Chapter 3

Main provisions of the bills and key issues raised

Introduction

3.1 This chapter outlines the purpose and provisions of the proposed Wheat Export Marketing Bill 2008 and the proposed Wheat Export Marketing (Repeal and Consequential Amendments) Bill 2008. The chapter also examines the issues raised during this inquiry in relation to specific provisions of the bills.

Purpose of the bill

3.2 The main purpose of the Wheat Export Marketing Bill 2008 is to implement reforms to Australia's export wheat marketing arrangements. The bill will establish a statutory entity, Wheat Exports Australia (WEA), to regulate the export of bulk wheat from Australia though a wheat export accreditation scheme. If this bill is enacted it will create the need to amend other existing laws. These proposed amendments are detailed in the Wheat Export Marketing (Repeal and Consequential Amendments) Bill 2008.

3.3 The bills create WEA and give it the power to develop an accreditation scheme to assess the suitability of companies to export wheat. The proposed accreditation scheme includes measures to address fair access to port terminal facilities. Provision is made for accreditation of wheat exporters who own and control bulk handling facilities to be subject to an access test. The bills also give WEA the power to suspend and revoke accreditation and to place conditions on the accreditation granted to an exporter.

Main provisions of the Wheat Export Marketing Bill 2008

Part 2 – Wheat export accreditation scheme

Compliance with the wheat export accreditation scheme

3.4 **Clause 6** makes it an offence to export wheat in bulk without being accredited under the wheat export accreditation scheme. Export of wheat in bags and containers is not affected by the accreditation scheme and remains unregulated.

Formulation of the wheat export accreditation scheme

3.5 **Division 2** of the bill provides for the formulation of the wheat export accreditation scheme. **Clause 7** permits WEA to develop an accreditation scheme, by way of legislative instrument, to manage the accreditation of companies to export bulk wheat. **Clause 8** provides for the wheat export accreditation scheme to empower WEA to make a range of administrative decisions such as granting, suspending, cancelling or varying the conditions of accreditation. **Clause 9** provides for WEA to

charge an application fee for export accreditation and for the amount of the fee to be determined on a cost recovery basis.

3.6 **Clause 10** provides that an accreditation under the wheat export accreditation scheme is not transferable.

Eligibility for accreditation

3.7 **Clause 11** of the bill provides the eligibility criteria that WEA must apply in developing the accreditation scheme. To be eligible for accreditation a company must be registered as a company under Part 2A of the *Corporations Act 2001* and must be a trading corporation to which paragraph 51(xx) of the Constitution applies. WEA must also be satisfied that the company is a fit and proper company, having regard to specified criteria. These criteria include the financial strength and business record of the company, its risk management strategies, and its criminal record during the five year period prior to the application for accreditation. WEA must also take into account the company's record in meeting importing countries' sanitary and phytosanitary requirements.

3.8 If the applicant company, or a related body corporate, is the provider of a port terminal service as defined in **Clause 4** of the bill, WEA must be satisfied that the company passes the access test provided for in **Clause 20** of the bill.

Conditions of accreditation

3.9 **Division 4** of the Bill provides that accreditation is subject to certain conditions imposed under the accreditation scheme. **Clauses 13 to 15** of the bill require an accredited company to give WEA an annual export report, an annual report on its compliance with Australian and foreign laws, and to report on any changes to the company which may affect its accreditation. **Clause 16** provides that contravention of a condition of accreditation is an offence under the bill.

Cancellation of accreditation

3.10 **Clause 17** sets out the conditions under which WEA can cancel the accreditation of a company. These conditions are similar to those considered in the application process. However, while a company in administration is ineligible for accreditation, if an accredited company enters administration, WEA will have the discretion to determine whether accreditation should be terminated. This provision allows WEA to assess whether the best interests of growers may be served by allowing the administrator to trade out of the situation. **Clause 17(2)** also provides for the wheat export accreditation scheme to specify other grounds for discretionary cancellation.

Surrender of accreditation

3.11 **Clause 18** provides for an accredited wheat exporter to apply to WEA to surrender its accreditation. If a company surrenders its accreditation, it must have met

its obligations under **Clauses 13 and 14** and must still provide its final export and compliance reports to WEA.

Register of accredited wheat exporters

3.12 **Clause 19** provides that WEA must maintain a register of accredited wheat exporters and make it available on the internet, to allow growers to check whether a company seeking to buy their wheat is an accredited exporter.

Access test

3.13 **Clause 20** provides for port terminal access for all accredited exporters. It sets out conditions that exporters who also operate grain storage and handling facilities at ports have to agree to before being accredited. If the port terminals are not already covered by an effective access regime, as certified by the National Competition Council, the following arrangements apply:

- for the period until 1 October 2009, such exporters must agree to provide access to accredited exporters and publish the terms and conditions for access to other exporters on their internet site before they can be accredited; and
- for the period after 1 October 2009, such exporters must enter into an access undertaking to provide access to accredited exporters. The undertaking must be approved by the Australian Competition and Consumer Commission (ACCC).

3.14 The notes to the bill state that the reason for the different conditions before and after 1 October 2009 is that it is not possible for the ACCC to receive, process and approve all of the access undertakings in time for the 2008-2009 marketing season. Under the *Trade Practices Act 1974*, the ACCC must observe certain public processes in considering an access undertaking and these necessitate the additional time.

Information-gathering and audit powers

3.15 **Part 3** of the Bill sets out WEA's information-gathering and auditing powers, which are generally consistent with the powers currently available to the Export Wheat Commission under the current *Wheat Marketing Act 1989*.

3.16 **Clauses 21 to 24** provide that WEA may demand information and documents from accredited exporters that it considers relevant to the performance of its functions. Failure to provide information required is a breach of a mandatory condition of accreditation. **Clauses 25 and 26** provide that WEA may request information, documents and reports of a person where WEA believes there are reasonable grounds that the person has information or a document that is relevant to WEA's powers or functions. **Clause 27** will provide WEA with the additional power to require an external audit of accredited companies.

3.17 **Clauses 29 and 30** of the bill provide for the minister to direct WEA to investigate and report on matters relating to any of its other functions, including the operation of the wheat export accreditation scheme. The same power is held under the existing *Wheat Marketing Act 1989*.

Establishment of Wheat Export Australia

3.18 **Part 5** of the bill provides for the establishment, functions, powers and liabilities of WEA. **Division 2** provides for WEA's constitution and for the membership of WEA. **Clause 37** provides for the minister to appoint between three and six part-time WEA members, having regard to the relevant eligibility criteria.

Planning and reporting obligations

3.19 **Division 8** sets out the planning and reporting obligations of WEA. **Clause 62** provides for WEA to prepare and publish a report for growers each marketing year in relation to the operation of the wheat export accreditation scheme during that year.

Review of decisions

3.20 **Part 6** provides for the process though which applicants may appeal decisions made by WEA. **Clause 66** provides for a person affected by such a decision to apply to WEA to reconsider the decision. **Clauses 67 and 68** provide for the process of reconsideration of a decision by WEA. **Clause 69** provides for review by the Administrative Appeals Tribunal.

Main provisions of the Wheat Export Marketing (Repeal and Consequential Amendments) Bill 2008

3.21 This bill provides for the Repeal of the *Wheat Marketing Act 1989* and for consequential amendments to the *Criminal Code Act 1995* (with regard to false statements), the *Customs (Prohibited Exports) Regulations 1958* (to amend the current prohibition on companies other than AWBI to export bulk wheat). The bill also amends the:

- *Financial Management and Accountability Regulations 1997;*
- *Freedom of Information Act 1982;*
- *Primary Industries and Energy Research and Development Act 1989;* and
- *Primary Industries Levies and Charges Collection Act 1991.*

3.22 Provisions under **Schedule 3** allow for the transition of the Export Wheat Commission (EWC) to WEA, including the transfer of funds, the termination of EWC members and the finalisation of the EWC's last annual report. **Schedule 3, Clause 3** provides that the EWC members will not be transferred to WEA at the time of transition. However, **Clause 3(3)** provides that neither this bill nor the Wheat Export Marketing Bill 2008 prevents an EWC member from being appointed as a member of

WEA. The notes to the bill state that permanent staff of the EWC will be transferred to WEA.

3.23 **Clause 7 of Schedule 3** provides for the EWC to begin developing the accreditation scheme before the *Wheat Export Marketing Act 2008* comes into force.

3.24 **Clause 8** will allow for AWB (International) Ltd (AWBI) to export wheat from the national pool until 30 September 2008, in order to prevent delays in finalising the 2007-08 pool runs and the receipt of final payments by growers. Other companies that have valid consents issued by the EWC to export bulk wheat will be able to continue to export wheat under the conditions of their existing consent until 1 October 2008.

3.25 **Clause 9** provides for WEA to report AWBI's performance and activities to the minister and to growers following finalisation of the 2007-2008 pool.

3.26 **Clause 10** provides that any investigation that the minister has directed, prior to 1 July 2008, will be continued and reported on, as necessary, by WEA.

Comments in relation to the Wheat Export Marketing Bill 2008

3.27 A wide range of views were expressed in relation to the changes embodied in the bill. The committee noted some general support for key elements of the bill; in particular, the creation of a contestable Australian wheat export market and provisions to ensure equitable access to key infrastructure at ports. The committee also received many suggestions for amendments to the bill and these are discussed below.[1]

Objectives of the Bill

3.28 A number of submitters suggested that the bill should contain a clearer and expanded set of objectives. In particular, the Grains Policy Institute (GPI)[2] would like to see 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.[3]

3.29 The Australian Grain Exporters Association (AGEA) also considers that WEA, growers and the wheat industry would be better served if the bill contained clear direction for WEA in relation to the aims of the scheme and what it has been established to achieve. The AGEA is concerned that, in its present form, the bill provides WEA with considerable discretionary powers in relation to the establishment and administration of the accreditation scheme. The AGEA emphasised the need for WEA, and the accreditation scheme, to be responsive to the changing needs of

1 Submission 28, Grain Growers Association, pp 26-27.

2 The Grains Policy Institute is a subsidiary of GrainCorp Operations Ltd and is funded by GrainCorp and the CBH Group.

3 Submission 21, Grains Policy Institute, p. 4.

growers and the broader industry, particularly during the period of transition from a regulated to a contestable market.[4]

3.30 PGA Western Graingrowers (PGA WG) would also like to see the objectives of the bill made clear, either in the bill itself or in an explanatory memorandum, legislative instrument, or the Second Reading Speech. PGA WA suggested the bill be amended to include the following objectives:

> The purpose of the Wheat Export Marketing Act 2008 is to enhance choice, competition, transparency and security in the export of bulk wheat from Australia.
>
> - Choice: to enable growers to sell to a range of accredited exporters.
> - Competition: to enable accredited exporter [sic] to compete for grower's wheat, and export it with no restrictions on quantity or destination.
> - Transparency: to enable all commercial participants to access aggregate information, in order to maximise the benefits of choice and competition and increase grower confidence in the system.
> - Security: to protect the international reputation of Australia wheat [sic]; to maintain high commercial standards for Australian exporter [sic]; to diversify export risk across accredited exporters.[5]

3.31 The Department of Agriculture, Fisheries and Forestry told the committee that:

> The role of the regulator is to administer the export of bulk wheat from Australia through making, administering and enforcing the accreditation scheme. It does not have a charter written into the act that it is working for anyone in particular. It is there to administer the scheme for the bulk export of wheat.[6]

Committee view

3.32 The committee considers that it is desirable that the bill provides guidance to WEA through a clearly stated objective. This objective should reflect the policy principles which underpin the legislation. The committee accepts that the role of the regulator is to administer the scheme in the best interests of the bulk wheat industry as a whole. However, the committee recognises that not all participants in the industry are on an equal footing. The committee therefore suggests that consideration be given to framing the objective in such a way as to recognise the interests of growers in the provision of a competitive wheat export market, particularly with regard to the scrutiny of the prudential and governance arrangements of exporters.

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4 Submission 23, Australian Grain Exporters Association, pp 3-4.

5 Submission 29, PGA Western Graingrowers, p. 6.

6 Mr Russell Phillips, *Committee Hansard*, 27 March 2008, p. 23.

Definitions

3.33 The committee received a number of suggestions for amendments to definitions of terms used in the bill.

Designated sanitary or phytosanitary measures

3.34 **Clause 4** of the bill provides for ***designated sanitary or phytosanitary measures*** to mean measures 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 that the measure relates to the importation of barley, canola, lupins, oats or wheat. This definition is relevant to WEA's assessment of fitness and propriety (see **Clause 11(1)(c)(xiv)**).

3.35 AWB submitted 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. AWB expressed concern that it is common for issues with sanitary and phytosanitary measures to be used for political purposes or as negotiating tactics.[7]

3.36 The Emerald Group agreed with these proposed changes, but also suggested that some consideration should also be given in situations where a bulk handling company is a service provider for loading exports. The Emerald Group stated that in such circumstances the bulk handling company will be responsible for loading and testing exports, including meeting any designated sanitary or phytosanitary measures. The Emerald Group believes that provision should be made for bulk handling companies to accept contractual or legislative liability for failure to meet these requirements.[8]

Executive officer

3.37 CBH suggested that the definition of 'executive officer' be amended to specifically include 'non executive directors' regardless of the director's involvement in the company. CBH submitted that WEA should be satisfied with the suitability of all directors of an applicant in addition to the 'executive officers'.[9]

Export

3.38 AWB submitted that the term 'export' should also be defined. AWB suggested that the meaning used in the *Barley Exporting Act 2007* (SA) would provide an appropriate model for a definition.[10]

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7 Submission 2, AWB Limited, p. 2.

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

9 Submission 23, CBH Group, p. 1.

10 Submission 2, AWB Limited, p. 2.

Administrative decisions - Clause 8 and Clauses 17 and 18

3.39 Some submitters sought clarification of the range of powers available to the WEA in administering the export accreditation scheme. The Grain Growers Association submitted that the range of powers provided to WEA under **Clause 8** of the bill should be expanded to include the power to grant conditional accreditation.[11]

3.40 In particular, the Wheat Growers Association of Western Australia (WGA WA) and the Western Australian Farmers Federation (WAFF) also noted that it is not clear whether WEA will have the power under **Clause 17** to impose new conditions subsequent to an initial accreditation. Both organisations have submitted that there may be circumstances in which applying new conditions to an exporter's accreditation may deliver a more desirable outcome than cancellation of accreditation.[12]

3.41 AWB also raised concerns about the breadth of WEA's discretion to determine the grounds for cancellation. AWB considered that WEA's power in this regard is too broad and consequently AWB does not support WEA having the power to specify grounds for mandatory or discretionary cancellation of accreditation as provided for in **Clauses 17(1)(e) and 17(2)(b)**. AWB argued that the bill should be more prescriptive regarding matters to be taken into account by WEA when cancelling accreditation.

3.42 The WGA WA and the WAFF also raised concerns regarding the provision in **Clause 8** of the bill for renewal of accreditation. The WGA WA and the WAFF submitted that it is not clear if the accreditation scheme is to include a process of renewal. They stated that if the bill does envisage a process of renewal of accreditation, there must be a demonstrable benefit flowing from such a process to justify the costs associated with it.[13]

Committee view

3.43 The committee considers that consideration should be given to clarifying the range of powers available to WEA under the bill. In particular, the committee suggests that, in addition to the ability to vary a condition, there may be merit in providing WEA with the ability to impose new conditions on an accredited exporter. However, the committee considers that the bill should provide clear guidance to WEA regarding the exercise of such a power. The committee considers that the WEA should not impose new conditions on an accredited exporter without following due process.

3.44 The committee therefore favours a simple renewal process and considers that provision of clear direction regarding the renewal process within the bill should provide greater certainty to accredited exporters.

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11 Submission 28, Grain Growers Association, p. 8.

12 Submission 10, Wheat Growers Association Western Australia, p. 11.

13 Submission 10, Wheat Growers Association Western Australia, p. 11.

Eligibility for accreditation

3.45 The committee notes that there was broad support for the proposed accreditation process. Submitters observed that the proposed changes presented welcome opportunities to many in the industry. The Flour Millers' Council of Australia (FMCA) submitted that the changes were well received by its member companies. The FMCA said that:

> In the past member companies, especially those with milling activities in other countries have sought to export bulk Australian wheat for delivery to overseas affiliate companies. The provision of the new legislation would make this possible, within the criteria of accreditation for the purpose.[14]

3.46 The committee also received evidence in support of the accreditation of cooperatives and of individual growers who may wish to export the wheat they produce on their own properties. However, the bill provides that to be accredited as a wheat exporter, an applicant must be registered as a company under the *Corporations Act 2001* and must be a 'trading corporation' to which paragraph 51(xx) of the Australian Constitution applies.

3.47 The Grain Growers Association (GGA) submitted that such entities are common in agriculture and the grains industry and should be entitled to apply for export accreditation, subject to compliance with relevant corporations legislation.[15] The WGA WA and the WAFF expressed concern that the definition of an accredited wheat exporter does not appear to reflect the government's pre-election commitment that growers will be able to directly participate in bulk exports through grower co-operatives and/or alliances.[16]

3.48 The committee also received evidence that individual growers who wish to bulk export wheat grown on their own properties should be exempt from the accreditation requirements. It was argued that such growers should also be afforded equal access to storage, handling and ship loading facilities.[17]

3.49 PGA WG expressed concern that an overly literal reading of **Clause 11** might limit the opportunity for niche marketing opportunities.[18] PGA WG also submitted that the accreditation scheme should allow WEA to distinguish between an accredited exporter who is seeking to export millions of tonnes to multiple destinations, a niche marketer seeking to export to a single destination and a group of growers seeking to export their own wheat. PGA WG considers that the term 'fit and proper' needs to be read differently in each case given the differences in risk profile in each circumstance

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14 Submission 20, Flour Millers' Council of Australia, p. 2.

15 Submission 28, Grain Growers Association, p. 8.

16 Submission 10, Wheat Growers Association Inc, p. 2.

17 Submission 9, The Hon. Wilson Tuckey, MP.

18 Submission 29, PGA Western Graingrowers, p. 7.

and that WEA should have clear instruction on how to interpret its role in such circumstances.[19]

3.50 The Department of Agriculture, Fisheries and Forestry advised the committee that it was examining the possibility of allowing other entities to become accredited. Mr Russell Phillips said:

> At the moment, it has been drafted so that the accreditation process will be applicable to companies that are subject to Australian law. That has been done for two major reasons. The first is to ensure the enforceability of the act by making sure that whoever has accreditation has a presence in Australia and is subject to Australian law. The second is that, in drafting the legislation, we were relying on certain constitutional powers for the right of the Commonwealth government to make laws in this area. It has been drafted around two arms: the export powers arm and the corporations powers arm. Some of the other legal entities in Australia, such as cooperatives, are not actually under Commonwealth Corporations Law; they are under state laws.

3.51 Mr Phillips observed that the legislation would not necessarily prevent entities such as co-operatives from seeking accreditation, as many of them, such as Co-operative Bulk Handling Limited (CBH) have corporations as subsidiaries. Mr Phillips told the committee that CBH had applied for its permits to export wheat to Indonesia in the name of AgraCorp, one of its corporations.[20]

3.52 The committee also received evidence which suggested that growers were not averse to setting up trading companies. Mr Halbert told the committee:

> It's not something I have given a great deal of thought to at the moment, but I would have no trouble setting up a trading company and operating that way. It is a lot safer system. There are already a couple of groups, like the Mingenew-Irwin Group, which I am part of, which are setting up companies and intend to export wheat in some form. Yes, I would be quite prepared to be part of that. I do not have any great trouble with the requirement that it needs to be a company that undertakes that.[21]

Committee view

3.53 The committee notes that DAFF has sought advice on the ability to amend the legislation to permit non-incorporated bodies to seek accreditation. The committee considers that there are benefits for the industry in promoting a competitive environment. In particular, the committee considers it desirable that the accreditation scheme supports increased choice for growers in marketing their wheat. The committee believes that in the interests of maximising competition and choice it is

19 Submission 29, PGA Western Graingrowers, p. 6.

20 Mr Russell Phillips, *Committee Hansard*, 27 March 2008, p. 14.

21 Mr Halbert, *Committee Hansard*, 31 March 2008, p. 4.

desirable that provision to permit the accreditation of co-operatives be included in the legislation subject to constitutional validity.

Formulation of the wheat export accreditation scheme

3.54 The proposed wheat export accreditation scheme was the subject of a significant amount of evidence before the committee. In general, there appeared to be broad support for the scheme as currently drafted. However, some submitters saw benefits in a simpler accreditation scheme and cautioned that a heavy-handed accreditation scheme may have unintended consequences for the industry.[22] The committee heard that:

> The less bureaucratic that body can be kept, the less chance it has of becoming political and restrictive and full of red tape. I think there are just four or five key points that need to be met for people to get a licence to export. They need to be able to pay for it, they need not to be criminals and there needs to be a market. Anything outside that becomes restrictive.[23]
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> It would concern me personally if it became overly complicated. I just think the legislation needs to set out some clear, concise, minimal guidelines and let industry do the rest of it.[24]

3.55 AWB noted that the proposed scheme is based on the barley accreditation scheme introduced in South Australia in mid 2007.[25] AWB argued that the South Australian model fulfils all the good public policy principles of simplicity, transparency, neutrality and low cost and provides a positive model for the Wheat Export Marketing Bill.[26]

3.56 However, AWB, like a number of other submitters, considers that the proposed bill, as currently drafted, is significantly more detailed than the South Australian legislation and argued that there are risks and costs associated with this.

3.57 AWB believes that there is a lack of clarity about the role of WEA in the accreditation process, and questioned whether they are to simply administer the approval process or whether they are to have an ongoing investigative or monitoring role.

> One of the risks is that, the more specifics that are included in the legislation, the more compliance and technical breaches will occur. What is unclear at the moment in this legislation is which way it wants to go. … I think that at the moment there is uncertainty within the industry and within the regulator in particular about what exactly their role is, particularly

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22 See, for example, Mr Alick Osborne, AGEA, *Committee Hansard*, 27 March 2008, p. 42.

23 Mr Jeff Fordham, *Committee Hansard*, 31 March 2008, p. 2.

24 Mr Gary Peacock, *Committee Hansard*, 31 March 2008, p. 7.

25 Submission 2, AWB Limited, p. 1.

26 Mr Robert Hadler, *Committee Hansard*, 27 March p. 1.

> around things like the monitoring and investigative role – that is whether they are simply there to give initial approval and then, it is up to each individual company as to how they can conduct their business.[27]

3.58 The Department of Agriculture, Fisheries and Forestry advised the committee that while there are similarities between the South Australian legislation and the proposed bill, the two pieces of legislation have different intended outcomes. Mr Russell Phillips told the committee that:

> The South Australian system was set up as a stepping stone to full deregulation of the barley industry. It is being administered by the Essential Services Commission of South Australia with that in mind. The arrangements we have here are not seen as that. But, if you like, the essential basis of the test in both instances is similar – that is 'Is the person fit and proper to be accredited?' Our legislation spells out a few more of the things that must be included in that assessment process. There is scope in the South Australian legislation for it to be as fulsome – if not more fulsome – if they chose to administer their system in that way. Our draft legislation has the same fit-and-proper test and spells out in more detail some of the things that must be taken into account by the regulator.[28]

3.59 CBH does not consider that the accreditation process is too onerous. Mr David Woolfe told the committee:

> It is important in the legislation that only companies which are appropriately qualified, have the appropriate expertise, credentials and so on are accredited to become exporters. It should be open to all organisations which are able to prove those certain thresholds. By and large, we have no great problem with the accreditation criteria, save a couple of things we put in our submission.[29]

3.60 At the other end of the spectrum, the Institute of Public Affairs submitted that the bill should be amended to remove all of the criteria for accreditation and that **Clause 17** should be replaced with a requirement that WEA licenses applicants who meet the single criterion of being a corporation under Australian law.[30]

Fit and proper company – Clause 11(1)(c)

3.61 The committee received a range of evidence in relation to the considerations that WEA should have regard to in determining whether an applicant company is a fit and proper company. The committee received suggestions from a number of sources about the role that the accreditation criteria could play in providing a degree of protection to growers.

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27 Mr Sasha Grebe, *Committee Hansard*, 27 March 2008, p. 11.

28 Mr Russell Phillips, *Committee Hansard*, 27 March 2008, p. 14.

29 Mr David Woolfe, *Committee Hansard*, 31 March 2008, p. 12.

30 Submission 22, Institute of Public Affairs, p. 8.

3.62 The Grain Growers Association (GGA) noted that the accreditation process only provides for consideration of the components of an applicant company which relate directly to its bulk wheat export business. The GGA considers that it is likely that participants in the trade of wheat will also participate in other areas of the wheat market: domestic, container and bulk export. Participants may well also be involved in trading a wider range of commodities. The GGA suggested that, in the interests of procedural fairness, all elements of an applicant's business should be subject to the same level of scrutiny. The GGA argued that without this, the bill would offer no protection to growers from potential exposure to rogue elements in the non-bulk components of the grain trade.[31]

3.63 Mr Andrew McMillan, from the WAFF also expressed concern that without a robust accreditation process there were risks to the financial security of growers. He said:

> It is my view that bankers will have a lot of trouble coming to terms with who is a reliable marketer and who is not a reliable marketer given the very skinny accreditation process and the lack of call they will have on the financial security of these marketers.[32]

3.64 The Grains Council supported probity tests as a component of the accreditation process, however it cautioned against relying on the accreditation process to provide a guarantee of security of payment to growers. The Grains Council submitted that in communicating these changes to growers, the Government should highlight that the role of WEA does not remove the individual grower's responsibility to perform their own due diligence on the companies they are considering trading with.[33]

3.65 The CBH Group argued that **Clause 11** of the bill should be modified to require WEA be required to 'consider a company's record in supporting the management of quality and development of Australian wheat and other grains in order to enhance the quality and reputation of the Australian grain industry'.[34] CBH also expressed the view that any accredited wheat exporter should be obliged to provide evidence of their ability to appropriately meet their customers' needs in relation to the support for the production of quality Australian wheat. CBH further argued that the reputation of, and premium return on, bulk Australian wheat will only be maintained through the careful targeting of wheat varieties to customer's needs.[35]

3.66 The Australian Grain Exporters Association (AGEA) submitted that maintenance of National Agricultural Commodity Marketers Association (NACMA)

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31 Submission 28, Grain Growers Association, p. 7.

32 Mr Andrew McMillan, *Committee Hansard*, 31 March 2008, p. 36.

33 Submission 25, Grains Council of Australia, pp 18-19.

34 Submission 3, CBH Group, p. 2.

35 Submission 3, CBH Group, p. 2.

membership should be considered as an important assessment criteria under **Clause 11**. AGEA stated that NACMA requires each member to comply with the NACMA code of conduct. The code requirements include:

- compliance with laws and regulations relating to the merchandising, inspection, grading, weighing, storing and handling of grain and other commodities;
- maintenance and promotion of high ethical standards and procedures in the transaction of business;
- fair and honest dealings with the public and employees; and
- consideration to the best interests of the agricultural industry and the public in sales, purchases, promotional practices and other transactions.

3.67 AGEA also stated that failure to comply with the code results in the cancellation of NACMA membership.[36]

3.68 Other submitters expressed concern regarding the potential for WEA to duplicate regulation currently undertaken by other agencies. The Grains Policy Institute (GPI) expressed concern that there is significant scope within **Clause 11** for replication of regulation currently undertaken by ASIC. The GPI argued that this was particularly true of those criteria which go to corporate governance and prudential management of a corporation. The GPI also raised concerns that WEA will not have the requisite expertise to make judgements on such matters.[37] It was suggested that the potential for duplication could be avoided if provision were made within the legislation for consultation between WEA and ASIC on such matters.[38]

3.69 WAFF also expressed concern about WEA's capacity to administer the accreditation process successfully. Mr Andrew McMillan told the committee:

> The biggest issue that we have with the draft legislation, I guess, is the uncertainty surrounding the accreditation process. History has shown that the Wheat Export Authority and these bodies that are appointed to advise government, manage legislation or whatever are generally grossly underfunded, so where they are going to find the expertise and the resources physically to be able to do the required level of due diligence to satisfy growers is clearly not evident in the legislation.[39]

3.70 Mr Peter Woods told the committee, in the context of a question about consideration of a company's risk management, that there are areas within the

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36 Submission 23, Australian Grain Exporters Association, pp 6-7.

37 Submission 21, Grains Policy Institute, pp. 4-5.

38 Submission No. 21, Grains Policy Institute, p. 5.

39 Mr Andrew McMillan, *Committee Hansard*, 31 March 2008, p. 36.

accreditation process where it would be clearly better for WEA to seek the assistance of professionals to assess aspects of applications and advise the commissioners.[40]

3.71 In the opinion of WGA WA and WAFF, an exporter should not be able to include in their contract with a grower, an extension of prohibition clause 17 of the Grain and Feed Trade Association General Contract for Feedingstuffs in Bags or Bulk FOB Terms (no:119).

3.72 WGA WA and WAFF proposed that **Clause 11(1)(c)** should be amended to require WEA to have regard to:

- ASIC and Australian Prudential Regulation Authority (APRA) enforceable undertakings; and
- the contract terms and conditions on which the accredited wheat exporter purchases wheat for export.

3.73 The committee also heard that it is important that the accreditation process is fair to both large and small traders. Mr Kim Packer, of Tamma Grains told the committee that:

> … as a small trader at this point in time, I would like to think that we would be given some sort of consideration for a track record that we have had in the past, because we have been doing what we are doing since 1986.[41]

3.74 AWB expressed concern at the discretion provided to WEA to take account of other matters it considers relevant (**Clause 11(1)(c)(xvii)**) and to specify additional eligibility requirements (**Clause 11(1)(f)**). AWB argued that the basis for determining eligibility should be clear and objective. AWB suggested that the rules upon which accreditation is to be granted should be set by Parliament in the primary legislation and not in a legislative instrument created by the body charged with administering the scheme.[42]

3.75 AWB told the committee of its concerns about the interpretation of the bill in subsequent regulation. Mr Hadler told the committee:

> The legislation basically gives carte blanch to the current Export Wheat Commission to determine all regulations for how the system will work in practice around accreditation and revocation of accreditation.
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> …
>
> I think the intent of the bill is quite light touch but there is potential for that to be unwound through regulatory development.[43]

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40 Mr Peter Woods, *Committee Hansard*, p. 12.

41 Mr Kim Packer, *Committee Hansard,* pp 66-67.

42 Submission 2, AWB Limited, p. 1

43 Mr Robert Hadler, *Committee Hansard*, 27 March 2008, p. 6.

3.76 The Emerald Group submitted that it broadly agrees with AWB's comments on WEA's discretion to vary the accreditation scheme. However, the Emerald Group does not believe that the nature and conditions of the scheme need to be spelt out in legislation. In its submission, the Emerald Group stated that it:

> … is of the opinion that complete WEA discretion could be avoided using a legislative instrument where Ministerial approval and industry consultation must be sought before conditions to the scheme could be changed.[44]

3.77 The PGA Western Graingrowers group suggested that the bill should explicitly provide for WEA to demonstrate why an applicant has been denied accreditation.[45]

3.78 Mr Gary McGill, from PGA Western Graingrowers, expressed confidence that the proposed accreditation process is sufficiently rigorous to protect growers and guard against possible defaults of payment.[46]

Consultation in the formulation of the accreditation scheme

3.79 The committee was interested to understand the extent to which the industry would be consulted in the formulation of the accreditation scheme. The committee notes that the Wheat Export Marketing (Repeal and Consequential Amendments) Bill 2008 provides the Export Wheat Commission with the authority to undertake consultation with potentially affected parties to ensure that the accreditation scheme is ready by 1 July 2008. The notes to the bill also state that, under the *Legislative Instruments Act 2003*, consultation on the development of legislative instruments is mandatory.[47]

3.80 The committee notes that the Export Wheat Commission has commenced consultation on the accreditation process. Mr Woods told the committee that the EWC had begun meeting with a wide range of industry groups. He said:

> Over the course of the week we did meet with all the growers as far as grower groups are concerned. It is very difficult to meet with all growers as such. We had, from memory, 14 grower groups represented either by teleconference or in person on Monday last week. On Tuesday we had the bulk storage and handling providers, who also have ports and port access issues, so that we could have the ACCC there to discuss issues there. We also spoke with industry representatives, advisers and consultants, and then with Australian and multinational exporters.[48]

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44 Emerald Group Australia, Answers to questions on notice, 23 April 2008, p. 2.

45 Submission 29, PGA Western Graingrowers, p. 6.

46 Mr Gary McGill, *Committee Hansard*, 31 March 2008, p. 29.

47 Wheat Export Marketing bill 2008, Explanatory Notes, http:/www.daff.gov.au/agriculture-food/what-sugar-crops/wheat-marketing/legislation, p. 3.

48 Mr Peter Woods, *Committee Hansard*, 26 March 2008, pp 4-5.

Committee view

3.81 The committee agrees that the accreditation process should be clear and objective and that clear policy guidance as to its formulation and implementation should be set out in the primary legislation.

3.82 The committee notes the calls for a 'light touch' accreditation scheme based on clear criteria contained in the primary legislation on the one hand, and for a rigorous assessment process capable of weeding out 'rogue elements' on the other. The committee considers that it is critical that in formulating the scheme an appropriate balance is struck between these different interests. The committee considers that once the legislation has operated for a number of years it would be appropriate to review whether the regulatory balance is right or whether a lighter or heavier touch is needed.

Conditions of accreditation

Conditions of accreditation – Clause 12

3.83 The Grains Policy Institute (GPI) submitted that **Clause 12** of the bill should be amended to provide for mutual recognition of equivalent export accreditation or licensing schemes operated under state jurisdictions. The GPI considers that such recognition would be consistent with National Competition Policy provisions for mutual recognition of complementary state and Commonwealth legislation and may speed the initial assessment of applications for accreditation.[49]

Annual reports

3.84 **Clause 13** of the bill provides that an accredited wheat exporter must give WEA a written report each year setting out the quantity of wheat exported by the accredited wheat exporter during that year. The report is required to be broken down by grade and country of destination; and note the terms and conditions on which the accredited wheat exporter acquired wheat from growers during that year.

3.85 Wheat Growers Association WA (WGA WA) would like to see a requirement for annual export reports to also include the following details: the wheat variety, seasons of production, acquisitions by regions, shipping port, and number of shipments. The WGA WA submitted that the annual export report should also disclose the terms and conditions on which wheat was acquired from non-grower sources for export, in addition to the quantity of wheat bought for export from growers and non-growers.[50]

3.86 CBH noted that **Clause 70** of the bill provides that the information contained in a report given to WEA under the wheat export accreditation scheme will be

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49 Submission 21, Grains Policy Institute, p. 5.

50 Submission 10, Wheat Growers Association WA, Appendix, Notes on the Wheat Export Marketing Bill 2008, p. 16.

protected confidential information if the person who provides the report claims the information to be 'commercial-in-confidence'.

3.87 CBH submitted that the bill should be amended to provide that reports submitted by a wheat exporter pursuant to **Section 13** be deemed to be protected confidential information, without the requirement to claim that the information is 'commercial in confidence'.[51]

3.88 WGA WA argued that **Clause 14** of the bill should be amended to ensure that, in preparing the annual compliance report, an accredited wheat exporter is required to report on compliance in relation to the broader range of business activities specified in **Clause 11** – in particular those specified in **Clause 11(1)(c)(ix)** and **Clause 11(1)(c)(xvi)**.[52]

Committee view

3.89 The committee notes that views discussed earlier in relation to **Clause 8 and Clauses 17 and 18** are relevant here. There may be circumstances where it would be desirable, and in the best interests of growers and others in the industry, for WEA to have the power to impose new conditions on an accredited exporter. In particular, the committee accepts that in certain circumstances it may be preferable for WEA to impose new conditions in preference to cancellation or suspension of an exporter's accreditation. However, the committee considers that this is not a step that should be taken without due process.

3.90 The committee also notes the support for mutual recognition of complementary state and commonwealth legislation in the formulation of the accreditation scheme. A similar point was also made in the context of the access test provided for in **Clause 20** of the bill. As a general principle, the committee considers that it is desirable to avoid duplication of regulation.

Register of accredited wheat exporters

3.91 The WGA WA would like to see the register of accredited wheat exporters provided for in **Clause 19** include the conditions of the respective accreditations and the name in which every accreditation is made. The WGA WA emphasised that the register should be made available for inspection free of charge.[53]

51 Submission 3, CBH Group, p. 6.

52 Submission 10, Wheat Growers Association WA, Appendix, Notes on the Wheat Export Marketing Bill 2008, p. 17.

53 Submission 10, Wheat Growers Association WA, Appendix, Notes on the Wheat Export Marketing Bill 2008, p. 17.

Committee view

3.92 The committee considers that the availability of a register of accredited exporters would be of great benefit to the wheat industry, particularly to growers. The committee considers that the register should be freely and easily accessible and should clearly state the name of the accredited exporter and the conditions under which accreditation has been granted.

Access to bulk storage and handling facilities

3.93 A number of witnesses before the committee expressed concern about the role and potential market power of bulk handling companies under the proposed changes. It was argued that bulk handling and storage facilities throughout Australia are owned and controlled by a limited number of companies. Concerns were raised 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.

Ownership of bulk grain storage and handling facilities

3.94 There are three state-based storage and handling operators, CBH Group in Western Australia, ABB in South Australia and GrainCorp in New South Wales, Victoria and Queensland.

3.95 In Western Australia there are four export grain terminals at Kwinana, the Port of Geraldton, the Port of Albany and the Port of Esperance, all managed by CBH. In South Australia there are seven grain export terminals located in Port Adelaide, Port Lincoln, Port Giles, Port Pirie, Ardrossan, Thevenard and Wallaroo, all owned and operated by ABB. In Victoria there are three grain terminals. The terminals at the Port of Geelong and Portland are owned by GrainCorp and the terminal at the Port of Melbourne is jointly owned by AWB GrainFlow and ABA (which is a joint venture between ABB and Japanese trading house Sumitomo). In New South Wales there are two export terminals for field grains at the Port of Newcastle and Port Kembla, both of which are owned and operated by GrainCorp. In Queensland there are three grain terminals at Fisherman Islands, Gladstone and Mackay, all operated by GrainCorp.

Access to port terminal facilities

3.96 **Clause 20** of the bill is intended to guarantee port terminal access to all exporters. It sets out the access test and conditions to be applied in the case of bulk handlers who also operate grain and storage facilities at ports. The notes to the bill state that the intent is to guarantee port terminal access to all accredited exporters while at the same time not restricting the ability of port terminal operators to function in a commercial environment. The notes to the bill also state that while bulk handlers currently provide port terminal access to other exporters, some industry stakeholders

have raised the possibility that, in a competitive environment, these bulk handlers may limit access to their port terminal facilities.[54]

3.97 As noted in paragraph 3.12, the access test provides for a different level of assessment depending on whether the company involved passes the accreditation test before or after 1 October 2009. Prior to 1 October 2009, a company will pass the test if it has published a statement on its internet site to the effect that it is willing to provide accredited wheat exporters with access to port terminal services for the export of wheat. The statement must include the terms and conditions of such access. After 1 October 2009, a company will pass the access test if they have entered into an access undertaking that has been approved by the ACCC under Division 2A of Part IIIA of the *Trade Practices Act 1974*.

3.98 The committee sought clarification of the reason for this watershed date in the legislation and the degree to which access arrangements would be vetted prior to 1 October 2009. Mr Russell Phillips (DAFF) told the committee that in the first year of operation of the legislation there would be no requirement for anyone to vet access arrangements.

> That is the situation because it is not possible for the ACCC to accept any access undertakings and go through all of the steps outlined in the Trade Practices Act prior to 1 October this year.
>
> …
>
> The check and balance will be the greater transparency under the terms and conditions that they are required to publish. I am sure that if they are unreasonable we will be hearing very quickly about that. [55]

3.99 Mr Phillips explained that state based legislation would also provide a check and balance in relation to port access.

> There are requirements in, say, the Western Australian legislation for CBH to grant access. … The ports in Victoria are also subject to potential scrutiny by the Essential Services Commission in Victoria. There are some other arrangements in place.[56]

3.100 The evidence the committee received in relation to the access provisions was split between those who considered that the proposed arrangements were onerous and unnecessary and those who favoured an expansion of the provisions to include access to upcountry storage.

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54 Wheat Export Marketing Bill 2008, Explanatory Notes, http://www.daff.gov.au/agriculture-food/wheat-sugar-crops/wheat-marketing/legislation, p. 5.

55 Mr Russell Phillips, *Committee Hansard*, 27 March 2008, p. 22.

56 Mr Russell Phillips, *Committee Hansard*, 27 March 2008, p. 23.

Arguments for a less interventionist approach to terminal access

3.101 A number of submitters presented evidence to the committee which suggested that the proposed access test was an unnecessary level of regulation and could have unintended consequences for the wheat export industry. The Institute of Public Affairs (IPA) argued that mandating an access regime for port infrastructure owners who also want to become accredited wheat exporters is flawed. The IPA stated that while in the short term this may result in lower access prices, in the longer term it has the potential to stymie incentives for additional investment to either expand grain handling facilities or to upgrade them to achieve greater efficiencies. The IPA illustrated this point by reference to infrastructure development at BHP's Hay Point coal terminal, which is not subject to access undertakings, and at the multiple-user regulated facilities at Dalrymple Bay and Port Waratah. In the IPA's opinion, delays in the expansion of the latter two facilities can be attributed to the level of regulation applied and required regulatory intervention.[57] The IPA also warned that mandating infrastructure access undertakings may result in underinvestment in port facilities which over time may lead to inefficiency and a lack of international competitiveness.[58]

3.102 Mr Donald Taylor[59] also observed that increased regulation has the potential to impede investment in the development of infrastructure. He said:

> If you look in Queensland at recent experience, especially in the coal industry, where they had extensive regulation to a monopoly holder of the Dalrymple port facilities and where the Queensland government put in place essential service regulations, it effectively delayed capital expenditure and slowed down the port. Part of the bottleneck we see now is the result of that government intervention, which had no real tangible benefits to the industry; in fact, it has been quite counterproductive.[60]

3.103 While it endorses the access test, PGA WG would also prefer to see a less interventionist approach to access to infrastructure. PGA WG favours a system which allows commercial arrangements to govern access to storage, handling and port facilities. It was argued that bulk handling companies will face significant commercial pressures, which should ensure they seek to maximise throughput in their facilities.[61] In PGA WG's view, it is a legacy of past public policy that a large percentage of storage, handling and port facilities are in the hands of three regionally-based entities: CBH in Western Australia, GrainCorp in the east and ABB in South Australia. PGA WG argued that such companies will face much greater pressure to maintain good

57 Submission 22, Institute of Public Affairs, p. 8.

58 Submission 22, Institute of Public Affairs, p. 2.

59 Mr Taylor is Chairman of GrainCorp and a shareholder GrainCorp, AWB and ABB. Mr Taylor appeared before the committee as wheat grower from Queensland.

60 Mr Donald Taylor, *Committee Hansard*, 31 March 2008, p. 75.

61 Submission 29, PGA Western Graingrowers, p. 8.

commercial practice than a company operating under a commercial monopoly protected by Government legislation.

> Already we have seen evidence of this. CBH developed and began to communicate its proposed access regime (Grain Express) prior to the release of the draft Bill. CBH has done this in recognition that throughput of its facilities in a competitive grains market will require them to operate on commercial terms within the wider industry.[62]

3.104 The evidence received from bulk handling companies echoed these concerns. GrainCorp, CBH and ABB all recognised the need for all exporters to have access to storage and handling facilities. However, the three companies expressed concerns about the form of the access requirements in the proposed bill. They submitted that the requirements in the bill imposed an unnecessary level of regulation, would introduce additional costs and would provide a disincentive to investment.[63]

3.105 In particular, CBH argued that access undertakings under part 111A of the Trade Practices Act in different industries have also involved heavy price regulation, and such an approach is likely to provide a disincentive to investment.[64] CBH further argued that there is no evidence of abuse of market position by bulk handling companies to date. CBH suggested that before introducing what it described as heavy handed price regulation, the situation should be monitored over the next 18 to 24 months. Mr David Woolfe told the committee that, in the event that there is abuse of market powers, there are existing remedies in the Trade Practices Act.[65]

3.106 Mr David Ginns, representing GrainCorp also told the committee that there is no issue regarding access to bulk handling and storage facilities. He said:

> I think one of the key issues that has been missed in all of the discussion about access to ports and up-country infrastructure is the establishment of the need for additional regulation. The commercial arrangements that were in place yesterday, are in place today and will be in place tomorrow will continue. There is a high degree of transparency with regard to charges imposed on the use of up-country infrastructure and ports. If you go to any of the websites of the major infrastructure providers, you will see the standard terms and conditions under which they offer their services. We have seen, I think, to some degree, the building up of an issue that is not an issue.[66]

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62 Submission 29, PGA Western Graingrowers, p. 7.

63 See, for example, Submissions 3 and 3A, CBH; Submission 24, GrainCorp; and Submission 39, ABB.

64 Submission 3, CBH, pp 3-4.

65 Mr David Woolfe, *Committee Hansard,* 31 March 2008, p. 15.

66 Mr David Ginns, GrainCorp, *Committee Hansard*, 22 April 2008, p. 88.

3.107 CBH argued that **Clause 20** should be amended to provide that bulk handling companies must not unfairly or unreasonably deny access to, or discriminate between, accredited wheat exporters who seek access to port facilities following the introduction of the proposed bills. CBH suggested that this could either be drafted into the legislation, or bulk handling companies could be required to provide an undertaking to the ACCC. CBH further suggested that such an undertaking could be modelled on the simple form of undertaking provided by ABB to the ACCC in relation to the Ausbulk merger or that provided by GrainCorp to the Victorian Essential Services Commission.

3.108 Mr Stephen Bartos, on behalf of AWB,[67] also told the committee that the access requirements that have been put in place in Victoria and South Australia could provide a good model for port access.

> … we suggest that some of the models would include basing it on the voluntary undertakings that have been put in place in Victoria and South Australia in particular for the handlers, the south Australian system being a good model. Voluntary undertakings under the Trade Practices Act are, in a sense, a slightly weak instrument, but they are enforceable in the courts – they are disclosable…[68]

3.109 However, Mr Bartos also emphasised that access to information was just as crucial to physical access to ports. He noted in particular:

> … this whole question of information that is held, particularly at ports, in relation to arrivals and departures of ships and their location with respect to the grain. That information is absolutely critical, and we are suggesting in this report that the solution there is a much better regime of transparency about that information, including regular publication, at least weekly, of some of that key information.[69]

3.110 CBH contended that as it is already required to provide open access to its port facilities and equipment under the Western Australian *Bulk Handling Act 1967*, the access test in **Clause 20** is unnecessary. CBH told the committee that Section 20 of the Bulk Handling Act requires CBH to:

> … allow a person, on payment of the prescribed charges, the use of any bulk handling facilities and equipment controlled by it at ports in the State.[70]

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67 Mr Stephen Bartos is a Director of the Allen Consulting Group who were commissioned by AWB to prepare reports on *Competition in the export grain supply chain*, March 2008 and *Industry Good Services – Wheat Rationale and future options*, March 2008.

68 Mr Stephen Bartos, *Committee Hansard*, 27 March 2008, p. 7.

69 Mr Stephen Bartos, *Committee Hansard*, 27 March 2008, pp 7-8.

70 Submission 3, CBH, p. 3.

3.111 Section 42(1) of the same Act requires CBH to receive all grain that is tendered to it in bulk. CBH would welcome an amendment to **Clause 20** to provide for the recognition of state or territory legislation.[71]

> **Senator MURRAY**—Just a clarification question please, Mr Woolfe. As a general principle, avoiding duplicate or overburdensome regulation is a good idea. The government is rightly focused on that. Would you accept an alternative to your view that section 20, I think it is, should not apply, which is the view that perhaps it would apply in the absence of any state legislation which already had the same effect? That would allow you just to abide by one regime which has the same effect as the other.
>
> **Mr Woolfe**—That does not sound like an unreasonable proposition. What we have also said in our submission is that, rather than having this access undertaking regime in part IIIA, which would, as I said, in our understanding involve very heavy regulatory burden, perhaps the concern could be addressed by the legislation simply stating that bulk-handling companies such as ourselves may not unfairly or unreasonably discriminate between marketers or prevent access. It could be dealt with very, very simply rather than through heavy regulatory oversight.[72]

3.112 In the event that the proposed access test in remains in the bill, CBH submitted that **Clause 20(1)** and **20(2)** be amended to provide a third option:

> (c) … at that time there is in force a regime established by a State or Territory for access to the port terminal service and that regime is legislatively enshrined.[73]

Current operation of port facilities

3.113 The committee was keen to understand the extent to which an increase in the number of wheat exporters needing to use port facilities would impact on the efficient operations of ports. In particular, the committee was interested to know how competing wheat exports would be prioritised within the port environment.

3.114 GrainCorp told the committee that it currently manages access to port facilities. It also manages the logistics of receiving, storing and loading grain with AWB in relation to wheat; and provides a range of service users for barley, sorghum and for oilseeds. Mr David Ginns[74] told the committee that the only limitation on ports is the physical capacity of each port. Each port has different infrastructure and different processes of accumulating grain depending on the size of the ships that can be outloaded, the outloading rates and the storage capacity to accumulate cargoes at port. Mr Ginns was confident that the logistics of managing this task and the complex

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71 Submission 3A, CBH, p. 1.

72 Mr David Woolfe, CBH, *Committee Hansard* 31 March 2008, p. 21

73 Submission 3A, CBH, p. 1.

74 Mr David Ginns is the Chief Executive of the Grains Policy Institute and appeared before the committee on behalf of both the GPI and GrainCorp Operations Ltd.

prioritisation and cargo accumulation protocols, are being successfully managed under the current arrangements and that this would continue under the proposed arrangements.[75]

> … there are protocols for the booking of ships and berth space and for the accumulation of cargoes for all of the three infrastructure owners. Those protocols are publicly available in that there are lead times for booking ships and accumulating cargo. It is a very complex business. That works currently for all other grains, and the same processes will work for wheat. There will be no shifting around of prioritisation simply because you have limitations on the volume and the speed at which grain can be accumulated at a port, stored and then outloaded.[76]

3.115 Mr Ginns also told the committee that an increase in the number of exporters using port facilities will not alter the size of the export task 'because you are still going to be managing the same cubic volume of wheat'.

Expansion of access test

3.116 The committee heard equally strong arguments from other witnesses in favour of an expansion of the access test. AWB told the committee that, given the natural regional monopolies of each of the three bulk handling companies, the proposed access provisions in the bill are essential.[77] AWB would like to see significantly greater detail in the legislation about the terms and conditions to be provided under **Clause 20(1)(a)(ii),** particularly in respect to price, identification of wheat stored and its location and the allocation of loading times.[78]

3.117 This position appears to be supported by Consolidated Grain Industries Ltd (CGI). CGI expressed concern that as the internal logistics of grain movement are controlled by the grain handling companies, there is potential for a grain handler to use this to frustrate a competitor's access to a terminal or the timely loading of a competitor's grain. CGI submitted that the definition of access should include a requirement that the first vessel to be presented is the first loaded. It was also argued that grain handling companies should be required to ensure that the competitor's stocks are positioned on a timely basis to ensure the smooth loading of the exporter's vessel.[79]

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75 Mr David Ginns, *Committee Hansard*, 26 March 2008, pp 30-31.

76 Mr David Ginns, *Committee Hansard*, 26 March 2008, p. 31.

77 Mr Robert Hadler, *Committee Hansard*, p. 2.

78 Submission 2, AWB, pp 2-5.

79 Submission 12, Consolidated Grain Industries Pty Ltd, p. 1.

3.118 The committee also received evidence that the access arrangements in the bill are essential and should be expanded to include access to the point of receival at upcountry storage and handling facilities.[80]

3.119 The committee heard that, 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.[81] The committee also heard that many wheat growers only have access to one storage and handling facility, unless the grain is transported long distances by road.[82]

3.120 The committee also received evidence that suggested that access to rail freight services should be subject to the access test.[83] AWB told the committee that the there should be a legislative prohibition on vertical integration right through the supply chain.[84] AWB submitted that:

> … the up-stream supply chain is inextricably linked to at-port services and is vital to traders' ability to safely and reliably receive, transport and outturn grain via [bulk handling companies] in the quantity, quality and condition that traders require.[85]

3.121 AWB proposed that bulk handling companies should be subject to much tighter requirements in relation to: the publication of terms and conditions, the movement of grain, performance obligations in relation to railway car uploading (upcountry) and discharge (at port) and notification of up-country site availability.[86]

3.122 The committee sought clarification from DAFF as to why the proposed access requirements do not apply to upcountry facilities. Mr Phillips told the committee that the proposed requirements address perceived bottlenecks in the infrastructure. He said:

> In the case of the up-country storage and also the up-country transport, they were not seen as being the same bottlenecks in the system that may be able to lead to a restriction of competition. As was pointed out by Mr Bartos, on the transport side of things, rail is substitutable for road and vice versa – maybe not perfectly, but they are substitutes. Up-country storage does not have the same barriers to entry as port terminal facilities. For example, there is adequate land. The cost to build up-country storage facilities is not as great as what it is at, say, port terminals. The legislation focuses on

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80 See, for example, Submission 35, NSW Farmers Association, p. 4.

81 Mr Robert Hadler, *Committee Hansard*, 27 March 2008, p. 2.

82 Submission 26, Mr Ralph Billing, p. 2.

83 Submission 26, Mr Ralph Billing, p. 2.

84 Mr Robert Hadler, *Committee Hansard*, 27 March 2008, p. 9.

85 Submission 2, AWB Limited, p. 5.

86 Submission 2, AWB Limited, p. 5.

> where there is the perception that there may be a bottleneck that could potentially restrict competition.[87]

3.123 GrainCorp does not accept that there is a monopoly in storage and handling as growers have other options for storage of their grain, including on-farm storage.[88] GrainCorp emphasised that the current excess capacity in storage and handling on the east coast would ensure access to such facilities.

> Along the east coast of Australia there is a capacity to store 40 million tonnes of grain, and only half is owned by GrainCorp. Owners of up-country silos are subject to considerable competition from temporary storage, such as silo bags and on-farm silos, and competitors in the form of local grain traders and merchants and AWB GrainFlow. Grain export ports are running well below capacity. In the case of GrainCorp those ports running at about 30% capacity, while every year GrainCorp has to carry the total cost of that infrastructure.[89]

3.124 GrainCorp and CBH emphasised that grain storage and handling infrastructure is a tonnage throughput business. GrainCorp told the committee that every tonne that bypasses a GrainCorp silo or port is revenue lost to the company:

> GrainCorp, CBH and ABB are in the business of encouraging use of their infrastructure – excluding companies just does not make commercial sense.[90]

3.125 This view was echoed by evidence provided by officers from DAFF:

> **Mr Mortimer –** What Senator Nash was asking about was access and enforceable access to receival points up country. I draw a link there between the information that Dr Sheales gave earlier about the nature of transactions that farmers have when they make a decision to grow their wheat. Clearly a lot of wheat is being sold to people other than AWB. There is a real question as to whether there would be a need for legislation to deal with arrangements around those receival points.
>
> **Senator NASH** – Sorry, can you just say that again. Did you say that you think there is a need for legislation?
>
> **Mr Mortimer –** No, I did not say that actually; I said rather the opposite. I said that the information that Dr Sheales put on the table observed behaviours of wheat sales by growers, which was essentially showing that in many parts of Australia not much actually does go to AWB, would raise a serious question as to whether you would need to have a new legislative arrangement there for a system that currently operates in a non-legislated

87 Mr Russell Phillips, *Committee Hansard*, 27 March 2008, p. 14.

88 Mr David Ginns, *Committee Hansard*, 26 March 2008, p. 22.

89 Mr David Ginns, *Committee Hansard,* 26 March 2008, p. 20.

90 Mr David Ginns, *Committee Hansard*, 26 March 2008, p. 21.

> way perfectly reasonably. There is no legislation around those receival points here and now.[91]

Abuse of market power - the role of the Trade Practices Act and the ACCC

3.126 The committee heard evidence from a range of witnesses and submitters regarding the degree of protection available to growers and others in the industry from anti-competitive practices and abuses of market power.

3.127 Views on the effectiveness of existing powers under the *Trade Practices Act 1974* (the TPA) varied greatly. For example, AWB told the committee that the Companies Act and the TPA would provide sufficient protection for wheat growers from market power.[92]

3.128 AGEA also expressed a preparedness to pursue remedies under the TPA and to work closely with the ACCC with regard to access undertakings. Mr Alick Osborne told the committee:

> We will work closely with the ACCC when they are ready to get going past September 2009 to make sure that issues such as access to up-country storage are not used as another way of restricting competition. We are strongly of the view that the removal of a national monopoly should not be replaced by a regional monopoly. We note the ACCC are going to administer a scheme out there. We have a number of Clauses that we would look to take up with the ACCC, specifically that exporters cannot be given access to the port but denied access to the up country. That would be an issue I think of third-line forcing or bundling of services, but I think those are already covered in the Trade Practices Act. We would look for those to be incorporated in the access regime administered by the ACCC.[93]

3.129 However, the committee notes that not all in the industry share this confidence that the provisions of the TPA will adequately address the competition issues they perceive. For this reason, the committee sought clarification from the ACCC regarding the extent to which it provides an effective remedy to abuses of market power.

> **Senator HURLEY** —I know you have had a look at this draft bill. Are the means to regulate posed in the bill potentially strong enough to ensure proper competition in terms of access and regulation?
>
> **Mr Dimasi**—The draft bill requires that a vertically integrated facility which controls bulk-handling facilities provide non-discriminatory access to those through an access undertaking to the ACCC. Now the access undertaking is a provision which is well understood—at least by us—and which can provide for price and non-price terms and conditions which can

91 *Committee Hansard*, 27 March 2008, pp 23-24.

92 Mr Robert Hadler, *Committee Hansard,* 27 March 2008, p. 5.

93 Mr Alick Osborne, *Committee Hansard*, 27 March 2008, p. 46.

> be arbitrated by the ACCC if there were disputes. It is, in the array of tools that we have to deal with those circumstances, a conventional tool that can be used to deal with the power that could exist.[94]

3.130 The committee notes the concerns of smaller exporting companies and some farmers that the TPA processes are too lengthy and costly to provide adequate protections and may be out of the reach of some companies and individuals. Mr Joe Dimasi, on behalf of the ACCC told the committee:

> Generally I would agree that under Part IIIA, or indeed other provisions of access, all the players vigorously pursue their interests and take all options available to them. Yes, gaining access can sometimes take a substantial amount of time.[95]

3.131 The ACCC was also asked what it its view would be if only one part of the market was open to competition and other parts of the market continued to be controlled by monopolies. Mr Dimasi told the committee:

> Again that depends on a whole range of circumstances. We have a number of areas where competition is introduced but there is monopoly provision, for example of infrastructure. That is where you have arrangements like part IIIA or part XIC, to deal with those matters. That is what happens in other sectors.[96]

3.132 The committee also noted that the ACCC does not agree that vertical integration is necessarily anti-competitive. Mr Dimasi told the committee:

> No, we would not necessarily agree with that, and the ACCC has made it clear that there are circumstances where vertical integration can provide benefits that exceed any anti competitive detriments.[97]

3.133 In answer to a question on notice, the ACCC stated that:

> The ACCC understands that the proposed legislation would allow for the vertical integration of bulk handling companies into wheat export marketing. If control of bulk handling facilities is a source of market power then it may be the case that the bulk handlers are in an advantageous position to compete in wheat export marketing. However, whether the bulk handling companies have the ability and incentive to act anti-competitively in the area of wheat export marketing would need to be considered on a case-specific basis.

3.134 The committee received a range of evidence about the potential benefits and risks of an initiative such as CBH's Grain Express proposal. The committee notes that CBH characterise Grain Express as an attempt "to set up a coordinated approach to the

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94 Mr Joe Dimasi, *Committee Hansard*, 22 April 2008, p. 26.

95 Mr Joe Dimasi, *Committee Hansard*, 22 April 2008, p. 24.

96 Mr Joe Dimasi, *Committee Hansard*, 22 April 2008, p. 26.

97 Mr Joe Dimasi, *Committee Hansard*, 22 April 2008, p. 26.

movement of grain, the accumulation of grain, the shipping of grain and access to terminals."[98] The committee notes that Grain Express has received support from some quarters of the Western Australian industry. However, the committee also received evidence regarding the potential risks associated with this type of proposal.[99]

3.135 The committee was therefore interested to understand how the ACCC would deal with a situation like that proposed by CBH in its Grain Express proposal. The ACCC confirmed that exclusive dealing conduct may raise issues under the TPA but that such conduct must be considered within the context of the particular circumstances and balanced against any benefit to the public. The ACCC confirmed that it had not received an application for authorisation or an exclusive dealing notification from the CBH group in relation to the Grain Express proposal.[100]

Supply Chain Code of Conduct

3.136 In supplementary submissions to the inquiry, GrainCorp, CBH and ABB provided the committee with a draft Supply Chain Code of Conduct. The three bulk handling companies stated that the draft code has been prepared to 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. The three companies accept that under this type of model, a breach of the code could lead to removal of accreditation.[101]

3.137 The committee was keen to understand what would happen in the event that an access problem arose under a voluntary code of conduct. Mr Joe Dimasi, from the ACCC, told the committee that the ACCC could see a lot of issues in relation to the proposed code of conduct.

> **CHAIR**—Before we go, Mr Dimasi, you just mentioned that you see a lot of issues in that code of conduct. Would you like to expand on that?
>
> **Mr Dimasi**—We very recently received it, and the only comment I would make about it is that it looks like a voluntary set of arrangements which provides for compulsory conciliation. That sort of arrangement can be useful in some circumstances. But, if you believe you have an access problem where there are a number of players that you deal with, these bilateral voluntary arrangements may have some difficulties in resolving your—

98 Mr Imre Mecshelyi, *Committee Hansard*, 31 March 2008, p. 14.

99 See, for example, Mr Joe Dimasi, *Committee Hansard,* 22 April 2008, p. 30; Mr Sasha Grebe, *Committee Hansard,* 22 April 2008, p. 49 and Mr Robert Hadler, *Committee Hansard*, 22 April 2008, p. 51.

100 ACCC, Answers to Questions on Notice, 23 April 2008.

101 Submission 24A, GrainCorp, Attachment 1, p. 1; ABB Grain Limited, Answer to Question on Notice, 24 April 2008.

…

Mr Dimasi—By this arrangement, we would have no involvement whatsoever.[102]

3.138 Mr Ginns clarified for the committee that the code of conduct was not being offered as a voluntary code but as an integral part of Section 11 of the accreditation regime.[103] He told the committee that:

> So, if you are an infrastructure owner—here we are talking about ports or up-country storage—and you own a significant amount of infrastructure and you want to be an accredited bulk wheat exporter, then you would have this code of conduct in place and attached to section 11. It would be overseen by Wheat Exports Australia. Sanctions would apply if you did not adhere to the provisions under the code as an infrastructure service provider and a bulk wheat exporter. The regulator of the act, Wheat Exports Australia, would come in and take your accreditation away if it was proved that there were breaches of the code.[104]

3.139 AWB told the committee that the supply chain code of conduct appeared superficially attractive because:

> … it applies an industry self-regulatory approach and it applies to up-country as well as port facilities. In fact, there is no barrier to having a voluntary code of conduct under the current trade practices agreement, and we would encourage all members of the industry to look at a voluntary code of conduct dealing with not only port issues and up-country issues but a whole range of issues that would give greater transparency and greater certainty for growers in how wheat is priced, stored, shipped and exported.[105]

3.140 However, AWB expressed concern that definitional issues within the code of conduct may lead to legal dispute. Mr Hadler noted the following particular concerns:

> … under this proposed code of conduct access would only be provided to other traders where there was surplus capacity. It is not clear who would determine what the surplus capacity was and when it would be available. One of the other definitional issues in here is that it would only forbid 'unreasonable' discrimination. Who would define what is unreasonable? I have no confidence at this stage that this would be an adequate set of arrangements that would provide fair access to all members of the grains industry.[106]

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102 Mr Joe Dimasi, *Committee Hansard*, 22 April 2008, p. 28.

103 Mr David Ginns, *Committee Hansard*, 22 April 2008, p. 90.

104 Mr David Ginns, *Committee Hansard*, 22 April 2008, p. 90.

105 Mr David Hadler, *Committee Hansard*, 22 April 2008, p. 50.

106 Mr David Hadler, AWB, *Committee Hansard*, p. 50.

Committee view

3.141 The committee notes the serious concerns raised during this inquiry in relation to the access provisions in the bill. In particular, the committee notes the concerns that access arrangements should apply to all points of the supply chain and that consideration needs to be given to ensuring an adequate level of regulatory oversight of protocols relating to the accumulation, movement and loading of wheat for export.

3.142 The committee also notes that access arrangements applied to accredited exporters will not address access issues that may arise in the event that grain handling companies do not seek accreditation. The committee notes the arguments presented to suggest that market forces should mitigate against discriminatory access in such circumstances. However, the committee considers this issue requires close consideration.

3.143 The committee considers that a consistent set of access requirements should be applied to all owners of bulk handling and storage facilities, whether they are located at port terminals or at the up-country point of receival.

3.144 While the committee notes that provisions exist under the TPA to address anti-competitive practices, careful consideration needs to be given to the extent to which these provisions offer practical remedies to the concerns raised during this inquiry.

3.145 The committee welcomes the attempt by the three bulk handling companies to arrive at an alternative solution to the complex question of appropriate regulation of access to bulk handling and storage facilities. In particular, the committee notes the preparedness of the proponents of the Supply Chain Code of Conduct to have the code embedded in the legislation. The committee considers that a Code of Conduct may be an acceptable alternative to the access provisions of the draft bill 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 Trade Practices Act 1974 and subject to acceptance by Wheat Exports Australia.
- The legislation should require the Code to recognise and address the following principles:
    - (a) Access to ports and up-country infrastructure on 'fair and reasonable commercial terms';
    - (b) An arbitration process that is binding on the parties; and
    - (c) Publication of standard terms and conditions of access.

- The legislation should provide powers to Wheat Exports Australia to revoke accreditation if the Code is breached.
- The access undertakings requirement currently spelled out in the legislation would remain but apply only to those companies which choose not to comply with the Code. The alternative option for companies that do not wish to comply with the provisions of the Code is the current requirement to negotiate an access undertaking with the ACCC.

3.146 The committee supports the current provisions relating to access at ports. The committee believes there is a need to ensure effective competition in relation to access to up-country infrastructure. The committee supports additional measures in relation to up-country infrastructure such as a mandatory code of conduct.

Review of decisions

3.147 AWB submitted that **Clause 66** of the bill should be amended to clarify who can seek a review of a decision by the WEA. AWB submitted that it is not clear whether persons other than the applicant for accreditation or an accredited export holder can apply for review. AWB submitted that it is not desirable for a person other than the person who is the direct object of the decision to apply for reconsideration. In particular, AWB submitted that it would not be appropriate for a competitor to the applicant for accreditation to be able to seek a review.[107]

Committee view

3.148 The committee considers that some clarification of the process for review of decisions would be appropriate.

Review of the legislation

3.149 The committee notes that there was broad support for a review of the legislation in 2010. PGA WG endorsed a review of the legislation in 2010 and encouraged the minister to restate his commitment to an independent economic review, with an analysis based on the costs and benefits of the system.

3.150 The Grain Growers Association (GGA) and the Grain Exporters Association also support a review of the legislation. The GGA suggested that such a review should consider:

(a) whether or not the legislation and regulation are providing appropriate controls to ensure a fully functional and competitive marketplace;

(b) any changes that may be required to ensure appropriate functionality for the marketplace; and

107 Submission 2, AWB Limited, p. 5.

(c) the timeframe for continuance of the arrangements and the future review periods.[108]

3.151 The GGA also supported a review of both the operation of the accreditation scheme and the access test.

3.152 The GCA also suggested that the review should also include a review of the transfer of responsibility for the provision of industry good functions. The GCA favoured explicit provision for review within the legislation itself and suggested that the minister be required to table a report of the review. [109]

3.153 Mr Russell Phillips confirmed that the government's policy includes a review of the legislation in 2010 to assess its effectiveness. Mr Phillips also confirmed that the review will be mentioned in the Second Reading Speech for the bill, but not provided for within the legislation itself.[110]

Committee view

3.154 The committee considers that provision for the review of the legislation is essential and that it is desirable for the minister to be required to table the report of such a review before the Parliament.

108 Submission 28, Grain Growers Association, p. 6.

109 Submission 25, Grains Council of Australia, pp 26-27.

110 Mr Russell Phillips, *Committee Hansard*, 27 March 2008, p. 28.