

GRAIN MARKETING BILL 2002
EXPLANATORY MEMORANDUM

PART 1 – PRELIMINARY

Clause 1 - Short title

States the short title of the proposed Act.

Clause 2 - Commencement

The Act will commence on a day to be fixed by proclamation. This day is not to be before the Minister is satisfied that the Grain Pool of W.A. (GPWA) is the sole shareholder of Grain Pool Pty Ltd (GPPL). GPPL is at present simply a shelf company waiting to take up the business of GPWA when the Act takes effect. The existing share in this company needs to be held by GPWA so that in due course it can be transferred as required by Schedule 1.

Clause 3 - Meanings of terms used.

Largely self explanatory. The following may be noted:

- **Grain** means the seed of a crop species but does not include what may be referred to as processed grain, that is, grain dealt with in a way that the regulations state exclude it from the definition. Nor does it include things that are made from the seed of a crop species but are not themselves seed. In other words, the Act will apply only to raw grain, not to processed grain or products manufactured from grain.
- **Prescribed grain** (the grain in respect to which the Act applies) consists of barley, lupins and canola. However, there is provision for the regulations to specify that any of these grains is no longer a prescribed grain, or that another grain becomes a prescribed grain. This will give the flexibility to reduce the number of grains to which the Act applies, or, which is less likely, to increase the number if necessary.

Clause 4 - Meaning of export in bulk

This clause stipulates that export in bulk means export other than in bags or containers that cannot hold more than 50 tonnes of grain.

PART 2 – GRAIN LICENSING AUTHORITY

Clause 5 - Authority established

Provides for the establishment of the Grain Licensing Authority by the appointment by the Minister of 5 members.

Clause 6 - Membership

The membership of the Authority is to consist of one independent chairman, two grain producers, a person from the Department of Agriculture and a person from the Department of Treasury and Finance.

Clause 7 - Term of Office

A member of the Authority is to be appointed for a fixed term of not more than 3 years and is eligible for reappointment.

Clause 8 - Casual vacancy

This clause sets out the means by which a position on the Authority may become vacant other than by expiry of the term of appointment of a member. A member may

resign or be removed from office on any of the grounds specified in subsection (2). These include the fact that the person would no longer be eligible for appointment.

Clause 9 - Remuneration and allowances

These are to be determined by the Minister on the recommendation of the Minister for Public Sector Management.

Clause 10 - Quorum

A quorum of the Authority is 3 members.

Clause 11 - Presiding at meetings

The chairman is to preside if present, otherwise the members are to appoint one of their number to preside.

Clause 12 - Procedure at meetings

Except as otherwise stated by the Act the Authority is to determine its own meeting procedures.

Clause 13 - Minutes

Accurate minutes must be kept of the Authorities meetings.

Clause 14 - Staff and other resources of Authority

The Authority is to be staffed and have facilities made available to it by the Department of Agriculture. The staff of the Authority is to include an executive officer.

Clause 15 - Application of *Financial Administration and Audit Act 1985*

Things done by the Authority are to be regarded as services under the control of the Department for the purposes of section 52 of the *Financial Administration and Audit Act 1985* (FAAA). This means that the accountable officer (the chief executive officer) for the Department is responsible for the financial administration of the operations of the Authority.

Things done by the Authority are regarded as operations of the Department for the purposes of Part II Division 13 of the FAAA. This means the reporting responsibilities of the accountable officer of the Department under that Division, include a report on the operations of the Authority.

Under section 23A of the FAAA the Treasurer may make a determination providing for prescribed revenue, that is, moneys lawfully received by a department, to be retained for services under the control of the department. The effect of clause 15(2) is that any licence fee (which under sections 35 and 38 will be paid to the Authority which is not a financial entity) are to be treated as having been lawfully received by the Department, so that section 23A of the FAAA can apply to them.

Clause 16 - Ministerial guidelines

This clause allows the Minister to issue (and amend or revoke) guidelines dealing with matters that the Minister requires to be considered in performing a function of the Authority under the Act. Guidelines will be issued for the information of persons involved in the grains industry and other members of the community as well as for the assistance of the Authority.

In performing a function, the Authority is required to take into account anything relevant that is in the guidelines. However, this does not mean that the guidelines can limit the Authority's duty to exercise its discretion in a particular case, prevent it

from taking into account matters not set out in the guidelines, or require it to take into account a guideline if to do so would be inconsistent with the Act itself.

Guidelines must be published in the manner prescribed by the regulations and before issuing or altering any guidelines the Minister is to consult with such industry bodies and other persons as the Minister thinks fit.

Guidelines are not subsidiary legislation within the meaning of the *Interpretation Act 1984*. This reinforces the appropriate role of the guidelines, as guidelines, rather than legislation as such, even if they have what might be regarded as legislative effect.

Clause 17 - Minister may give directions

The Minister may give written directions to the Authority with respect to the performance of its functions, either generally or in relation to a particular matter and the Authority is to give effect to any such directions. This ensures the Authority is subject to appropriate Ministerial control if necessary. The clause includes standard provisions for any direction given to be tabled in Parliament and to be included in the annual report of the Department under the FAAA.

Clause 18 - Minister to have access to information

A standard clause allowing the Minister to have access to information in the possession of the Authority, for the purposes of proper accountability.

Clause 19 - Licensing

This states the essential function of the Authority – to administer the licensing scheme in Part 3.

Clause 20 - Reports to Minister

The Authority is to report to the Minister annually and whenever directed by the Minister to do so on the operation and effectiveness of the licensing scheme and on any other matters relating to the operation of the Act that the Minister specifies.

Clause 21 - Powers, generally

Simply states that the Authority has all the powers necessary to perform its functions.

Clause 22 - Power of entry

The power of entry given by the section is for ascertaining whether a contravention of the Act has occurred or for obtaining evidence of a contravention. It includes the power to search and inspect any place document or thing.

Safeguards are built into the provisions so that the power of entry and search may only be exercised where:

- consent has been obtained;
- notice has been given and the owner or occupier has not objected; or
- a warrant has been obtained.

PART 3 – EXPORT CONTROLS

Clause 23 - Offence of buying prescribed grain in bulk

Under section 23(2) buying prescribed grain for export in bulk will be allowed:

- by the main export licence holder;
- if the grain is bought in accordance with a special export licence; or

- if the grain is bought from the main export licence holder or has previously been sold by the main export licence holder.

It will be an offence to buy prescribed grain for export in bulk except as allowed under 23(2).

Clause 24 - Offence of exporting prescribed grain in bulk

Under clause 24(2) the export of prescribed grain in bulk will be allowed:

- by the main export licence holder;
- if the grain is exported in accordance with a special export licence; or
- if the grain is bought from the main export licence holder or has previously been sold by the main export licence holder.

It will be an offence to export prescribed grain in bulk except as allowed under section 24(2).

Clause 25 – Main export licence

This licence may be granted by the Authority with the Minister’s approval. While it has effect it authorises the holder to buy any prescribed grain for export in bulk and to export any prescribed grain in bulk.

Clause 26 – When main export licence has effect

A main export licence has effect from the time specified in the licence unless it is cancelled. Subclause (2) ensures there will only ever be one export licence in effect at a time.

Clause 27 – First main export licence

The effect of this clause is that Grain Pool Pty Ltd will be the holder of the first main export licence by force of the Act, as soon as it comes into operation. The licence will not have to be specifically issued by the Authority.

Clause 28 – Obligation to buy grain

Subclause (1) makes it a condition of the main export licence that the holder buys all grain offered to it unless it may decline to do so under subclause (3).

Subclause (2) provides that the terms on which the main export licence holder is obliged to buy grain are those on which it buys grain in similar circumstances from other people.

Under subclause (3) grain need not be purchased for if it was not produced in the current season or does not comply with set standards as to that type of grain. (However, if grain is from a previous harvest season or sub-standard in any way the main licence holder, while not obliged to buy the grain, may choose to do so.)

Clause 29 – Special export licence

This clause empowers the Authority to grant special export licences. A special export licence authorises its holder to buy prescribed grain for export in accordance with the Act and to export any prescribed grain specified in the licence to any market specified in the licence.

“Market” is defined to mean “country or part of a country”.

Clause 30 - Details to be specified in application

Sets out the five matters, which must be specified in an application for a licence, namely, the type and quantity of grain, the market, the term and the season of production.

Clause 31 – Prerequisites for grant of special licence

A special licence can't be granted with a term that begins during the first year of operation of the Act unless the Minister authorises it.

In relation to other licences (where the term would begin more than one year after the Act commences), before making its decision the Authority must decide:

- whether the main export licence holder exports prescribed grain to the market for which the licence is sought; and
- if so whether the price at which the main export licence exports that grain incorporates a premium resulting from the exercise of its market power as the main export licence holder.

These decisions need to be made so that the Authority can exercise its power to grant a licence in accordance with subclause (3).

If a premium is found to exist:

- the Authority is required to consult the main export licence holder before granting the special export licence (it will thereby get information relevant to whether that premium would be significantly affected by the grant of the special licence); and
- the Authority can't grant the special export licence if it considers that to do so would be likely to affect that premium to an extent it considers significant.

Under subclause (4) the Authority is also required to consider the effect if any, that granting the licence would have on the State's reputation as a grain exporter and on the State's grain industry generally.

Clause 32 – Term of Special Licence

The term must be at least one year, may be extended and has effect until the end of the term unless cancelled.

Clause 33 – special Export Licence conditions

Conditions may be imposed on a special export licence. These include those matters specified in subclause (2). Conditions may be varied, either at the request of the holder or of the Authority's own motion.

Clause 34 – Matters to be specified in special export licence

In addition to the grain and the market that must be specified under clause 29, a special export licence must specify the term of the licence, the quantity of grain to which it applies and any conditions to which it is subject.

Clause 35 – application for licence

This clause applies to a special licence and a main licence subsequent to the first. An application must be made in the form approved by the Authority and be accompanied by the prescribed fee. The Authority may require an applicant for a licence to provide any other information necessary to consider the application.

Clause 36 – Licence not transferable

No licence granted under the Act is transferable.

Clause 37 – Cancellation of licence

A licence may be cancelled by notice in writing. The notice must specify the time the cancellation is to take effect (which may be postponed if an appeal is lodged). A main export licence cannot be cancelled except as directed by the Minister.

Clause 38 – Licence fees

The effect of subclause (1) is that the initial fee payable for a licence must be paid before the licence is issued, but this does not apply to the first main export licence. The holder of a licence fee must pay any other relevant licence fee prescribed by the regulations and any outstanding fees may be recovered as a debt due to the State.

Clause 39 – Notice of decisions

If the Authority refuses to grant a licence it must give the applicant notice of that decision within 14 days after it is made.

Clause 40 – Appeals

Appeals may be made to the Minister against decisions of the Authority to refuse to grant a licence, cancel a licence or vary or impose a new condition on a licence. An appeal must be made within 30 days of receipt of notice of the decision appealed against. The appeal must be by notice in writing setting out the grounds of appeal and any representations the appellant wishes to make in support of the appeal.

If the appeal is against the cancellation of a licence the time the cancellation has effect is postponed until the appeal is dealt with or withdrawn and the time specified in the notice may be varied when dealing with the appeal.

The Minister may confirm, vary or reverse a decision appealed against and the decision of the Minister is final. Notice of the decision together with reasons for it must be given to the appellant within 7 days after it is made.

PART 4 – MISCELLANEOUS**Clause 41 – Exemption for restrictive trade practices**

This clause is included to prevent anything done in accordance with the main export licence from being regarded as a breach of Part IV (the competitive conduct provisions) of the *Trade Practices Act 1974* (TPA) of the Commonwealth or the Western Australian Competition Code. Such an exemption is contemplated by section 51 of that Part of the TPA, which requires that the conduct to be disregarded must be specified in and specifically authorised by an Act and that the authorising provision must expressly refer to the TPA.

Clause 42 – Publication of information about special export licences

This clause requires the Authority to make certain information publicly available. The information includes the total amount of prescribed grain produced in each season for which a special licence was sought and the total for which a special licence was granted. It will also include the number of applications and such other information as may be prescribed.

Clause 43 – Evidence

This is a provision to assist with the straightforward prosecution of offences against the Act.

A certificate purporting to be signed by the Chairman of the Authority is evidence of any fact stated in the certificate without proof of the signature or the appointment of the person as Chairman. The facts that may be stated are listed in subclause (3).

Subclause (2) states that a certificate may not be used unless:

- the defendant has had 28 days notice of the intention to use a certificate to give evidence of a fact; and
- has not, at least 14 days before the certificate is to be used, given notice requiring the Chairman to attend at a witness.

Clause 44 – Regulations

Subclause (1) is a general regulation-making power and subclause (2) specifically states that regulations may prescribe the procedures governing meetings of the Authority.

Subclause (3) will prevent an additional grain becoming a prescribed grain or a prescribed grain ceasing to be a prescribed grain without at least 6 months notice. This is to allow forward planning by licence holders and applicants for licences.

Clause 45 – Repeal

The existing *Grain Marketing Act 1975* is to be repealed.

Clause 46 – Transitional and saving provisions

The necessary transitional and saving provisions are set out in Schedule 1.

Clause 47 – Consequential amendments

The few consequential amendments to other Acts that are required by the repeal are set out in Schedule 2.

Clause 48 – Review of Act

The usual provision for review after 5 years with an additional provision for review if, in the Minister's opinion, a material change occurs in the ownership or control of Grain Pool Pty Ltd or CBH.

Clause 49 – Expiry

The purpose of this clause is to allow the Act to expire when the restrictions on the export of wheat under the Commonwealth Wheat Marketing Act are removed. More particularly, it allows the Act (other than the provisions empowering the making of transitional regulations) to expire when an order is made by the Minister under subclause (2). If an order is made, the day specified as the expiry day:

- won't be retrospective; and
- will be as soon as practicable after the 30 April next following the relevant Commonwealth legislative change.

The relevant Commonwealth legislative change will be a change as a result of which there cease to be restrictions on the export of wheat.

Subclause (4) provides for the making of what may be termed transitional regulations, that is, regulations dealing with matters that need to be dealt with as a result of the expiry of the Act. These regulations may be expressed to have effect before the day on which they are published in the Gazette, but if so, can not prejudicially effect the rights of any person (other than the State) existing before the day of publication. Nor can they impose any liabilities on a person (other than the State) in respect of anything done or omitted to be done before that day.

SCHEDULE 1 – TRANSITIONAL AND SAVINGS PROVISIONS

Clause 1 – Meanings of terms used in this Schedule

Defines various terms used in Schedule 1. These are self-explanatory.

Clause 2 – Interpretation Act to apply

Schedule 1 does not limit the operation of the provisions of the Interpretation Act 1984 relating to the effect of repeals.

Clause 3 – GPWA continued for certain purposes

Despite the repeal of the Grain Marketing Act 1975 under which it is established, GPWA continues in existence for the purposes of:

- (a) reporting under the FAAA for any financial year for which a report has yet to be submitted;
- (b) performing functions under clause 5 - which effects the merger between Grain Pool Pty Ltd and CBH; and
- (c) winding up its affairs in relation to taxation. This will enable the finalization of certain GST returns which may not be able to be performed by GPPL by the authority of the other provisions of Schedule 1.

By subclause (2), the former Directors of the governing body of GPWA (the Board of Directors) cease to hold office on the commencement day and GPWA as continued by this clause is to be governed by the Chairman of the Board of directors or a person appointed by him. That person is to be the accountable authority within the meaning of the FAAA of GPWA as continued. The accountable authority has obligations in relation to reporting under Schedule 1.

GPWA as continued by clause 3 has all the powers it needs to perform its functions and is to be provided with clerical and other assistance by GPPL.

Clause 4 – Devolution of assets, liabilities

It is this clause that gives effect to the transfer of all the assets and liabilities of GPWA to GPPL. It ensures that the assets transferred are transferred without restriction and it ensures that anything that might formerly have been done by GPWA can henceforth be done by GPPL.

Clause 5 – Shares in Grain Pool Pty Ltd

The consideration of the transfer effected by clause 4 is to be the issue, on the commencement day, of shares in GPPL to GPWA.

The day after these shares are issued to GPWA all the shares in GPPL that are held by GPWA are required to be transferred to CBH. The shares so transferred will include the one already held before the Act commences. It is through this transfer that GPPL becomes a wholly owned subsidiary of CBH.

Clause 6 – Agreements and instruments

Provides that any agreement or instrument to which GPWA was a party or which contains a reference to GPWA continues with GPPL as party and with references to GPWA construed as references to GPPL. This will ensure that the transfer of assets, liabilities, rights and obligations operates effectively to put GPPL in the place of GPWA for all purposes.

Clause 7 – References to GPWA in written law

As with agreements and instruments, any references in to GPWA in written laws are to be construed a references to GPPL.

Clause 8 – Staff

Employees of GPWA become employees of GPPL on the same terms and conditions and with the same rights (unless they agree otherwise) as before commencement of the Act. Subclause (3) provides that such a person is not entitled to any payment or other benefit because employment with GPWA has ceased.

Clause 9 – Final report

Covers the situation where the commencement day is not immediately after the end of a financial year (for which a report would be required by clause 3(1)). In such a case, a final report is required under section 70A of the FAAA and the person performing the role under clause 3(2)(b) is to be the reporting officer for that purpose.

Again, GPPL is to provide any necessary clerical or other assistance.

Clause 10 – Immunity continues

If GPWA had the benefit of any immunity in respect of any act, matter or thing, that immunity continues for the benefit of GPPL.

Clause 11 – Exemption from State tax

No stamp duty or other State taxes and charges are to be payable in relation to anything done by operation of the Schedule or for the purpose of giving effect to the Schedule.

Clause 12 – Registration of documents

Registrar of titles empowered to register any necessary documents to give effect to the Schedule.

Clause 13 – Saving

The operation of any provision of the Schedule is not to be regarded as a civil wrong, breach of contract, as giving a remedy to a party to an instrument or permitting its termination because of the change in ownership of anything, as causing a contract or instrument to be void or unenforceable or as releasing or allowing the release of any surety.

The purpose of this clause is to prevent any claims or legal actions arising as a result of the operation of the provisions of the Schedule.

SCHEDULE 2 – CONSEQUENTIAL AMENDMENTS TO OTHER ACTS

Clause 1 – Bulk Handling Act 1967

GPWA is removed from the definition of “marketing authority” because it will cease to be a marketing authority and cease to exist at all.

Section 8 of the Bulk handling Act will also be amended to remove a reference to GPWA but as section 8 is due to be repealed in its entirety by the proposed *Bulk Handling Amendment Act 2002* this amendment to it will only come into operation if that hasn’t happened already.

Clause 2 – Bulk Handling Act Repeal Act 2000

Had section 14 of this Act come into operation, which it hasn’t, it would have amended certain provisions of the *Grain Marketing Act 1975*. If by any chance it does come into operation before the commencement of this clause, the amendments it will have made will be repealed as part of the total repeal of the *Grain Marketing Act 1975*. If it has not come into effect before this clause it will be repealed because

the amendments it would make won't be needed. (The Grain Marketing Act will have been repealed.)

Clause 3 – *Constitution Acts Amendment Act 1899*

The Board of Directors of GPWA is removed from Schedule V Part 3 of this Act and the Grain Licensing Authority is included. The Schedule referred to lists those bodies whose members vacate office automatically if declared to be elected as a member of the Legislature. GPWA is removed because there will no longer be such a body and the Grain Licensing Authority is listed to ensure that a member of the Authority can't hold that office and be a member of Parliament at the same time.

Clause 4 – *Financial Administration and Audit Act 1985*

GPWA is removed from the Schedule to the FAAA that lists the bodies that are statutory authorities for the purpose of that Act.

Clause 5 – *Statutory Corporations (Liability of Directors) Act 1996*

GPWA is removed from the Schedule that lists those directors of bodies that are directors for the purpose of part 3 of this Act, which imposes certain duties on those directors.