed of the decision. However, this period can be extended by WEA: **subclause 69(3)**.

When WEA is reconsidering its decision, it must not take into account any new information. It must consider only the information which was available when the original decision was made, unless there are 'special circumstances': **subclause 70(2)**. The term 'special circumstances' is not defined in the Bill and there is no guidance either in the Explanatory Memorandum or in the Senate Committee report about the circumstances in which further information will be considered or the nature of that information.

WEA must make its decision on reconsideration within 30 days of receiving the application. If it fails to do so, WEA is deemed to have made a decision that the original decision is to stand: **clause 71**. Having made a new decision, WEA has a further 28 days in which to provide the applicant with a written statement of reasons for the decision: **subclause 70(5)**.

Clause 72 provides that a person who is aggrieved by the reconsideration decision of WEA, including a 'deemed' decision under clause 71, may seek a review of that decision by the Administrative Appeals Tribunal (AAT). The review by the AAT is a 'merits review' which is a review of the fact finding, and often the policy choices involved in the decision under review as distinct from its lawfulness.⁶⁷

Part 7

Part 7 relates to the protection of confidential information.

Clause 73 lists the information which is 'confidential information'. It relates to information provided to WEA in relation to the Scheme where the person providing the information claims that it is 'commercial in confidence' information and where disclosure of the information could **either** reasonably be expected to cause financial loss or detriment to a person or body corporate **or** to directly benefit a competitor of the person or body corporate.

Subclause 74(1) provides that an '**entrusted public official**' (in the context of the Bill) is a person who is or was:

- a WEA member, a WEA staff member or a person assisting WEA⁶⁸
- the Minister or

67. Butterworths Concise Australian Legal Dictionary, Third Edition, LexisNexis Butterworths, Australia, 2004, p. 280.

68. **Clause 62** provides the circumstances in which a person may assist WEA.

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- a person employed as a member of staff of the Minister under the *Members of Parliament (Staff) Act 1984*.

It is an offence for an ‘entrusted public official’ to disclose ‘protected confidential information’ to another person: **subclause 74(2)**. However there are exceptions to this general prohibition which are listed in **subclause 74(3)**. These include:

- where the disclosure is with the consent of the person: **paragraph 74(3)(a)** or under a court order: **paragraph 74(3)(b)**
- the disclosure is to the Minister: **paragraph 74(3)(d)**
- where the disclosure is to a person in the course of their duties such as employee of the Australian Quarantine and Inspection Service: **paragraph 74(3)(g)**, a Customs officer: **paragraph 74(3)(h)** or a member of the Australian Federal Police: **paragraph 74(3)(i)**
- where disclosure is to a regulatory body such as the Australian Securities and Investments Commission: **paragraph 74(3)(k)**, the Commissioner of Taxation: **paragraph 74(3)(m)**, or the Australian Competition and Consumer Commission: **paragraph 74(3)(n)**.

Part 8

Part 8 of the Bill relates to civil penalty orders.

Under **subclause 76(1)** the Federal Court may order a person who has contravened a civil penalty provision of the Act to pay a pecuniary penalty to the Commonwealth. The order is a ‘civil penalty order’.⁶⁹

The Federal Court must have regard to the matters listed in **subclause 76(3)** in setting the amount of the penalty including:

- the nature and extent of the contravention
- the nature and extent of any loss or damage suffered
- the circumstances in which the contravention took place and
- whether the person has previously been found to have engaged in similar conduct.

Subclause 76(4) sets out the maximum amount of penalty payable by a body corporate. These range from 3,000 penalty units⁷⁰ (\$330 000) where a company which is not an

69. The standard of proof in a civil matter is ‘on the balance of probabilities’.

70. The term ‘penalty unit’ is defined in **clause 5** of the Bill as having the same meaning given by section 4AA of the Crimes Act 1914. That amount is \$110.

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accredited wheat exporter has exported wheat, to 150 penalty units (\$165 000) where, for example, a company has failed to comply with the conditions of accreditation, and 1,000 penalty units (\$110 000) where, for example, a company has failed to comply with the reporting conditions.

Subclause 76(5) sets out the maximum amount of penalty payable by an individual. These are set at 600 penalty units (\$66 000), 300 penalty units (\$33 000) and 200 penalty units (\$22 000) for a similar range of offences as those in subclause 76(4).

Only WEA may apply for a civil penalty order: **clause 77**. The application for a civil penalty order must be commenced within 6 years of the contravention: **clause 79**.

Where both criminal proceedings and civil penalty proceedings have been commenced in respect of conduct which is substantially the same, the civil penalty proceedings will be stayed: **subclause 82(1)**. Proceedings for a civil penalty order may only be recommenced if the person is not convicted of an offence: **subclause 82(2)**.

Even if a civil penalty order has been made, criminal proceedings may be started against a person in respect of the same conduct: **clause 83**. However, the evidence given by the person in the civil penalty proceedings is not admissible in criminal proceedings against the person, unless the evidence given was false: **clause 84**.

It is a defence in civil penalty proceedings that a person was under a mistaken but reasonable belief about the facts leading to the contravention of the civil penalty provision: **subclause 85(1)**. In that case the evidential burden in relation to the matter lies with the person who wishes to rely on the defence: **subclause 85(3)**.

Part 9

There is, entrenched in section 51(xxxi) of the *Constitution*, a guarantee which stipulates that property acquired by the Commonwealth Government must be acquired 'on just terms'.

Clause 88 refers to an acquisition otherwise than on just terms in the context of section 51(xxxi) of the *Constitution* but then provides that the Commonwealth is liable to pay a 'reasonable amount of compensation'. It should be noted that this subsection:

- does not specifically apply paragraph 51(xxxi) Constitution to the acquisition
- does not require 'just terms'
- provides that the Commonwealth is liable to pay a 'reasonable amount of compensation', as distinct from 'just terms'.

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It should be noted, however, that use of such a provision is commonplace, for example, section 152AQC of the *Trade Practices Act 1974* and in section 60 of the *Northern Territory Emergency Response Act 2007*.

Clause 89 provides that before 1 January 2011 the Productivity Commission must begin to conduct a review of the Act and the operation of the Scheme. The Bill does not provide for a finish date for the review. The Productivity Commission must provide a written report to the Minister who must, within 15 sitting days of receiving the report, table copies of it in each House of the Parliament.

It should be noted here that the Senate Committee received submissions about a range of matters relevant to wheat export marketing but which were not covered by any provision in either the exposure draft bill or this Bill. These comments reflected a perception about the adverse effects of the demise of the single desk including:

- the operation of regional pools which growers perceived could close at any time leaving those who harvest later, or who have not committed to a pool be unable to sell their wheat and so forced into costly storage options⁷¹
- a reduction in financial security and access to finance without the security of payment and finance offered under the single desk⁷²
- the absence of a ‘receiver of last resort’ which was of particular importance to smaller growers who might not have the capacity to store excess grain⁷³
- a concern by growers about how banks and other financial institutions will respond to this major change in the market⁷⁴
- the absence of a body to undertake ‘industry good functions’⁷⁵ such as market development and promotion, and plant breeding, potentially undermining Australia’s competitive advantage in the world market⁷⁶ and

71. Senate Standing Committee on Rural and Regional Affairs and Transport, op. cit., p. 6.

72. *ibid.*

73. *ibid.*, p. 7.

74. *ibid.*, p. 8.

75. Wheat Industry Expert Group has produced a list of eleven services that constitute ‘industry good’ functions being, industry strategic planning, research and development, wheat variety classification, wheat receival standards, information provision, crop sharing activities, technical market support, wheat promotion, branding, trade advocacy and regulatory advocacy. Wheat Industry Export Group, *The Provision and Transition of Industry Development Functions for the Australian Wheat Industry, Discussion Paper*, March 2008, p. 8.

76. Senate Standing Committee on Rural and Regional Affairs and Transport, op. cit., p. 9.

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- a lack of access to timely information about grain stocks through the supply chain so as to manage both supply and risk.⁷⁷

There is little doubt that if any or all of these adverse perceptions become a reality they will be communicated to the Productivity Commission.

Concluding comments

The comments by Brett Roberts, former Chair of the South Australian Farmers Federation Grain Council are worthy of note. He says:

I think we've got to take a lesson from other parts of the world. When you look at the reforms of the Common Agricultural Policy and the redirection of the US Farm program, they move away from politicising commodities [to] more generic things, like the environment, for example. The politicising of specific commodities was done years ago and I think wheat is one of the last ones to move away from that...

... Growers may well think that things are happening too fast, but quite simply I think that's a catch up because we've hung on to the old legacies for too long.⁷⁸

77. *ibid.*, p. 11.

78. Grains Policy Institute, *Submission No. 21*, 4 April 2008, p. 110.

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