

2010 – 2011 – 2012

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

WHEAT EXPORT MARKETING AMENDMENT BILL 2012

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Agriculture, Fisheries and Forestry,
Senator the Hon. Joseph Ludwig)

WHEAT EXPORT MARKETING AMENDMENT BILL 2012

OUTLINE

This Bill implements the Australian Government's response to the Productivity Commission review of wheat export marketing arrangements.

The transition to a fully deregulated bulk wheat export market began on 1 July 2008 with the abolition of the single desk wheat marketing arrangements. The *Wheat Export Marketing Act 2008* (the Act) established a system for regulating the export of bulk wheat, where exporters of bulk wheat must be accredited under the Wheat Export Accreditation Scheme (the Scheme), administered by Wheat Exports Australia (WEA) and primarily funded from the Wheat Export Charge (WEC).

The Productivity Commission report on its inquiry into wheat export marketing arrangements was tabled in Parliament on 28 October 2010. This Bill will implement the Commission's recommendations relating to the Act but under a staged approach to ensure the full benefits of the 2008 reforms are realised.

It will abolish the Scheme and the WEC on 30 September 2012, and wind-up WEA on 31 December 2012. This will give WEA time to complete outstanding tasks such as its final Annual Report and the 2012/13 Report for Growers. The requirement for providers of grain port terminal services to pass the access test as a condition for exporting bulk wheat will be retained until 30 September 2014. The access test will then be abolished, on the condition that a non-prescribed voluntary industry code of conduct covering access to grain export terminals is in place.

If such a code is approved, the market will move to full deregulation from 1 October 2014. All aspects of the industry will be subject to general competition law administered by the Australian Competition and Consumer Commission (ACCC) and complemented by the code. If a code is not approved, the access test will continue.

This Bill will bring the bulk wheat export market into line with other agricultural commodity markets and promote further competition in the wheat industry leading to increased productivity and profitability. It will mean that more buyers will be competing for wheat, helping growers to get prices that reflect market value. The Bill is expected to drive further marketing innovation and improve the services that marketers provide to secure supplies of wheat. It is expected that the industry will also benefit from the removal of the costs associated with bulk wheat export market regulation.

The *Wheat Export Marketing Amendment Bill 2012* must be read in conjunction with other legislation controlling trade and commerce, such as Part IV of the *Competition and Consumer Act 2010*. The legislation amended or repealed by this Bill is in no way an exhaustive list of legislation assisting in the facilitation, control and operation of the Australian wheat export industry.

FINANCIAL IMPACT STATEMENT

There are expected to be no significant resource implications from a budget perspective.

HUMAN RIGHTS STATEMENT

This Bill amends the *Wheat Export Marketing Act 2008* to give effect to the government response to the Productivity Commission inquiry into wheat export marketing arrangements. The Bill also makes minor amendments to the *Criminal Code Act 1995* which do not make any substantive changes to the law.

This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. It has been identified that this Bill may engage the following human rights:

Article 14 of the *International Covenant on Civil and Political Rights (ICCPR)*: The Right to a Fair Trial and Right to a Fair Hearing.

- The Bill contains civil penalties which are intended to deter and punish those who do not comply with certain provisions, encouraging maximum compliance by affected parties.
- This Bill and existing provisions in the *Wheat Export Marketing Act 2008* will provide for fair trial rights to apply to proceedings brought under the provisions of this Bill.
 - Section 76 of the *Wheat Export Marketing Act 2008* ensures that any proceedings brought under the civil penalty provisions in the Bill are heard by the Federal Court of Australia and in determining the amount of pecuniary penalty, the Court must have regard to a list of relevant matters.
 - Under item 59 of Schedule 1 of the Bill, the penalties attached to each contravention are limited to a particular quantity of penalty units. These maximum penalties vary between penalty provisions depending on the seriousness of the offence. There is also a separate scale of reduced penalties where a body corporate is the subject of a civil penalty order as opposed to a person other than a body corporate.

Article 17 of the *International Covenant on Civil and Political Rights*: The Right to Privacy.

- Article 17 of the ICCPR provides that no one shall be subjected to arbitrary or unlawful interference with their privacy. Collecting, using, storing and sharing personal information, including its release without a person's knowledge or consent, all amount to interferences with the right to privacy.
- Item 34 of Schedule 1 of the Bill provides the Secretary of the Department of Agriculture, Fisheries and Forestry with the power to obtain information from a person in regards to certain issues identified in the Bill.
 - The release of this information is necessary to ensure that providers of port terminal services provide fair and transparent access to their facilities to other bulk wheat exporters. The Bill restricts the circumstances in which

this information can be obtained and it does not purport to exclude the *Privacy Act 1988*.

**Article 6 of the *International Covenant on Economic, Social and Cultural Rights*:
The Right to Work and Rights at Work.**

- It could be argued that WEA staff will be affected by the Bill indirectly through the abolition of WEA. However, the Bill will not displace any of their entitlements at law as WEA's staff will be treated in accordance with relevant employment legislation including the *Public Service Act 1999*.

Conclusion

- The Bill is compatible with human rights because to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate.

REGULATION IMPACT STATEMENT

The Office of Best Practice Regulation (OBPR) approved the Regulation Impact Statement (RIS) for the Government Response to the Productivity Commission Review of Wheat Export Marketing Arrangements on 15 August 2011 (Reference 120707). The RIS is available on the OBPR website at <http://ris.finance.gov.au/>.

WHEAT EXPORT MARKETING AMENDMENT BILL 2012

NOTES ON CLAUSES

Section 1: Short title

This section is a formal provision specifying the short title of this Bill.

Section 2: Commencement

This section provides that the Bill commences upon Royal Assent with the following exceptions:

- Schedule 1 will commence on 1 October 2012. This is accordance with the government response which proposes the abolition of the Wheat Export Accreditation Scheme (the Scheme) and the Wheat Export Charge on 30 September 2012.
- Schedule 2 which abolishes WEA will commence on 1 January 2013. Whilst the Scheme will cease on 30 September 2012, WEA will continue in operation until 31 December 2012 to complete outstanding tasks such as preparation of its final Annual Report and the Report for Growers.
- Schedule 3 will commence on 1 October 2014. This allows the access test to continue to operate until 1 October 2014 to provide industry with sufficient time to adjust to the new trading environment. However, these provisions will not commence at all unless the Minister has, before 1 October 2014, published a notice in the *Gazette*, under subsection 12(1) of the *Wheat Export Marketing Act 2008* as amended by this Bill on 1 October 2012, notifying approval of a code of conduct covering grain export terminal operators in accordance with the criteria contained in Division 4 of this Bill.

Section 3: Schedule(s)

This section is the formal enabling provision for the Schedules to the Bill, providing that each Act specified in a Schedule is amended in accordance with the applicable items of the Schedule. In this Bill, the Acts being amended are the *Wheat Export Marketing Act 2008* (the Act) and the *Criminal Code Act 1995*.

The section also provides that the other items of the Schedules have effect according to their terms. This is a standard enabling clause for transitional, savings and application items in amending legislation.

Schedule 1 – Amendments relating to the wheat export accreditation scheme

Part 1– Amendments

Wheat Export Marketing Act 2008

Item 1: Paragraph 3(a)

This item amends this paragraph to more accurately reflect the objectives and purposes of the Act after the abolition of WEA.

Item 2: Section 4

This item provides a simplified outline of the key elements of the Bill.

Items 3-27: Section 5

These items repeal those definitions in the Act that relate to the Scheme and are no longer required. It also amends the definition of the access test and continuous disclosure rules to reflect the abolition of the Scheme and WEA and the introduction of the new access test arrangements.

Item 28: Section 6

This item repeals Section 6 of the Act which defines when a person has been involved in a contravention as this concept only applies for the purposes of the Scheme.

Item 29: Part 2

This item repeals Part 2 of the Act, with the effect of abolishing the *Wheat Export Accreditation Scheme 2008* which, as a legislative instrument, automatically lapses when the enabling provisions are repealed. It substitutes the following Divisions which will retain an amended access test arrangement for port terminal service providers where the provider, or an associated entity of the provider, exports bulk wheat:

Part 2 – Access Test

Division 1 – Requirement to pass the access test

Section 7: Requirement to pass the access test

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. ‘Port terminal facility’ and ‘port terminal service’ are defined in section 5 of the Act.

From 1 October 2012, a provider of a port terminal service must pass the access test if the provider, or an associated entity of the provider, exports bulk wheat. They will not be able to do so if the provider does not pass the access test. 'Associated entity' is defined in section 5 of the Act as having the same meaning as in the *Corporations Act 2001*.

Decisions on whether a bulk wheat exporter is required to satisfy the access test (currently made by WEA) will be made by the Department of Agriculture, Fisheries and Forestry.

The access test operates on the basis of a bulk wheat export occurring in certain circumstances; i.e. where a provider of a port terminal conducts the exportation or where an associated entity of that provider conducts the exportation - see subsection (1). However, for the benefit of other potential exporters it is necessary to require the provider to continuously comply with the access test between any exportation conducted by the provider or an associated entity of the provider. For that reason, subsection (2) requires the provider of a port terminal service to continuously comply with the access test for a period of 12 months from the time of an export referred to in subsection (1).

This means that the requirement for continuous compliance with the access test will only be interrupted in the unlikely event that there is a period of more than 12 months between any exports of bulk wheat by a provider of a port terminal service or an associated entity of the provider. This ensures that providers that are required to pass the access test will need to do so continuously from the time of their first export during the period from 1 October 2012 until 30 September 2014 if they want to export bulk wheat.

The requirement for continuous compliance (as opposed to compliance measured at the time of export) mitigates against the possibility of a provider, or an associated entity of that provider, changing their legal identity in order to avoid the access test applying to successive exports.

Subsection (2) works in conjunction with subsection 8(1) as inserted by the Bill.

Subsection (3) gives the Secretary of the Department of Agriculture, Fisheries and Forestry the power to exempt an export from this requirement, or exempt a provider of a port terminal service from the requirement to pass the access test, if he/she is satisfied there are special circumstances. In exercising this discretion the Secretary may have regard to such matters as the nature and duration and circumstances of the failure to pass the access test, any remedial action that has been taken since the failure, or if there is no connection between the exporter and the port terminal service provider who did not pass the access test.

Subsection (4) is included to assist readers, as the instrument is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*.

Section 8: Exports of wheat

This section deals with circumstances when the export of wheat is not permitted because there has been a failure to pass the access test.

Under subsection (1), a port terminal service provider, or an associated entity of the provider, must not export bulk wheat using a port terminal service if the provider (whether the exporter, the associated entity or another person) was required to pass the access test and has done so during the 12 month period prior to the date of export.

This subsection works in conjunction with subsection 7(2) as inserted by this Bill, by 'looking back' to require that there has not been a failure to have passed the access test within the previous 12 month period. The requirement for continuous compliance with the access test will only be interrupted in the unlikely event that there is a period of more than 12 months between any exports of bulk wheat by a provider of a port terminal service or an associated entity of the provider.

Subsection (2) gives the Secretary of the Department of Agriculture, Fisheries and Forestry the power to exempt an export from this requirement, or exempt a provider of a port terminal service from the requirement to pass the access test, if he/she is satisfied there are special circumstances. In exercising this discretion the Secretary may have regard to such matters as the nature and duration and circumstances of the failure to pass the access test, any remedial action that has been taken since the failure, or if there is no connection between the exporter and the port terminal service provider who did not pass the access test.

Subsection (3) provides that the access test only applies to bulk wheat exporters, and hence does not apply to the exports of wheat in bags or containers that are capable of holding not more than 50 tonnes of wheat. A person who wishes to rely on this subsection bears an evidential burden in relation to that matter under subsection (4).

Subsection (5) provides that a person must not aid, abet, counsel, procure, induce, be knowingly concerned with, be a party to or conspire with others to effect a contravention of subsection (1).

Subsection (6) allows for contraventions of subsections (1) and (5) to attract a civil penalty. This will be enforced by the Secretary of the Department of Agriculture, Fisheries and Forestry who will be able to apply for a civil penalty order in relation to a contravention of subsections (1) or (5) under item 60.

Subsection (7) is included to assist readers, as the instrument is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*.

Division 2 – Access test

Section 9: Access test

This section sets out the criteria that a person must meet in order to pass the access test. It provides for two methods of passing the access test.

Subsection (1) provides that to pass the access test, at a particular time, a person must have a formal access undertaking, accepted by the ACCC under Division 6, Part IIIA of the *Competition and Consumer Act 2010* which relates to access to the port terminal services for the export of wheat. The person must also comply with the continuous disclosure rules in subsection (4). The ACCC will monitor compliance

with the continuous disclosure rules and notify the Department of Agriculture, Fisheries and Forestry of any breaches.

This subsection will allow those persons that already have access undertakings in place with the ACCC under the current arrangements to pass the access test.

Subsection (2) clarifies that the ACCC's decision to accept an access undertaking is sufficient to pass the access test. This contrasts with section 44ZZBA(1) of the *Competition and Consumer Act 2010* which provides for appeal processes before an undertaking comes into force. This does not prevent appeals against the ACCC's decisions from taking place, but means that the access test is passed once the ACCC approves an undertaking. This has been done to eliminate the possibility of a third party delaying a port terminal service provider from passing the access test through vexatious use of the legal process. A port terminal service provider should not be disadvantaged by such appeals if it has acted in good faith and provided an access undertaking that is satisfactory to the ACCC. This subsection does not prevent the Australian Competition Tribunal from amending the access undertaking on appeal.

The access test may also be satisfied under subsection (3) if a state or territory access regime in relation to port access has been declared to be effective under the *Competition and Consumer Act 2010*. However, the Department of Agriculture, Fisheries and Forestry must be satisfied that the regime declared to be effective covers the full port terminal facility. The provider must also comply with the continuous disclosure rules, listed in subsection (4), in relation to the port terminal service. If this circumstance arose, as in subsection 9(1) the ACCC would monitor compliance with the continuous disclosure rules and notify the Department of Agriculture, Fisheries and Forestry of any breaches.

Subsection (4) lists the continuous disclosure rules that are referred to in subsections (1) and (3). Under these rules a person must publish their policies and procedures for managing demand for the port terminal service on their website. They must also publish on their website, a loading statement setting out the information stated in subsections (4)(b) and (c) and this should be updated each business day. The loading statement must also be provided to the ACCC, each business day, in the manner and form approved by the ACCC.

Subsection (5) clarifies that the access test arrangement only applies in relation to bulk wheat exports.

Division 3 – Application of the Customs Act 1901

Section 10: Application of the Customs Act 1901

This section provides that the Secretary of the Department of Agriculture, Fisheries and Forestry can apply in writing to the Australian Customs and Border Protection Service (Customs) if he/she wishes for section 229 of the *Customs Act 1901* to apply to an exportation. Goods under the *Customs Act 1901* provisions are described as forfeited to the Crown because they are prohibited imports within the meaning of that Act. This provision enables enforcement agencies to take immediate action to stop bulk wheat exports that are in contravention of the access test under section 8 of the Act as amended by this Bill.

Regulation 9AAA of the Customs (Prohibited Exports) Regulations 1958, which prohibited exports of wheat in bulk except by an accredited exporter, will be repealed.

Section 11: Delegation by the Secretary

Subsection (1) allows for the Secretary of the Department of Agriculture, Fisheries and Forestry to delegate, by writing, his/her powers or functions under this Bill to a Senior Executive Service (SES) employee or an acting SES employee in the Department of Agriculture, Fisheries and Forestry. This delegation provision allows the Commonwealth to carry out the powers and functions under this Bill at an appropriate level of authority and in a cost effective manner.

Subsection (2) provides that when carrying out the powers or functions of the Secretary under this Bill, the delegate must comply with any directions of the Secretary. Any direction or delegation given in writing by the Secretary is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*.

Division 4 – Code of conduct

Section 12: Minister to approve code of conduct

The purpose of this section is to allow for the access test requirements contained in Division 2 to be abolished on 30 September 2014, if a non-prescribed voluntary code of conduct, covering grain export port terminal operators, is implemented by that date.

If a code is not in place, the access test requirements will continue and those grain export port terminal operators that require access undertakings with the ACCC will need to ensure they are in place.

The code of conduct must include the key elements of existing access undertakings, such as publication of key information including, but not limited to, that required by the continuous disclosure rules, and must be consistent with ACCC guidelines for developing voluntary codes of conduct. It must also be consistent with the operation of an efficient and profitable bulk wheat export marketing industry that supports the competitiveness of all sectors through the supply chain.

Subsection (3) is included to assist readers. It simply highlights that a notice under subsection (1) does not fall under the definition of ‘legislative instrument’ under section 5 of the *Legislative Instruments Act 2003*. It is in no way purporting to exempt the section from the *Legislative Instruments Act 2003*.

Division 5 – Transitional reports

Section 13: Export reports and compliance reports

Subsections (1) and (2) require a person who was an accredited wheat exporter immediately before the commencement of this item, to provide WEA with a written report on its operations for the 2011-12 marketing year in relation to its exports of bulk wheat. This report must be provided by 30 October 2012.

The report is primarily required to provide transparency to growers and WEA regarding the specification, destination and quantities of bulk wheat exported. It will assist WEA complete its reporting requirements to growers.

The term ‘specification’ used in subsection (2) has the meaning generally accepted in the industry.

Subsection (3) clarifies that the report only applies to bulk wheat exports.

Subsection (4) requires a person who was an accredited exporter, immediately before the commencement of this item, to provide WEA with a report on its compliance with: its accreditation conditions; applicable Australian and foreign laws; and applicable United Nations sanctions provisions. The report must relate to the 2011-12 marketing year and must be provided by 30 October 2012.

Subsection (5) provides that a person must not aid, abet, counsel, procure, induce, be knowingly concerned with, be a party to or conspire with others to effect a contravention of subsections (2) or (4).

Under subsection (6) contraventions of subsections (2), (4) and (5) attract a civil penalty. The maximum penalty attached to a contravention of this section is \$110 000 for a body corporate. This section would not apply to persons other than a body corporate. Details of civil penalties are set out in Part 8 of the Act.

Subsection (7) clarifies that the terms used in this item will have the same meanings as in the *Wheat Export Marketing Act 2008*, as in force immediately before the commencement of this item.

Section 14: Post-cancellation reports

This section provides that where WEA cancels an accreditation on or after 1 September 2012, the exporter in question must provide WEA with export and compliance reports similar to those required under section 13. These reports are required in relation to the period from the start of the 2011-12 marketing year to the date of notification of the cancellation. They must be provided within 30 days after the cancellation.

Subsection (3) provides that a person must not aid, abet, counsel, procure, induce, be knowingly concerned with, be a party to or conspire with others to effect a contravention of subsections (2).

Under subsection (4) contraventions of subsections (2) and (3) attract a civil penalty. The maximum penalty attached to a contravention of this section is \$110 000 for a body corporate. This section would not apply to persons other than a body corporate. Details of civil penalties are set out in Part 8 of the Act.

Subsection (5) clarifies that the terms used in this section will have the same meanings as in the *Wheat Export Marketing Act 2008*, as in force immediately before the commencement of this item.

Item 30: Transitional – access test

This item allows a person who passed the access test at a particular time under the existing arrangements in the *Wheat Export Marketing Act 2008*, to be taken to have passed the access test contained in this Bill at that particular time.

Item 31: Part 3 (heading)

This item repeals the existing heading ‘Part 3 – Information-gathering and audit powers’ and substitutes the heading ‘Part 3 – Information-gathering powers.’

Item 32: Division 1 of Part 3 (heading)

This item repeals the existing heading and substitutes the following ‘Division 1– Secretary may obtain information and documents.’

Item 33: Section 25 (heading)

This item repeals the current heading of this section and substitutes: ‘25 Secretary may obtain information and documents’.

Item 34: Subsection 25(1)

This item provides the Secretary of the Department of Agriculture, Fisheries and Forestry, with the power to obtain information from a person that is relevant to determining whether that person is required to pass the access test in relation to a particular port terminal service. The department will perform this function following the abolition of WEA. The Secretary may also obtain information from a person that is relevant to determining whether that person passed the access test in relation to a particular port terminal service at a particular time as the department will also have a role in enforcing non-compliance with the access test.

Items 35-38: Subsection 25(2)

These items provide that a request by the Secretary under subsection 25(2) must be made by a written notice which specifies how the person is to give the information and within what time frame. It also clarifies that a person is not required to make a copy of a document required under this section. The Secretary may, however, make copies of such document under subsection 27, as inserted by this Bill. These items allow the Secretary to obtain information relevant to administration of the access test.

Item 39: Subsection 25(2) (note)

This item repeals the note under this section, as it relates to the accreditation scheme and is no longer relevant to the interpretation of this section.

Item 40: Subsection 25(4)

Subsection 25(4) is repealed as it refers to sections that will be repealed by this Bill.

Item 41: Subsection 25(5)

This item provides that this section applies to both companies and individuals. This is because this Bill will remove the prohibition on individuals exporting wheat.

Item 42: Section 26

This item repeals the section in the Act relating to compensation for persons who are required to make copies of documents under section 25. While a person may still be

required to provide information under section 25, he/she will not be responsible for making copies.

Item 43: Subsection 27(1)

This item provides that the Secretary may inspect documents and make copies of documents provided under section 25 and retain those copies.

Item 44: Paragraph 27(1)(a)

This item clarifies that a copy will not need to be produced under section 25.

Item 45: Subsection 27(2)

This item repeals the subsection allowing WEA to retain possession of a copy of a document to reflect that copies of documents are no longer required. The Secretary may, however, make and retain copies of documents provided under section 25.

Item 46: Section 28 (heading)

This item amends the heading for Section 28 from 'WEA may retain documents' to 'Secretary may retain documents'. This reflects the department's new functions relating to administration of the access test.

Item 47: Subsection 28(1)

This item allows the Secretary to retain possession of a document produced under section 25.

Item 48: Subsections 28(2) and (4)

This item provides that if the Secretary retains a document produced under section 25, he/she must provide a certified copy of the document to the person who is otherwise entitled to it, or the Secretary must permit the person to inspect and make copies of, or take extracts from, the document.

Item 49: Divisions 2 and 3 of Part 3

This item repeals those divisions of the Act that relate to WEA's other information-gathering powers and external audits of accredited wheat exporters. These will not be required once the Scheme is abolished.

The item also inserts a new Division 2 into the Act which provides for the application of section 155 of the *Competition and Consumer Act 2010* to section 9(1)(c) and 9(3)(b), as inserted by this Bill. This provides the ACCC with the power to obtain information and documents to enable it to monitor a person's compliance with the continuous disclosure rules.

Item 50: Subsection 57(2)

This item removes, from the functions and powers that WEA may delegate, the formulation of the Wheat Export Accreditation Scheme and the power to set fees to accompany applications for reconsideration of decisions. This is because the Scheme will be abolished by this Bill and WEA will not be reviewing decisions under the scheme (see item 54).

Item 51: Paragraph 59(b)

This item provides that application fees for accreditation under the Wheat Export Accreditation Scheme will not be credited to the WEA Special Account. This is because the Scheme will be abolished by this Bill.

Item 52: Paragraph 60(c)

This item will correct the punctuation in this paragraph after the removal of paragraph 60(d) and (e).

Item 53: Paragraphs 60(d) and (e)

This item removes from the purposes of WEA's special account, the paying of compensation under section 26 for providing copies of requested information as these are no longer required. It also removes the requirement to reimburse an accredited wheat exporter for reasonable expenses in complying with a requirement for an external audit as this provision will not be required once the Wheat Export Accreditation Scheme is abolished.

Item 54: Section 67 to 72

This item repeals sections allowing for decisions of WEA under the Wheat Export Accreditation Scheme to be reviewed by the Administrative Appeals Tribunal following a process of internal reconsideration by WEA. As this Bill abolishes the Wheat Export Accreditation Scheme, and it is not being replaced, there will be no need to review decisions relating to the scheme, as nothing would be achieved by varying or revoking a decision relating to the abolished scheme. Item 31 in Schedule 2 of this Bill deals with the situation where there may be proceedings pending a court or tribunal immediately before WEA is abolished.

The item inserts a new section 72 which provides that persons, whose interests are affected by a decision of the Secretary of the Department of Agriculture, Fisheries and Forestry under subsection 7(4) or subsection 8(2), to be able to apply to the Administrative Appeals Tribunal for review of those decisions. It is envisaged that a person who feels that their interests have been affected by a decision of the Secretary, would in the first instance alert the Secretary who would undertake a process of internal reconsideration of that decision. If this process failed to reach a resolution, then a person would be able to apply to the Tribunal for review of the original decision.

Items 55-58: Subparagraph 73(a)

These items amend Paragraph 73 which deals with the protection of confidential information. It provides that information that was given to WEA under certain sections of the Act, as in force immediately before the commencement of this item, will still be classified as protected confidential information.

Item 59: Subsections 76(4) and (5)

This item amends subsections 76(4) and (5), which set out separate maximum penalties for the contravention of each civil penalty provision in the Act by a body corporate and a person other than a body corporate. This removes references to provisions that will be repealed.

This item substitutes maximum penalties payable by a body corporate and a person other than a body corporate for contraventions of civil penalty provisions in this Bill.

The maximum penalties vary between penalty provisions depending on the seriousness of the offence and there is a separate scale of reduced penalties where a body corporate is the subject of a civil penalty order as opposed to a person other than a body corporate. This proposed approach to civil penalties is consistent with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.

Item 60: Subsection 77(1)

This item sets out who can apply for a civil penalty order in respect of contraventions of civil penalty provisions in this Bill. It sets out the provisions under which the department and WEA may apply for a civil penalty order. An application for a civil penalty order only requires action on behalf of the Secretary or WEA, rather than the Director of Public Prosecutions. The Director of Public Prosecutions will however have standing under subsection 6(1) of the *Director of Public Prosecutions Act 1983* to apply for a civil penalty order.

The Secretary will be able to apply for a civil penalty order in relation to a contravention of subsections 8(1) or (5) which prevents specific people from exporting wheat unless they have passed the access test. The Secretary will also be responsible for applications for civil penalty orders in relation to 25(5) or (6) where the Secretary may require the provision of information and documents from a person.

WEA will be able to apply for civil penalty orders in relation to contraventions of subsections 13(2), (4) or (5) and subsections 14(2) or (3) which relate to the supplying of export, compliance and post-cancellation reports by former accredited bulk wheat exporters.

Item 61: Paragraph 86(1)

This item removes references to provisions that will be repealed and substitutes the civil penalty provisions contained in this Bill. This has the effect that a person can have a civil penalty order made against them irrespective of their state of mind at the time of the contravention of a civil penalty provision in this Bill.

Item 62: Section 87

This item allows for the sharing of information, between the Department of Agriculture, Fisheries and Forestry, WEA, Customs and the ACCC, that is relevant to the determination of whether a person is required to pass the access test in relation to a particular port terminal service, and/or whether they have passed the access test in relation to a particular port terminal service at a particular time.

Part 2 – Consequential amendments

Criminal Code Act 1995

This Part makes minor consequential amendments to Division 136 of the *Criminal Code Act 1995* which relates to false or misleading statements in applications. These amendments are required as a result of the removal of the Scheme by this Bill.

Item 63: Subparagraph 136.1(1)(c)(iii)

This item removes “benefit; or”, and substitutes “benefit; and”. This corrects the punctuation in this subparagraph after removing subparagraph (iv) which includes reference to the scheme.

Item 64: Subparagraph 136.1(1)(c)(iv)

This item repeals the subparagraph which made it an offence to intentionally make a statement which is false or misleading in relation to an application for accreditation under the Scheme. There will be no new or continuing accreditations once the Scheme is abolished on 30 September 2012.

Item 65: Subparagraph 136.1(4)(c)(iii)

This item removes “benefit; or”, and substitutes “benefit; and”. This corrects the punctuation in this subparagraph after removing subparagraph (iv) which includes reference to the scheme.

Item 66: Subparagraph 136.1(4)(c)(iv)

This item repeals the subparagraph which made it an offence to recklessly make a statement which is false or misleading in relation to an application for accreditation under the Wheat Export Accreditation Scheme. There will be no new or continuing accreditations once the Scheme is abolished on 30 September 2012.

Item 67: Subparagraph 136.1(9)

This item removes the reference to the definition of Wheat Export Accreditation Scheme in the *Wheat Export Marketing Act 2008*. The Scheme will be abolished by this Bill on 30 September 2012.

Schedule 2 – Amendments relating to Wheat Exports Australia

Part 1 – Amendments

Wheat Export Marketing Act 2008

Items 1-10: Section 5

These items repeal those definitions relating to WEA that will no longer be necessary for the interpretation of this Bill after the abolition of WEA and the WEC.

Item 11: Division 5 of Part 2

This item repeals Division 5 of Part 2 of the Act, as amended by this Bill by Schedule 1, which relates to transitional reports. This function will no longer be required after 30 October 2012 as this is the final date by which exporters that were accredited under the Scheme in the 2011-12 marketing year, must submit their compliance and export reports.

Item 12: Part 4

This item repeals Part 4 of the Act which relates to investigations. There will be no new or continuing investigations once WEA is abolished on 31 December 2012. However, if when WEA is abolished, there are any proceedings pending in any court or tribunal to which WEA is a party, then the Commonwealth will be substituted for WEA as a party to those proceedings under Item 31.

Item 13: Part 5 (heading)

This item amends the heading of Part 5 as all provisions except that relating to the WEA Special Account will be repealed when WEA is abolished on 31 December 2012. At this time, 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. It also substitutes the following heading: Part 5 – Wheat Industry Special Account.

Item 14: Divisions 1 to 5 of Part 5

This item repeals those divisions of Part 5 of the Act which relate to the establishment, functions, powers and liabilities of WEA. WEA will continue in operation until 31 December 2012 to complete outstanding tasks such as preparation of its final Annual Report and the Report to Growers. It will then be abolished by the commencement of this Schedule on 1 January 2013. Any liabilities of WEA immediately before the commencement of this Schedule will become liabilities of the Commonwealth under Item 25 of this Schedule.

Item 15: Division 6 of Part 5

This item repeals Division 6 of Part 5 of the Act which relates to the Wheat Exports Australia Special Account. It substitutes a new Division 6 which provides for the WEA Special Account to be replaced by a new Wheat Industry Special Account on 1 January 2013 with all moneys transferred to the new account to be used for measures or programs to assist the wheat export industry, as determined by the

Minister. This excludes \$500 000 which was provided to WEA by the Department of Agriculture, Fisheries and Forestry in June 2010 on the basis that it would only be used if needed to meet a possible funding shortfall. As a shortfall did not eventuate, this amount will be returned to the Department of Agriculture, Fisheries and Forestry. The Wheat Export Charge which primarily funded the operations of WEA will be abolished on 30 September 2012 through amending or repealing Part 5 of Schedule 14 of the *Primary Industries (Customs) Charges Regulations 2000* and Part 2 of Schedule 24 of the *Primary Industries Levies and Charges Collection Regulations 1991*.

Item 16: Divisions 7 to 9 of Part 5

This item repeals divisions of Part 5 of the Act relating to WEA staff, the WEA Chair and WEA's planning and reporting obligations to reflect the abolition of WEA on 31 December 2012. WEA's staff will be treated in accordance with relevant employment legislation including the *Public Service Act 1999*.

Item 17: Part 7

This item repeals Part 7 of the Act which relates to the protection of confidential information. This Part will not be relevant after WEA is abolished, except as provided for in Item 35 of this Schedule which allows for these provisions to continue to apply in relation to protected confidential information, disclosed to, or obtained by, a person before the commencement of this item.

Item 18: Paragraph 76(4)(b)

This item corrects the punctuation in this paragraph after the removal of paragraph 76(4)(c) as amended by this Bill.

Item 19: Paragraph 76(4)(c)

This item repeals paragraph 76(4)(c) as amended under this Bill by Schedule 1, which relates to civil penalties for transitional reports.

Item 20: Subsection 77(1A)

This item repeals subsection 77(1A) of the Act as amended by this Bill in Schedule 1, which relates to who may apply for a civil penalty order, to reflect the abolition of WEA on 31 December 2012. This subsection allows WEA to apply for a civil penalty order in relation to the provision of export, compliance and post cancellation reports in the period between 1 October and 31 December 2012. The repeal of this subsection will not affect the Secretary's standing, or the Director of Public Prosecutions standing under subsection 6(1) of the *Director of Public Prosecutions Act 1983*, to apply for civil penalties in relation to contraventions of the remaining civil penalty provisions.

Item 21: Paragraphs 86(1)(b), (c) and (d)

This item removes references to Sections 12 and 13 (transitional reports) from these paragraphs.

Item 22: Paragraphs 87(1)(a), (2)(a) and (3)(a)

This item removes WEA from this paragraph as WEA will be abolished by this Schedule.

Part 2 – Transitional provisions

Division 1 – Preliminary

Item 23: Definitions

This item defines several terms used throughout this Part that are relevant to the interpretation of its provisions.

Division 2 – Transfer of assets and liabilities

Item 24: Vesting of assets of WEA

This item provides that when WEA is abolished, any of its assets immediately become assets of the Commonwealth.

Item 25: Vesting of liabilities of WEA

This item provides that when WEA is abolished, any of its liabilities will become liabilities of the Commonwealth.

Item 26: Certificates relating to vesting of land

This item provides a process for registration of the vesting of land, for use in the event that any land (including any interest in land) vests in the Commonwealth under this Division.

Sub-item (3) is included to assist readers. It simply highlights that a certificate made under sub-item (1) does not fall under the definition of ‘legislative instrument’ under section 5 of the *Legislative Instruments Act 2003*. It is in no way purporting to exempt the item from the *Legislative Instruments Act 2003*.

Item 27: Certificates for vesting of assets other than land

This item provides a process for registration of the vesting of an asset other than land, in the event that any such asset (the vesting of which is suitable for registration) vests in the Commonwealth under this Division.

Sub-item (3) is included to assist readers. It simply highlights that a certificate made under sub-item (1) does not fall under the definition of ‘legislative instrument’ under section 5 of the *Legislative Instruments Act 2003*. It is in no way purporting to exempt the item from the *Legislative Instruments Act 2003*.

Item 28: Exemption from stamp duty and other State or Territory taxes

This item is needed to ensure that State and Territory taxes such as stamp duty do not apply to the transfers of assets and liabilities that this Division would affect.

Sub-item (1) provides that no stamp duty or other tax is payable under the law of a State or Territory in respect of an exempt matter or anything connected with an exempt matter. The term ‘exempt matter’ is defined in sub-item (2) to mean the vesting of an asset or liability under this Division, or the operation of this Division (including regulations made for the purpose of this Part) in any other respect.

Under sub-item (3), the Minister would have the power to certify in writing that a specified matter is an exempt matter, or that a specified thing was connected with a specified exempt matter.

Sub-item (4) is included to assist readers. It simply highlights that a certificate made under subsection (3) does not fall under the definition of 'legislative instrument' under section 5 of the *Legislative Instruments Act 2003*. It is in no way purporting to exempt the item from the *Legislative Instruments Act 2003*.

Item 29: Certificates taken to be authentic

This item provides that a document that appears to be a certificate made under this Part is taken to be such a certificate and is taken to have been properly given, unless the contrary is established.

Division 3 – Transfer of other matters

Item 30: Transitional – acts of WEA to be attributed to the Commonwealth

This item provides that once WEA is abolished, anything done by or in relation to WEA has effect as if it had been done by, or in relation to, the Commonwealth.

Item 31: Transitional – substitution of the Commonwealth as a party in certain proceedings

This item provides that once WEA is abolished the Commonwealth will be substituted for WEA as a party to any proceedings that were pending in court or to which WEA was a party.

This provision is designed to ensure that any existing litigation is not affected.

Item 32: Transitional – transfer of records to the Department

This item provides that any records or documents that were in WEA's possession or that relate to WEA will be transferred to the Department of Agriculture, Fisheries and Forestry once WEA is abolished.

Item 33: Transitional – transfer of Ombudsman investigations

This item provides that if before WEA is abolished, a complaint was made to the Ombudsman or an investigation was begun by the Ombudsman in relation to action taken by WEA, then the *Ombudsman Act 1976* applies after WEA is abolished as if that action had been taken by the Department of Agriculture, Fisheries and Forestry.

Item 34: References in certain instruments to Wheat Exports Australia

This item provides that if an instrument is in force before WEA is abolished and the instrument refers to WEA, then after WEA is abolished the instrument has effect as if the reference to WEA was a reference to the Commonwealth. However, the Minister may, by writing, determine that this does not apply in relation to a specified reference.

Sub-item (2) is included to assist readers. It simply highlights that a written determination under sub-item (2) is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*. It is in no way purporting to exempt the provision from the *Legislative Instruments Act 2003*.

Division 4 – Other Transitional matters

Item 35: Transitional – secrecy of information obtained under the *Wheat Export Marketing Act 2008*

The purpose of this item is to ensure that information that was disclosed to, or obtained by, a person before commencement will continue to be subject to the secrecy provisions in the *Wheat Export Marketing Act 2008* — despite those provisions being repealed by this Bill.

Item 36: Appropriation of money

This item provides that references to WEA shall mean references to the Department of Agriculture, Fisheries and Forestry for the purposes of the operation of any Act appropriating money for expenditure out of the Consolidated Revenue Fund.

It also provides that after commencement on 1 January 2013 the Minister must determine in writing the transfer of no more than \$500 000 from the Wheat Industry Special Account to the Department of Agriculture, Fisheries and Forestry under a departmental item. In making this determination the Minister will comply with any written directions given by the Finance Minister. This is because \$500 000 was provided to WEA by the department in June 2010 on the basis that it would only be used if needed to meet a possible funding shortfall. This did not eventuate.

Sub-item (6) is included to assist readers. It simply highlights that a written determination under sub-item (2) is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*. It is in no way purporting to exempt the provision from the *Legislative Instruments Act 2003*.

Item 37: Compensation for acquisition of property

This clause provides for compensation to be paid by the Commonwealth to a person from whom property is acquired on other than just terms as a result of the operation of this Part. If the Commonwealth and the person in question cannot agree on the amount of any such compensation to be paid, a court of competent jurisdiction may, on application by the person from whom the property was acquired, determine what is a reasonable amount of compensation for the acquisition of the property. ‘Acquisition of property’ and ‘just terms’ have the same meaning as in paragraph 51 (xxxi) of the Australian Constitution.

Item 38: Delegation by Minister

This item provides that the Minister may, by writing, delegate all or any of his or her powers and functions under this Part to either the Secretary, a SES, or an acting SES employee, in the Department of Agriculture, Fisheries and Forestry. It notes that in exercising powers of functions under a delegation, the delegate must comply with any directions of the Minister.

Item 39: Transitional – regulations

This item allows for the Governor-General to make regulations prescribing matters of a transitional nature relating to the amendments or repeals made by this Schedule.

Sub-item (2) allows for regulations made under this item to modify the provisions of this Part. This regulation-making power has been included to ensure that the

Governor-General has sufficient power to make regulations that will address any transitional issues relating to the amendments or repeals made by Schedule 2. There is a need for flexibility in this situation so that any unforeseen issues that occur as a result of the amendments or repeals made by Schedule 2, e.g. staffing matters, can be dealt with. The power is restricted to transitional issues and is envisaged to be of short duration given the operation of Schedule 3.

Schedule 3 – Repeal of the Wheat Export Marketing Act 2008

Wheat Export Marketing Act 2008

Item 1: The whole of the Act

This item repeals the entire *Wheat Export Marketing Act 2008*. It commences on 1 October 2014, providing that the Minister has, before that day, published a notice in the *Gazette* under subsection 12(1) of the *Wheat Export Marketing Act 2008* as amended by this Bill notifying approval of a code of conduct covering grain export terminal operators in accordance with the criteria contained in Division 4 of the Bill.