



**Australian Government**

**Grains Research and  
Development Corporation**

4 April 2008

**GRDC**

**Grains  
Research &  
Development  
Corporation**

The Secretary  
Senate Standing Committee on Rural and Regional Affairs and Transport  
PO Box 6100  
Parliament House  
CANBERRA ACT 2600

Dear Secretary

***Wheat Export Marketing Bill 2008  
Wheat Export Marketing (Repeal and Consequential Amendments) Bill 2008***

Thank you for the opportunity to provide a submission on the *Wheat Export Marketing Bill 2008* and the *Wheat Export Marketing (Repeal and Consequential Amendments) Bill 2008*.

The Grains Research and Development Corporation (GRDC) is one of the world's leading grains research organisations, responsible for planning, investing and overseeing research and development, delivering improvements in production, sustainability and profitability across the Australian grains industry. The GRDC was established in 1990 under the Primary Industries and Energy Research and Development Act 1989 and is subject to accountability and reporting obligations set out in the Commonwealth Authorities and Companies Act 1997. The GRDC's portfolio department in the Australian Government is the Department of Agriculture, Fisheries and Forestry (DAFF).

The GRDC has provided the following recommendations in relation to the Wheat Export Marketing Bill 2008:

- Submission to the Wheat Industry Expert Group in relation to Wheat Industry Development Functions.
- Submission to DAFF outlining a series of recommendations in relation to data generation and governance for complying with the Plant Breeders Rights Legislation.
- Letter to the Export Wheat Commission in relation to the Wheat Export Accreditation Scheme for bulk wheat exports.

These communications are attached for your information.

Yours sincerely

Mr Peter F Reading  
Managing Director

**ATTACHMENTS:**

- 1 GRDC Submission to the Wheat Industry Expert Group
- 2 GRDC Submission to DAFF
- 3 GRDC Submission to the Export Wheat Commission

Mr John Crosbie  
Chairman  
Wheat Industry Expert Group  
GPO Box 858  
Canberra ACT 2601

27 March 2008

Dear John

**Submission: Wheat Industry Development**

The GRDC congratulates the Department of Agriculture, Fisheries and Forestry (DAFF) and the Wheat Industry Expert Group (WIEG) for the timely production and clarity of the suggested path for the various industry development functions in the new wheat marketing environment.

As discussed with you, the GRDC believes the Australian grains industry requires world-class wheat breeding programs to maintain global competitiveness.

There has been a fundamental shift in the way wheat breeding is supported in Australia as a consequence of the PBR Act 1994 which enables breeders to protect their intellectual property. Wheat breeders are now rewarded according to the performance of their varieties in the market place, through End Point Royalties (EPRs).

However, achieving high levels of EPR compliance is a significant issue for the industry. To achieve high levels of compliance, industry wide receival data is required. Specifically, the name of the variety being delivered must be recorded and reported to the PBR owner. This information is also important to the exporter for them to be able to demonstrate that the wheat they are exporting has proper title.

Previously, AWB has collected this information and has also collected EPRs on behalf of the PBR owners, on a fee for service basis. The GRDC is concerned that under the new wheat marketing arrangements this information will be more difficult to collect. We contend that it will be extremely difficult for ABARE and or ABS to collect accurate receival data to the variety level.

The GRDC believes that generating varietal information at point of receival is critical to addressing the issues of EPR compliance. We believe that it is necessary for Government to require the collection of this industry good information. The GRDC has recommended to DAFF specific changes to the draft wheat marketing bill and highlighted these issues with the Wheat Export Commission (please see attached).

Yours sincerely



Peter Reading  
Managing Director

Mr Bill Schumann  
Wheat Marketing Submissions  
Department of Agriculture, Fisheries & Forestry  
GPO Box 858  
CANBERRA ACT 2601



27 March 2008

Dear Mr Schumann

### **Submission re Draft Wheat Export Marketing Bill**

The Grains Research and Development Corporation (GRDC) provides the following submission to the Department of Agriculture, Fisheries and Forestry (DAFF) in relation to the Draft Wheat Export Marketing Bill.

The GRDC congratulates DAFF for the timely production and clarity of the draft legislation and the explanatory sheets.

Two issues that the GRDC believes require increased attention are data-generation and governance for complying with Plant Breeders Rights (PBR) legislation. These issues are discussed in detail following on from the recommendations below.

### **Recommendations**

Grains industry productivity is supported through the development of new varieties. It is critical that industry development continues through the breeding of new varieties. There has been a fundamental shift in the way wheat breeding is funded based on Plant Breeders Rights and rewarding of breeding organisations through End Point Royalties (EPRs). This system must be supported by the generation of varietal level data and governance over the meeting of PBR obligations. Therefore the GRDC recommends that:

- the new legislation for export wheat marketing includes a requirement for licensees to have robust systems and processes in place to enable annual reporting to the licensor demonstrating that, to their reasonable knowledge and belief, the obligations to pay EPRs on the grain they have purchased and plan to export have been met
- the requirement for traders to have robust systems and processes relating to these EPR obligations is a component of the accreditation process for an organisation to be confirmed as one that is "*fit and proper*" to receive a bulk wheat export licence
- this requirement be explicitly included in the legislation through:
  - an additional sub-section in section 11 (1)(c) of the legislation (accreditation)
  - a requirement to include variety-level reporting in section 13 (1)(c) (reporting obligations)
  - a requirement in section 13 (1) that there be an annual statement from the licensee, that to its reasonable knowledge and actual belief the obligations to pay EPRs on the grain it has exported have been met (reporting obligations).

Further, the GRDC recommends that DAFF considers mechanisms to ensure similar governance over the significant (>2mmt) export wheat trade through containers. This could be implemented by providing Wheat Export Australia with similar powers to those the Export Wheat Commission currently has with respect to reporting obligations for container exports.

## **Background and discussion**

### **Breeding new wheat varieties**

Crop breeding is an increasingly important global activity as the world population grows and encroaches on once-productive land. Yield increases must be made as the amount of arable land reduces and climate change impacts on traditional production environments.

In Australia most crop breeding relies on a combination of State government and GRDC funding. In turn, State governments and the GRDC rely on royalties to off-set their investment in plant breeding. It is the Plant Breeders Rights (PBR) Act (1994) that enables royalties to be generated from crop breeding.

As noted in the Wheat Industry Expert Group (WIEG) discussion paper on industry development functions, the near-to-market wheat breeding activities carried out by the three major wheat breeding organisations in Australia rely on royalties to sustain their operations. Public funds, including GRDC investment, are used to support pre-breeding activities such as international germplasm exchange and sourcing of new technologies. The potential contribution that new genes and technology can make to grains industry productivity must be realised through breeding programs.

### **Plant Breeders Rights (PBR)**

Lobbying for plant variety rights in Australia began in the late 1960s and resulted in the introduction of the Plant Variety Rights Act 1987 (the PVR Act). In 1994, the PVR Act was replaced by the Plant Breeder's Rights Act to harmonise with the international obligations included in the updated UPOV Convention of 1991, to which Australia is a signatory.

The UPOV Convention is an International Convention for the Protection of New Varieties of Plants. The primary purpose of the UPOV Convention is to ensure that the member states acknowledge the achievements of breeders of new plant varieties by making available to them an exclusive property right.

The purpose of the PBR Act is to stimulate plant breeding activity and to encourage the development of new crop varieties for Australian markets. The introduction of PBR opened the way to change Australia's wheat-breeding sector by allowing breeders to control their intellectual property and subsequently generate financial return for their endeavours.

### **Implementation of PBR**

The PBR Act provides a platform of rights for owners of plant varieties. In order to convey how the owner intends to exercise their PBR rights, a system of contracts is used. These contracts contain terms and conditions associated with growing the variety, including the method that the breeder is using to gain financial reward.

Methods of financial reward are either seed royalties or End Point Royalties (EPRs). Seed royalties are an up-front payment made by growers at the time of purchasing seed to give that grower the right to use a PBR-protected variety. An EPR is a payment made to the owner(s) of a plant variety in exchange for the right to grow that variety where the payment is based on production. Therefore an EPR captures value for the breeder when a grower sells grain produced from that variety.

EPRs allow plant breeding investment to be maintained in the absence of public funding (wheat and canola breeding in Australia), or in an environment of declining public investment (most other winter crops).

Plant breeders are increasingly using EPRs as their preferred value-capture mechanism because of the advantageous risk return it offers over seed royalties. In 2004-05, 35 per cent of the wheat crop received by AWB was from varieties attracting EPRs. This increased to 49 per cent in 2005-06. If the wheat marketing environment had remained stable, the trend where the exports of wheat were increasingly made up of varieties with EPRs attached to them would have continued. However, the new marketing environment is likely to disrupt this trend unless specific action is taken.

In the single desk environment, accumulators provided data to AWB. AWB provided a service of deducting EPRs payable on varieties and then forwarding the payments to the PBR owners on the grower's behalf. It was an efficient system for bulk wheat export. The same system could work well in a semi-regulated environment if there is onus on bulk wheat export licensees to ensure that EPRs have been deducted on the grain they are trading.

### **International considerations**

Meeting PBR obligations is a legal requirement and therefore traders need governance processes around PBR to ensure this legal obligation, just like any other legal obligation, is consistently met.

Under Section 18 of the PBR Act, traders, and therefore prospective bulk wheat export licensees, may find themselves in a situation where PBR obligations have not been met on the grain they are trading. Therefore theoretically, PBR owners whose PBR obligations have not been met could disrupt trade. To date this has not occurred because:

- it is not a desirable approach as it would have major negative impact on industry
- wheat breeding has only recently become reliant on EPR income, and
- it is currently difficult to track PBR rights attached to varieties and therefore it is very risky to take legal action due to the lack of evidence available.

As a signatory to the UPOV Convention [Article 30(1)], Australia is obligated to have a system that enables PBR enforcement. Effective PBR enforcement relies on having adequate data generation so that varieties can be tracked and reconciled with PBR instruments such as EPR payments.

Having an effective value-capture mechanism such as EPRs in place for plant breeding has broader benefits than just sustaining the close-to-market breeding activities. These are:

- attracting technology to Australia to drive future innovation and total factor productivity
- allowing breeders and pre-breeding researchers to participate in international exchanges of germplasm to provide genetic diversity and new sources of variation that can be exploited in the Australian environment.

In the latter situation of international germplasm exchange, there is an obligation on Australia to provide financial returns to the owners of the germplasm. A robust value-capture system such as EPRs supports Australia's ability to meet this obligation.

### **Varietal level data supports PBR and EPR collection**

Generation of data down to the variety level and willingness to collect EPRs are essential for the development of the grains industry. The grains industry requires the following data:

- what varieties are being delivered and exported
- whether the varieties are proprietary varieties, and
- if they are proprietary varieties with EPR obligations, whether the EPRs have been paid on them prior to export.

### **Is there a legitimate role for government?**

The development of new varieties provides significant public good throughout the grains' industry value chain. As recognised in sections 4.02 and 6.02 of the WIEG discussion paper, the breeders of new varieties play a significant role in the research and development phase within the grains industry and "*a robust and effective R&D program is essential if the wheat industry is to be viable and sustainable into the future*".

The greatest risk to the future of EPR-funded plant breeding is the inability to efficiently and effectively collect royalties. The threat lies with the lack of traceability on varieties because of the lack of variety-specific data. This problem is unlikely to be solved in the absence of government intervention – there are not sufficient returns in the system at this point in time to fund traceability of varieties to the point where a case of PBR infringement can be brought before the courts with sufficient supporting evidence.

In the regulated market for wheat, AWB collected variety-level data as well as EPRs. This meant that the three main accumulators of grain needed to collect varietal information. In a semi-regulated and deregulated environment, if one trader is not collecting and reporting varietal level data, then most likely none of the others will. In a competitive environment, participants seek a level playing field.

The GRDC believes it is legitimate for government to take action to ensure adequate governance over PBR obligations and generation of varietal data. There is no commercial organisation other than the accumulators that can generate variety level data.

### **What do we want government to do?**

The GRDC recommends that the wheat marketing legislation requires wheat export licensees to have robust systems and processes to monitor PBR obligations on grain traded as part of their governance processes. In turn, Wheat Export Australia (WEA) as the licensor should expect that the systems and processes deployed by their licensees satisfy this governance requirement and that a report to this effect is delivered to WEA as the licensor annually.

In practice, these recommendations when implemented will generate varietal level information at the point of grain delivery.

More specifically, the GRDC recommends that:

- the new legislation for export wheat marketing includes a requirement for licensees to have robust systems and processes in place to enable annual reporting to the licensor demonstrating that, to their reasonable knowledge and belief, the obligations to pay EPRs on the grain they have purchased and plan to export have been met
- the requirement for traders to have robust systems and processes relating to these EPR obligations is a component of the accreditation process for an organisation to be confirmed as one that is "*fit and proper*" to receive a bulk wheat export licence
- this requirement be explicitly included in the legislation through:

- an additional sub-section in section 11 (1)(c) of the legislation (accreditation)
- a requirement to include variety-level reporting in section 13 (1)(c) (reporting obligations)
- a requirement in section 13 (1) that there be an annual statement from the licensee, that to its reasonable knowledge and actual belief the obligations to pay EPRs on the grain it has exported have been met (reporting obligations).

Further, the GRDC recommends that DAFF considers mechanisms to ensure similar governance over the significant (>2mmt) export wheat trade through containers. This could be implemented by providing Wheat Export Australia with similar powers to those the Export Wheat Commission currently has with respect to reporting obligations for container exports.

### **Why does it need to be in the wheat marketing legislation?**

It is highly preferable for the systems and processes and reporting obligation above to be included in the Act directly.

The alternative is for these obligations to be included as part of the accreditation scheme run by EWC /Wheat Export Australia (WEA) under section 7. However, WEA would need to rely on section 7(1)(c), to include it as "ancillary or incidental matters" to the wheat accreditation scheme. This has two weaknesses:

Firstly, the obligations would need to be ancillary or incidental to sections 11(1)(c)(xvi) or (xvii) in the Act, which relate to:

- (xvi) contravention of an Australian law where the contravention relates to trade in barley, canola, lupins, oats or wheat;
- (xvii) such other matters (if any) as WEA considers relevant.

This risks the industry descending into legal action based on a view that reporting on systems and processes in place to ensure PBR obligations in the form of EPR payments have been met cannot be validly included within one of those headings.

Secondly, it does not provide a clear, explicit message to industry about the expectation for PBR obligations to be met.

### **What if government doesn't support the recommendations?**

Whilst the single desk environment enabled reasonable EPR compliance on bulk export wheat, EPR compliance for the domestic market is poor. The increasing size of the domestic wheat trade on the east coast of Australia already poses a significant threat to the future of Australian breeding through poor EPR collection compliance. If poor EPR collection compliance extends to export wheat, then it is highly unlikely that wheat breeding can be self-sustained through EPRs. In turn this means:

- less private investment in breeding,
- less technology will be attracted to Australia, and
- reduced ability for Australia to meet its international obligations.

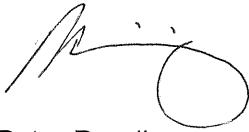
Ultimately this will impact negatively on grains industry productivity.

### **Conclusion**

The GRDC believes that generating varietal information at the point of delivery will provide the foundation from which industry can move forward to address the issues of

EPR compliance in both the domestic and export wheat market. This can be achieved through assistance from government in the form of legislative requirements, combined with industry efforts to solve the issue of reconciling variety-level information with obligations to pay EPRs.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Peter Reading', with a large, stylized loop at the end.

Peter Reading  
Managing Director

cc Mr John Crosbie  
Chairman  
Wheat Industry Expert Group

cc Mr Peter Woods  
Chief Executive Officer  
Export Wheat Commission



Mr Peter Woods  
Chief Executive Officer,  
Export Wheat Commission  
Unit 2, Royal Life Saving House  
26 28 Napier Close  
Deakin ACT 2600

27<sup>th</sup> March, 2008

Dear Peter

I understand that the Export Wheat Commission (EWC) is consulting industry groups and representatives on the details of the new Wheat Export Accreditation Scheme for bulk wheat exports. I note from your press release that the EWC is specifically looking for input into the probity checks and conditions that could be imposed on accredited exporters. In particular, I note that you are interested in discussing what regulations should be included in the new Scheme and how it will operate.

The Grains Research & Development Corporation (GRDC) is one of the world's leading grains research organisations, responsible for planning, investing and overseeing research and development, delivering improvements in production, sustainability and profitability across the Australian grains industry. GRDC is a statutory corporation, founded in 1990 under the Primary Industries and Energy Research and Development Act 1989 (PIERD Act), it is subject to accountability and reporting obligations set out in the Commonwealth Authorities and Companies Act 1997 (CAC Act). The GRDC's portfolio department is the Australian Government Department of Agriculture, Fisheries and Forestry (DAFF).

Over the last several years wheat breeding in Australia has undergone a transformation. The changes, and the push to streamline wheat research, reflect the move in recent years from largely public and state-based breeding programs to a commercial breeding sector supported by nationally coordinated pre-breeding efforts. These commercial wheat breeding ventures now live or die on the success of their varieties in the market place.

The introduction in 1994 of the Plant Breeders Rights (PBR) Act in Australia opened the way to change Australia's wheat-breeding sector. The Act allows breeders to control their intellectual property. Breeders claim their financial reward via seed royalties (and) or end point royalties (EPRs).

For some time now, Australian wheat breeding companies have been expressing their concern that EPR non-compliance is a serious issue and that the proposed changes to wheat export arrangements are anticipated to exacerbate the problem. It is critical that a 'culture of compliance' is institutionalised across all sectors of the grains industry if the industry is to maintain a viable wheat breeding sector.

Whilst it is primarily the grower's responsibility to ensure EPRs are paid, under the PBR Act 1994, exporters may still have obligations to the PBR owner of the varieties they export. The Act gives the PBR owner "exclusive rights to do, or to licence another person to do, the following acts...." including "export the material". These rights are somewhat restricted by Section 18. However, the person doing the act (exporting) is still required to pay "equitable remuneration to the grantee" for the privilege.

Therefore, the GRDC in its written submission to the Wheat Export Marketing Bill is recommending that PBR obligations are clearly and specifically acknowledged in the proposed wheat marketing legislation. Specifically:

1. the new legislation for export wheat marketing includes a requirement for licensees to have robust systems and processes in place to enable annual reporting to the licensor demonstrating that, to their reasonable knowledge and belief, the obligations to pay EPRs on the grain they have purchased and plan to export have been met
2. the requirement for traders to have robust systems and processes relating to these EPR obligations is a component of the accreditation process for an organisation to be confirmed as one that is "*fit and proper*" to receive a bulk wheat export licence
3. this requirement be explicitly included in the legislation through:
  - o an additional sub-section in section 11 (1)(c) of the legislation (accreditation)
  - o a requirement to include variety-level reporting in section 13 (1)(c) (reporting obligations)
  - o a requirement in section 13 (1) that there be an annual statement from the licensee, that to its reasonable knowledge and actual belief the obligations to pay EPRs on the grain it has exported have been met (reporting obligations).

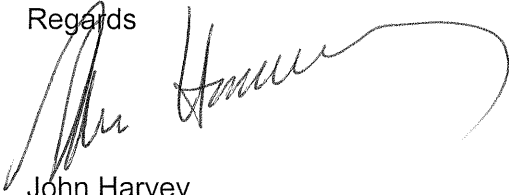
Further, the GRDC recommends that DAFF considers mechanisms to ensure similar governance over the significant (>2mmt) export wheat trade through containers. This could be implemented by providing Wheat Export Australia (EWA) with similar powers to those the EWC currently has with respect to reporting obligations for container exports.

In the event that these recommendations are not incorporated into the Bill we recommend that WEA:

1. uses its powers under section 11 (1) (c) (xvii) to require that, in order to be accredited, a licensee must have robust systems and processes in place enabling them to report annually to WEA that, to their reasonable knowledge and belief, the obligations to pay EPRs on the grain they have exported have been met, and
2. a condition to report annually on how licensees have met the obligations to pay EPRs on grain that they have exported under section 12 (c).

I encourage you to contact me on 02 6166 4500 if you would like to discuss any aspect of this submission in greater detail.

Regards



John Harvey  
Executive Manager Varieties

Cc Mr John Crosby  
Chair, Wheat Industry Expert Group

Mr Bill Schumann  
Wheat Marketing Submissions  
Department of Agriculture, Fisheries & Forestry  
GPO Box 858  
CANBERRA ACT 2601



27 March 2008

Dear Mr Schumann

### **Submission re Draft Wheat Export Marketing Bill**

The Grains Research and Development Corporation (GRDC) provides the following submission to the Department of Agriculture, Fisheries and Forestry (DAFF) in relation to the Draft Wheat Export Marketing Bill.

The GRDC congratulates DAFF for the timely production and clarity of the draft legislation and the explanatory sheets.

Two issues that the GRDC believes require increased attention are data-generation and governance for complying with Plant Breeders Rights (PBR) legislation. These issues are discussed in detail following on from the recommendations below.

### **Recommendations**

Grains industry productivity is supported through the development of new varieties. It is critical that industry development continues through the breeding of new varieties. There has been a fundamental shift in the way wheat breeding is funded based on Plant Breeders Rights and rewarding of breeding organisations through End Point Royalties (EPRs). This system must be supported by the generation of varietal level data and governance over the meeting of PBR obligations. Therefore the GRDC recommends that:

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Further, the GRDC recommends that DAFF considers mechanisms to ensure similar governance over the significant (>2mmt) export wheat trade through containers. This could be implemented by providing Wheat Export Australia with similar powers to those the Export Wheat Commission currently has with respect to reporting obligations for container exports.

## **Background and discussion**

### **Breeding new wheat varieties**

Crop breeding is an increasingly important global activity as the world population grows and encroaches on once-productive land. Yield increases must be made as the amount of arable land reduces and climate change impacts on traditional production environments.

In Australia most crop breeding relies on a combination of State government and GRDC funding. In turn, State governments and the GRDC rely on royalties to off-set their investment in plant breeding. It is the Plant Breeders Rights (PBR) Act (1994) that enables royalties to be generated from crop breeding.

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### **Plant Breeders Rights (PBR)**

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### **Implementation of PBR**

The PBR Act provides a platform of rights for owners of plant varieties. In order to convey how the owner intends to exercise their PBR rights, a system of contracts is used. These contracts contain terms and conditions associated with growing the variety, including the method that the breeder is using to gain financial reward.

Methods of financial reward are either seed royalties or End Point Royalties (EPRs). Seed royalties are an up-front payment made by growers at the time of purchasing seed to give that grower the right to use a PBR-protected variety. An EPR is a payment made to the owner(s) of a plant variety in exchange for the right to grow that variety where the payment is based on production. Therefore an EPR captures value for the breeder when a grower sells grain produced from that variety.

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### **International considerations**

Meeting PBR obligations is a legal requirement and therefore traders need governance processes around PBR to ensure this legal obligation, just like any other legal obligation, is consistently met.

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In the latter situation of international germplasm exchange, there is an obligation on Australia to provide financial returns to the owners of the germplasm. A robust value-capture system such as EPRs supports Australia's ability to meet this obligation.

### **Varietal level data supports PBR and EPR collection**

Generation of data down to the variety level and willingness to collect EPRs are essential for the development of the grains industry. The grains industry requires the following data:

- what varieties are being delivered and exported
- whether the varieties are proprietary varieties, and
- if they are proprietary varieties with EPR obligations, whether the EPRs have been paid on them prior to export.

### **Is there a legitimate role for government?**

The development of new varieties provides significant public good throughout the grains' industry value chain. As recognised in sections 4.02 and 6.02 of the WIEG discussion paper, the breeders of new varieties play a significant role in the research and development phase within the grains industry and *“a robust and effective R&D program is essential if the wheat industry is to be viable and sustainable into the future”*.

The greatest risk to the future of EPR-funded plant breeding is the inability to efficiently and effectively collect royalties. The threat lies with the lack of traceability on varieties because of the lack of variety-specific data. This problem is unlikely to be solved in the absence of government intervention – there are not sufficient returns in the system at this point in time to fund traceability of varieties to the point where a case of PBR infringement can be brought before the courts with sufficient supporting evidence.

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The GRDC believes it is legitimate for government to take action to ensure adequate governance over PBR obligations and generation of varietal data. There is no commercial organisation other than the accumulators that can generate variety level data.

### **What do we want government to do?**

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In practice, these recommendations when implemented will generate varietal level information at the point of grain delivery.

More specifically, the GRDC recommends that:

- the new legislation for export wheat marketing includes a requirement for licensees to have robust systems and processes in place to enable annual reporting to the licensor demonstrating that, to their reasonable knowledge and belief, the obligations to pay EPRs on the grain they have purchased and plan to export have been met
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- a requirement in section 13 (1) that there be an annual statement from the licensee, that to its reasonable knowledge and actual belief the obligations to pay EPRs on the grain it has exported have been met (reporting obligations).

Further, the GRDC recommends that DAFF considers mechanisms to ensure similar governance over the significant (>2mmt) export wheat trade through containers. This could be implemented by providing Wheat Export Australia with similar powers to those the Export Wheat Commission currently has with respect to reporting obligations for container exports.

### **Why does it need to be in the wheat marketing legislation?**

It is highly preferable for the systems and processes and reporting obligation above to be included in the Act directly.

The alternative is for these obligations to be included as part of the accreditation scheme run by EWC /Wheat Export Australia (WEA) under section 7. However, WEA would need to rely on section 7(1)(c), to include it as "ancillary or incidental matters" to the wheat accreditation scheme. This has two weaknesses:

Firstly, the obligations would need to be ancillary or incidental to sections 11(1)(c)(xvi) or (xvii) in the Act, which relate to:

- (xvi) contravention of an Australian law where the contravention relates to trade in barley, canola, lupins, oats or wheat;
- (xvii) such other matters (if any) as WEA considers relevant.

This risks the industry descending into legal action based on a view that reporting on systems and processes in place to ensure PBR obligations in the form of EPR payments have been met cannot be validly included within one of those headings.

Secondly, it does not provide a clear, explicit message to industry about the expectation for PBR obligations to be met.

### **What if government doesn't support the recommendations?**

Whilst the single desk environment enabled reasonable EPR compliance on bulk export wheat, EPR compliance for the domestic market is poor. The increasing size of the domestic wheat trade on the east coast of Australia already poses a significant threat to the future of Australian breeding through poor EPR collection compliance. If poor EPR collection compliance extends to export wheat, then it is highly unlikely that wheat breeding can be self-sustained through EPRs. In turn this means:

- less private investment in breeding,
- less technology will be attracted to Australia, and
- reduced ability for Australia to meet its international obligations.

Ultimately this will impact negatively on grains industry productivity.

### **Conclusion**

The GRDC believes that generating varietal information at the point of delivery will provide the foundation from which industry can move forward to address the issues of

EPR compliance in both the domestic and export wheat market. This can be achieved through assistance from government in the form of legislative requirements, combined with industry efforts to solve the issue of reconciling variety-level information with obligations to pay EPRs.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Peter Reading', with a large, stylized loop at the end.

Peter Reading  
Managing Director

cc Mr John Crosbie  
Chairman  
Wheat Industry Expert Group

cc Mr Peter Woods  
Chief Executive Officer  
Export Wheat Commission



Mr Peter Woods  
Chief Executive Officer,  
Export Wheat Commission  
Unit 2, Royal Life Saving House  
26 28 Napier Close  
Deakin ACT 2600

27<sup>th</sup> March, 2008

Dear Peter

I understand that the Export Wheat Commission (EWC) is consulting industry groups and representatives on the details of the new Wheat Export Accreditation Scheme for bulk wheat exports. I note from your press release that the EWC is specifically looking for input into the probity checks and conditions that could be imposed on accredited exporters. In particular, I note that you are interested in discussing what regulations should be included in the new Scheme and how it will operate.

The Grains Research & Development Corporation (GRDC) is one of the world's leading grains research organisations, responsible for planning, investing and overseeing research and development, delivering improvements in production, sustainability and profitability across the Australian grains industry. GRDC is a statutory corporation, founded in 1990 under the Primary Industries and Energy Research and Development Act 1989 (PIERD Act), it is subject to accountability and reporting obligations set out in the Commonwealth Authorities and Companies Act 1997 (CAC Act). The GRDC's portfolio department is the Australian Government Department of Agriculture, Fisheries and Forestry (DAFF).

Over the last several years wheat breeding in Australia has undergone a transformation. The changes, and the push to streamline wheat research, reflect the move in recent years from largely public and state-based breeding programs to a commercial breeding sector supported by nationally coordinated pre-breeding efforts. These commercial wheat breeding ventures now live or die on the success of their varieties in the market place.

The introduction in 1994 of the Plant Breeders Rights (PBR) Act in Australia opened the way to change Australia's wheat-breeding sector. The Act allows breeders to control their intellectual property. Breeders claim their financial reward via seed royalties (and) or end point royalties (EPRs).

For some time now, Australian wheat breeding companies have been expressing their concern that EPR non-compliance is a serious issue and that the proposed changes to wheat export arrangements are anticipated to exacerbate the problem. It is critical that a 'culture of compliance' is institutionalised across all sectors of the grains industry if the industry is to maintain a viable wheat breeding sector.

Whilst it is primarily the grower's responsibility to ensure EPRs are paid, under the PBR Act 1994, exporters may still have obligations to the PBR owner of the varieties they export. The Act gives the PBR owner "exclusive rights to do, or to licence another person to do, the following acts...." including "export the material". These rights are somewhat restricted by Section 18. However, the person doing the act (exporting) is still required to pay "equitable remuneration to the grantee" for the privilege.

Therefore, the GRDC in its written submission to the Wheat Export Marketing Bill is recommending that PBR obligations are clearly and specifically acknowledged in the proposed wheat marketing legislation. Specifically:

1. the new legislation for export wheat marketing includes a requirement for licensees to have robust systems and processes in place to enable annual reporting to the licensor demonstrating that, to their reasonable knowledge and belief, the obligations to pay EPRs on the grain they have purchased and plan to export have been met
2. the requirement for traders to have robust systems and processes relating to these EPR obligations is a component of the accreditation process for an organisation to be confirmed as one that is "*fit and proper*" to receive a bulk wheat export licence
3. this requirement be explicitly included in the legislation through:
  - o an additional sub-section in section 11 (1)(c) of the legislation (accreditation)
  - o a requirement to include variety-level reporting in section 13 (1)(c) (reporting obligations)
  - o a requirement in section 13 (1) that there be an annual statement from the licensee, that to its reasonable knowledge and actual belief the obligations to pay EPRs on the grain it has exported have been met (reporting obligations).

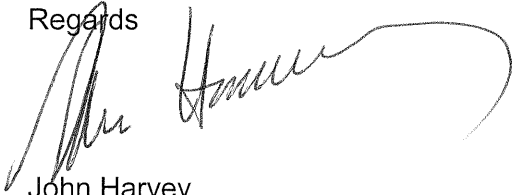
Further, the GRDC recommends that DAFF considers mechanisms to ensure similar governance over the significant (>2mmt) export wheat trade through containers. This could be implemented by providing Wheat Export Australia (EWA) with similar powers to those the EWC currently has with respect to reporting obligations for container exports.

In the event that these recommendations are not incorporated into the Bill we recommend that WEA:

1. uses its powers under section 11 (1) (c) (xvii) to require that, in order to be accredited, a licensee must have robust systems and processes in place enabling them to report annually to WEA that, to their reasonable knowledge and belief, the obligations to pay EPRs on the grain they have exported have been met, and
2. a condition to report annually on how licensees have met the obligations to pay EPRs on grain that they have exported under section 12 (c).

I encourage you to contact me on 02 6166 4500 if you would like to discuss any aspect of this submission in greater detail.

Regards



John Harvey  
Executive Manager Varieties

Cc Mr John Crosby  
Chair, Wheat Industry Expert Group

Mr Bill Schumann  
Wheat Marketing Submissions  
Department of Agriculture, Fisheries & Forestry  
GPO Box 858  
CANBERRA ACT 2601



27 March 2008

Dear Mr Schumann

### **Submission re Draft Wheat Export Marketing Bill**

The Grains Research and Development Corporation (GRDC) provides the following submission to the Department of Agriculture, Fisheries and Forestry (DAFF) in relation to the Draft Wheat Export Marketing Bill.

The GRDC congratulates DAFF for the timely production and clarity of the draft legislation and the explanatory sheets.

Two issues that the GRDC believes require increased attention are data-generation and governance for complying with Plant Breeders Rights (PBR) legislation. These issues are discussed in detail following on from the recommendations below.

### **Recommendations**

Grains industry productivity is supported through the development of new varieties. It is critical that industry development continues through the breeding of new varieties. There has been a fundamental shift in the way wheat breeding is funded based on Plant Breeders Rights and rewarding of breeding organisations through End Point Royalties (EPRs). This system must be supported by the generation of varietal level data and governance over the meeting of PBR obligations. Therefore the GRDC recommends that:

- the new legislation for export wheat marketing includes a requirement for licensees to have robust systems and processes in place to enable annual reporting to the licensor demonstrating that, to their reasonable knowledge and belief, the obligations to pay EPRs on the grain they have purchased and plan to export have been met
- the requirement for traders to have robust systems and processes relating to these EPR obligations is a component of the accreditation process for an organisation to be confirmed as one that is "*fit and proper*" to receive a bulk wheat export licence
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Further, the GRDC recommends that DAFF considers mechanisms to ensure similar governance over the significant (>2mmt) export wheat trade through containers. This could be implemented by providing Wheat Export Australia with similar powers to those the Export Wheat Commission currently has with respect to reporting obligations for container exports.

## **Background and discussion**

### **Breeding new wheat varieties**

Crop breeding is an increasingly important global activity as the world population grows and encroaches on once-productive land. Yield increases must be made as the amount of arable land reduces and climate change impacts on traditional production environments.

In Australia most crop breeding relies on a combination of State government and GRDC funding. In turn, State governments and the GRDC rely on royalties to off-set their investment in plant breeding. It is the Plant Breeders Rights (PBR) Act (1994) that enables royalties to be generated from crop breeding.

As noted in the Wheat Industry Expert Group (WIEG) discussion paper on industry development functions, the near-to-market wheat breeding activities carried out by the three major wheat breeding organisations in Australia rely on royalties to sustain their operations. Public funds, including GRDC investment, are used to support pre-breeding activities such as international germplasm exchange and sourcing of new technologies. The potential contribution that new genes and technology can make to grains industry productivity must be realised through breeding programs.

### **Plant Breeders Rights (PBR)**

Lobbying for plant variety rights in Australia began in the late 1960s and resulted in the introduction of the Plant Variety Rights Act 1987 (the PVR Act). In 1994, the PVR Act was replaced by the Plant Breeder's Rights Act to harmonise with the international obligations included in the updated UPOV Convention of 1991, to which Australia is a signatory.

The UPOV Convention is an International Convention for the Protection of New Varieties of Plants. The primary purpose of the UPOV Convention is to ensure that the member states acknowledge the achievements of breeders of new plant varieties by making available to them an exclusive property right.

The purpose of the PBR Act is to stimulate plant breeding activity and to encourage the development of new crop varieties for Australian markets. The introduction of PBR opened the way to change Australia's wheat-breeding sector by allowing breeders to control their intellectual property and subsequently generate financial return for their endeavours.

### **Implementation of PBR**

The PBR Act provides a platform of rights for owners of plant varieties. In order to convey how the owner intends to exercise their PBR rights, a system of contracts is used. These contracts contain terms and conditions associated with growing the variety, including the method that the breeder is using to gain financial reward.

Methods of financial reward are either seed royalties or End Point Royalties (EPRs). Seed royalties are an up-front payment made by growers at the time of purchasing seed to give that grower the right to use a PBR-protected variety. An EPR is a payment made to the owner(s) of a plant variety in exchange for the right to grow that variety where the payment is based on production. Therefore an EPR captures value for the breeder when a grower sells grain produced from that variety.

EPRs allow plant breeding investment to be maintained in the absence of public funding (wheat and canola breeding in Australia), or in an environment of declining public investment (most other winter crops).

Plant breeders are increasingly using EPRs as their preferred value-capture mechanism because of the advantageous risk return it offers over seed royalties. In 2004-05, 35 per cent of the wheat crop received by AWB was from varieties attracting EPRs. This increased to 49 per cent in 2005-06. If the wheat marketing environment had remained stable, the trend where the exports of wheat were increasingly made up of varieties with EPRs attached to them would have continued. However, the new marketing environment is likely to disrupt this trend unless specific action is taken.

In the single desk environment, accumulators provided data to AWB. AWB provided a service of deducting EPRs payable on varieties and then forwarding the payments to the PBR owners on the grower's behalf. It was an efficient system for bulk wheat export. The same system could work well in a semi-regulated environment if there is onus on bulk wheat export licensees to ensure that EPRs have been deducted on the grain they are trading.

### **International considerations**

Meeting PBR obligations is a legal requirement and therefore traders need governance processes around PBR to ensure this legal obligation, just like any other legal obligation, is consistently met.

Under Section 18 of the PBR Act, traders, and therefore prospective bulk wheat export licensees, may find themselves in a situation where PBR obligations have not been met on the grain they are trading. Therefore theoretically, PBR owners whose PBR obligations have not been met could disrupt trade. To date this has not occurred because:

- it is not a desirable approach as it would have major negative impact on industry
- wheat breeding has only recently become reliant on EPR income, and
- it is currently difficult to track PBR rights attached to varieties and therefore it is very risky to take legal action due to the lack of evidence available.

As a signatory to the UPOV Convention [Article 30(1)], Australia is obligated to have a system that enables PBR enforcement. Effective PBR enforcement relies on having adequate data generation so that varieties can be tracked and reconciled with PBR instruments such as EPR payments.

Having an effective value-capture mechanism such as EPRs in place for plant breeding has broader benefits than just sustaining the close-to-market breeding activities. These are:

- attracting technology to Australia to drive future innovation and total factor productivity
- allowing breeders and pre-breeding researchers to participate in international exchanges of germplasm to provide genetic diversity and new sources of variation that can be exploited in the Australian environment.

In the latter situation of international germplasm exchange, there is an obligation on Australia to provide financial returns to the owners of the germplasm. A robust value-capture system such as EPRs supports Australia's ability to meet this obligation.

### **Varietal level data supports PBR and EPR collection**

Generation of data down to the variety level and willingness to collect EPRs are essential for the development of the grains industry. The grains industry requires the following data:

- what varieties are being delivered and exported
- whether the varieties are proprietary varieties, and
- if they are proprietary varieties with EPR obligations, whether the EPRs have been paid on them prior to export.

### **Is there a legitimate role for government?**

The development of new varieties provides significant public good throughout the grains' industry value chain. As recognised in sections 4.02 and 6.02 of the WIEG discussion paper, the breeders of new varieties play a significant role in the research and development phase within the grains industry and "*a robust and effective R&D program is essential if the wheat industry is to be viable and sustainable into the future*".

The greatest risk to the future of EPR-funded plant breeding is the inability to efficiently and effectively collect royalties. The threat lies with the lack of traceability on varieties because of the lack of variety-specific data. This problem is unlikely to be solved in the absence of government intervention – there are not sufficient returns in the system at this point in time to fund traceability of varieties to the point where a case of PBR infringement can be brought before the courts with sufficient supporting evidence.

In the regulated market for wheat, AWB collected variety-level data as well as EPRs. This meant that the three main accumulators of grain needed to collect varietal information. In a semi-regulated and deregulated environment, if one trader is not collecting and reporting varietal level data, then most likely none of the others will. In a competitive environment, participants seek a level playing field.

The GRDC believes it is legitimate for government to take action to ensure adequate governance over PBR obligations and generation of varietal data. There is no commercial organisation other than the accumulators that can generate variety level data.

### **What do we want government to do?**

The GRDC recommends that the wheat marketing legislation requires wheat export licensees to have robust systems and processes to monitor PBR obligations on grain traded as part of their governance processes. In turn, Wheat Export Australia (WEA) as the licensor should expect that the systems and processes deployed by their licensees satisfy this governance requirement and that a report to this effect is delivered to WEA as the licensor annually.

In practice, these recommendations when implemented will generate varietal level information at the point of grain delivery.

More specifically, the GRDC recommends that:

- the new legislation for export wheat marketing includes a requirement for licensees to have robust systems and processes in place to enable annual reporting to the licensor demonstrating that, to their reasonable knowledge and belief, the obligations to pay EPRs on the grain they have purchased and plan to export have been met
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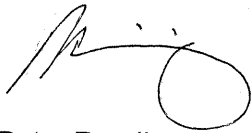
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### **Conclusion**

The GRDC believes that generating varietal information at the point of delivery will provide the foundation from which industry can move forward to address the issues of

EPR compliance in both the domestic and export wheat market. This can be achieved through assistance from government in the form of legislative requirements, combined with industry efforts to solve the issue of reconciling variety-level information with obligations to pay EPRs.

Yours sincerely

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