

### ***Statutory Reviewing Function***

1. In order for the WEA to disclose of any of the information contained in the SLA under either clauses 3 or 4, it must be making this disclosure as part of its 'statutory reviewing function'. The WEA has a number of reviewing and reporting functions under the Act:

- to monitor AWB(I)'s performance in relation to the export of wheat and examine and report on the benefits to growers that result from that performance (s.5(1)(b));
- present the WEA's annual report and interim reports under the *Commonwealth Authorities and Companies Act 1997* to the Grains Council and report on the WEA's operations for the period to which those reports relate (s.15(1) and (2));
- report on the WEA's operations to other meetings of the Grains Council at least once every 6 months (s.15(3));
- by 2004, conduct a review and report to the Minister on:
  - the export arrangements under the Act as they relate to AWB(I);
  - consultations between the WEA and AWB(I) in relation to the granting of export consents by the WEA; and
  - granting or withholding of approval by AWB(I) to the grant of those export consents by the WEA (s.57).

2. Of these functions, compiling the report on AWB(I)'s Business Structure and Environment seems most likely to come within the WEA's function of monitoring AWB(I)'s performance in relation to the export of wheat under s.5 of the Act. The WEA wants to show the report to a broader audience than the Grains Council so s.15 is not sufficient to authorise disclosure and at this stage the WEA is not reporting to the Minister under s.57(7).

3. It is important therefore to ascertain the scope of the WEA's obligation to 'monitor AWB(I)'s performance in relation to the export of wheat' under s.5(1). As the provision is expressed in general terms, it is useful to look at the purpose and object underlying the Act (see also s.15AA of the *Acts Interpretation Act 1901*). The Wheat Marketing Legislation Bill 1998 (the Bill) effectively gave AWB(I) a statutory monopoly over the export of wheat. At the same time the WEA was set up as an independent body to approve export applications (other than from AWB(I)) and to monitor the performance of AWB(I).

4. At a number of points in the final version of the Explanatory Memorandum (EM) to the Bill, the importance of monitoring AWB(I)'s use of its statutory

monopoly is emphasised. For example in the Regulation Impact Statement, paragraph 24 states:

Accountability is important because the monopoly is a gift of Government. It will be provided by Parliament through legislation on behalf of the community as a whole. Consequently the community should be satisfied, through Parliament, that the monopoly is used as intended.

At several other points in the EM there are references to the role of the WEA in monitoring the AWB(I)'s monopoly (see paragraphs 33 and 74). Accordingly, in keeping with the purpose of the legislation, the monitoring and reporting function in s.5(1)(b) should be broadly interpreted.

5. The wording of s.5(1)(b) could, on one view, suggest that the WEA is only to report to growers on AWB(I)'s performance. However, parts of the EM suggest that the subsection was intended to be interpreted more broadly than this. For example, paragraph 34 provides:

The WEA would monitor, examine and report on the benefits accruing to growers from the performance of the pool subsidiary's use of its wheat export rights to ensure that the company was using them in accordance with the intentions of Parliament.

The use of 'accruing to growers' here and also references to accountability for the statutory monopoly suggest that the WEA must report not only to growers but to the public more generally.

6. However, the final sentence of the notes to subsection 5(1) in the EM suggests a limitation on the role of the WEA in monitoring the performance of AWB(I). Paragraph 74 of the EM relevantly states:

The new subsection 5(1) provides that the WEA's functions will be to control the export of wheat from Australia, to monitor export performance of Company B [AWB(I)] including to examine and report on the benefits to growers of the performance of Company B exporting wheat. This is a consequence of that company having the automatic right to export wheat under the proposed new subsection 57(1A) of the [Act]... Its monitoring role will not involve overlooking the financial and marketing operations of Company B which are the responsibility of Company B's directors.

7. To the extent this suggests that all of AWB(I)'s financial and marketing operations are exempt from the WEA's monitoring role, we first note that it is difficult to see why these particular operations would be excluded. Obviously, the company's financial reporting requirements under the Corporations Law are the responsibility of its directors. However, there seems no reason to distinguish between its marketing operations and its other functions, as the company directors presumably have a role in overseeing all of AWB(I)'s operations.

8. Second, if a very broad interpretation is taken of the financial and marketing operations of AWB(I), then little of significance would remain within the WEA's monitoring functions. Arguably, it could mean that the WEA should not monitor, for example, the prices obtained by AWB(I) for wheat exported by it, its efforts to find and exploit new export markets, or the return that it obtains for growers on wheat exported by it. Such an interpretation of the WEA's role under s.5(1) seems inconsistent with the purpose of the Act as expressed elsewhere in the EM. Also, the clear implication from the words 'the benefits to growers that result from that performance' is that the financial implications of AWB(I)'s performance are to be considered and evaluated by the WEA on behalf of growers (and also the broader community).

9. It may be that the EM reflects that, for example, a detailed analysis of AWB(I)'s financial performance is not intended to be part of the WEA's functions under s.5(1). However, in our view a very narrow interpretation of the WEA's role in monitoring AWB(I)'s performance of its export functions should not be adopted.