COMMENTARY ON WHEAT EXPORT MARKETING BILL 2008

Whilst the draft WEM Bill endeavours to use plain English to express its purposes it could have been expressed more clearly and with more certainty.

PART 1

1. Neither Section 4 Definitions nor Section 20 define the meaning of "access test". Accordingly, its inclusion in the Definitions list is superfluous. Either it is deleted or properly defined.

2. Assuming an actual definition in the Trade Practices Act 1974 for the meaning of "access undertaking" that definition should be replicated in Section 4.

3. The Section 4 definition of "designated sanctuary………measure" should be confined to importation of wheat. Any other grain is irrelevant and beyond the interest of WEA.

4. "Port terminal facility" definition is repetitive in its subparagraphs (g), (h)and (i)

5. Section 6(2) exemption could be better expressed as "……………………

   (a) bags; or

   (b) containers;,

   each bag or each container of which is not capable of holding more than 50 tonnes of wheat".

6. Section 7 presupposes a legislative instrument by which WEA formulates the scheme. Arguably this is an ultra vites delegation of legislative power and/or blurs the Doctrine of separation of powers where the WEA has the role of criminal prosecutor for Section 6 contraventions. The Parliament should legislate the scheme, or alternatively the Minister should determine regulations that formulate the scheme to be administered by WEA. Indeed it would be

helpful if the Section 4 definition of WEA was extended to define its purpose consistent with the Section 3 Simplified Outline.

7. Again, the intended empowerment of WEA to formulate the scheme whereby it makes the rules applicable for its decision making under Section 8(2) arguably constitutes a derogation of legislative power. The Minister should take ownership and responsibility for the formulation of whatever is intended by legislative instrument under Section 7(1) that goes beyond the guidelines set out in Section 11.

8. The order of Parts in the Act should be changed to logical order:-

   (a) Part 5 establishment of WEA to be Part 2.

   (b) Parts 2, 3 and 4 to be Parts 3, 4, 5.

PART 2

9. Part 2 Divisions should be rearranged. Divisions 2, 3, 4 and perhaps Division 5 and 6 should precede Division 1, which should be re-named "Non-compliance with………"

10. Nowhere in Part 2 are there sections to the effect that:

   (i) "WEA shall grant accreditation to a company if it is satisfied that the company is eligible under Section 11 and undertakes to comply with its obligations under the (W.E.M.) Act".

   (ii) "Accreditation by WEA shall entitle a company to export bulk wheat."

11. Further, if "bulk wheat" was defined in the Section 4 Definitions in a manner exclusive of bags or containers each of capacity not exceeding 50 tonnes of wheat, then the Bill could be simplified to delete Sections 6(2), 13(2), 18(4), 20(4). All that is needed apart from such Definitions is amendment to confine Section 6(1)(a) to an offence of export of bulk wheat.

12. Without that distinctive definition, Section 7 is not as clear as the Minister's introduction of a scheme to "manage……..export bulk wheat".

13. The offence under Section 6 can never be committed. "Person" means natural person, not company. A person can never satisfy Section 11 criteria.

14. At present, there is no offence of a company exporting (bulk) wheat without accreditation.

    In short, Section 6 must be amended to substitute "company" for "person" and to impose liability upon the Directors of the company.

15. Section 11(c) should be amended to enable WEA to consider "the financial guarantees offered on behalf of a company" and "the business records and risk management arrangements of its Guarantors". This is a vital avenue for co-operatives.

    Rightly, the Bill provides for accreditation of companies only. This is because it brings the accredited entity within the regimes of Corporations Law, the Trade Practices Act and A.S.I.C..

    Co-operatives, for example CBH, have the option to form a company to hold the accreditation. Such company initially will be without business record and without risk management experience. WEA should require guarantees of such a company and then assess the guarantors as if the company.

16. Division 8 Access test introduces a new entity known as "body corporate". For clarity, reference to "body corporate" and "body" should be amended to "company" and, if need be, a Section 4 definition inserted.

    If the owner/operator of port terminal services in Western Australia is a co-operative (eg CBH) then Section 20 will not apply to it under the present Bill. Apart from the above Section 11(c) amendment Section 20 should be amended to allow a company subsidiary of a guarantor co-operative owning or

operating port terminal services to pass the access test if that guarantor complies with Section 20 requirements.

The question arises whether ACCC is able to accept such undertaking of the guarantor co-operative. If not, then Section 20(3)(b) needs amendment to accommodate acceptance by, say, the (State) Registrar of Co-operatives.

PART 3

17. If WEA has reason to believe that an accredited exporter has documents relevant to its duties under Section 17, then it should not be precluded from obtaining same by a demand from that exporter under Section 22 for "reasonable compensation".

18. Again, a person will never be entitled under Section 22 because a person will never be an accredited exporter.

19. Section 22 simply should be omitted, particularly in view of the Section 65 and 69 opportunities.

20. Section 24(2) and (4) (second and fourth lines) should be amended to replace "person" with "company".

21. Sections 25 and 26 should be amended to replace "person" with "company".

22. Section 30(5) and (6) should have similar amendment.

23. By implication, under Section 30(5) WEA is under no obligation (rightly) to provide a copy of the report to a company.

24. Adequate funding of WEA, particularly in exercise of its regulatory powers, is a key issue, that presently is insufficiently defined in both the Bill and Minister's Introduction. The former Wheat Export Authority was underfunded and unable to take a broad view of its role.

    This Bill gives broad powers to WEA and imposes duties that go beyond the role of the former Authority.

Yet funding is addressed only by Section 34 with its restrictive definition of “financial liability” and by Section 55.

25. Section 55(2) funding is of fees on application for accreditation (Section 9), which fees are not to be a tax. Presumably, that precludes an application fee as a percentage on export tonnage. Although not spelt out in Section 11, WEA in its assessment of a company’s financial resources and risk management would be entitled to require a company to disclose the estimated tonnage to be exported. It then could vary provisional application fees applicable to ranges say up to one million tonnes, five million tonnes etc. In subsequent years it could impose final application fees, based on any report disclosing a higher tonnage than on original application.

26. But Section 55(1) “wheat export charge” constitutes an otherwise undefined charge with consequential risk of being passed on to the Grower. That proposed charge should be explained by the Minister.

27. Whatever, the funding of an active WEA performing its roles and duties fully will well exceed Section 55 funding and fall back upon the interpretation of Section 34. The question remains as to the Commonwealth’s commitment.

PART 6

Section 66(1) should amend “person” to “company”.

PART 7

28. Again, reference to “person” should be so amended.

Section 70 arguably denies the public interest of transparency and knowledge of wrongdoing by a company, which can hide behind its claim of commercial-in-confidence information and its assertion that disclosure either, will cause it financial loss or will directly benefit its competitor. Wrongdoing may relate to accreditation criteria and not to matters under Section 30(4) involving police.

Even the Minister is at risk if he acts pursuant to Section 30(6). The Minister should have that power under Section 30(6) to publish in his discretion in the public interest, without having to apply for a Court order.

So, at least Section 71(3)(b) should be amended to include order of Administrative Appeals Tribunal, and Section 71(3)(e) amended to include Section 30(6).

PART 8

29. Section 72 should be amended to extend "person" to "person, company or other entity".

CONCLUSION

30. The single desk system had to be changed, not merely because of the Iraq scandal and of international perception of inconsistency in trade liberalisation negotiations. Internally, the denial of export entitlement to other major industry parties, such as CBH, is no longer maintainable.

The accreditation system (akin to ABA in broadcasting) has merit if WEA is fully funded to carry out its roles and duties. WEA has clear responsibility to the Minister, who has, rightly, the power under Section 29 to direct investigation.

Apart from the above amendments, the Minister should cause now the drafting of regulations or criteria by which the Accreditation Scheme is to be formulated. These must address:

(a) the disparate nature of production, not merely of seasonal vagaries but also of times of harvests, hence supply, (eg. north viz south 3 months)

(b) the wheat industry service flow on effects to perhaps 30% of rural population in mainland states

(c) the need for accredited exporters to attract supply (hence grower risk taking) in dry times reconciled with the need for growers to deliver (within usual specifications) during bumper harvests, without "price depression racheting" by traders/exporters.

WEA would have the power to adopt "industry good functions" criteria

(i) in the maintenance by accredited exporters of these usual specifications, regardless of the volume of harvest

(ii) in the responsible maintenance of both "cash" and pooling choices for growers on silo delivery

(iii) in transparency and reporting by accredited exporters of both their trading ("cash") and pooling arms.

(iv) in random inspection of bulk export wheat consignments for description and quality assurance.

(v) in the enforcement of PVR royalty collections.

Without such criteria, individual growers are at a distinct imbalance in market power to utilise the remedies under the Trade Practices Act. But even with such criteria, the Bill's apparent total deregulation of container exports provides a loop hole and hence risk to Australia's reputation. The growth of container exports would undermine the funding base of WEA, and give container exporters an unfair advantage.

Bill Burke

ADDENDUM TO COMMENTARY ON W.E.M. BILL 2008

Section 6(i) may be better amended

"An offence is committed by an exporter if

a) Bulk wheat is exported by that exporter, and

b) That exporter is not accredited by WEA"

This enables prosecution against an individual, a company, a co-operative, a trust or whatever entity exporting.

This qualifies my Commentary Paragraphs 13 & 14, and gives recognition to the possibility, however remote, that the legal identity of a bulk wheat exporter might be a person as a front for a large entity.

Bill Burke
9th April 2008