

Wheat Industry Fund Regulations (Amendment) 1994 No. 254

EXPLANATORY STATEMENT

STATUTORY RULES 1994 No. 254

Issued by Authority of the Minister for Primary Industries and Energy

WHEAT MARKETING ACT 1989

WHEAT INDUSTRY FUND REGULATIONS (AMENDMENT)

Section 94 of the Wheat Marketing Act 1989 (the Act) provides that the Governor-General may make regulations for the purposes of the Act, including regulations regarding the operation and management of the Wheat Industry Fund (the Fund).

The Fund, established under the Act, is made up of levies paid on all wheat sold or processed plus earnings on Fund monies. The Fund provides a capital base for the business operations of the Australian Wheat Board (AWB), other than wheat pools, to strengthen its overall marketing functions for the benefit of all grain growers. These business operations, which must meet commercial and strategic criteria, cover domestic trading, including cash purchases, of wheat and other grains, and investments in downstream processing and other value adding activities both domestically and offshore. It is also intended to build up the size of the Fund so that the AWB can make advance payments for pool return wheat after the announced cessation in 1999 of the current borrowing guarantees provided by the Government. The industry has accepted the necessity for the Fund levy to continue until that time.

The use and management of Fund monies is determined by the provisions of the Act and the associated Wheat Industry Fund Regulations, Statutory Rules 1990 No. 28 as amended, which require the AWB to manage the Fund in accordance with an Annual Business Plan approved by the Grains Council of Australia (GCA).

The management arrangements for the Fund, under current Regulations, require levy payments and earnings on investments to be clearly identified with equity holders. Equity may also be acquired by transfer from an equity holder to another person, although there is no recognised market to enable that to readily occur. At present an application for a refund of equity in the Fund can only be made in the case of death or bankruptcy of the equity holder. No decision has been made to date to revolve the Fund. For the past 12 to 18 months some wheat-growers have been pressing the GCA and AWB for additional access to their equity.

The main purpose of the amending Regulations (the Regulations) is to provide growers with increased access to their equity through the implementation of an optional equity reduction scheme and by extending the refund provisions to persons leaving the industry. It will give holders of equity in the Fund the opportunity to redeem a proportion of that equity by selling it back to the Fund. These arrangements will also maintain the integrity of the Fund as the AWB's long term capital base. The Regulations also

- provide for the conversion of Fund equity to a units basis and for those units to be identified by their WIF financial year of issue;
- allow the AWB to re-sell equity which has been redeemed or paid out, and to act as a broker for the sale or transfer of Fund equity;
- require that the earliest equity in the Fund be paid out first if the Fund is revolved; and

- make a number of consequential amendments and corrections.

The Regulations commenced on the date of Gazetta.

Details of the Regulations are set out in the Attachment.

ATTACHMENT

Details of the Regulations are as follows:

Regulation 1 - Provides for amendment of the Wheat Industry Fund Regulations.

Regulation 2 - Makes a number of corrections and consequential amendments to definitions used in the Regulations.

A new subregulation 2(2) defines the identity of units in terms of the Wheat Industry Fund (WIF) financial year of issue. Normally this is the WIF financial year in which the associated levy and earnings have been credited to the Fund. However, units purchased under Regulation 10B, either directly through the optional equity reduction scheme or where the AWB has acted as a broker as a result of a request under that scheme, lose their previous identity and are identified by the WIF financial year in which they were purchased. Units transferred outside of Regulation 10B retain their year of issue identity.

Regulation 3 - Provides for any brokerage fee received by the AWB in respect of the purchase, sale or transfer of WIF equity, as well as money received by the AWB from the sale of redeemed, paid out or vested equity (under Regulation 10B), to be credited to the Fund.

Regulation 4 -

Subregulation 4.1 is a technical correction to ensure consistency with the new definition of "WIF financial year".

Subregulation 4.2 provides for the Annual Business Plan to deal with additional matters regarding the annual issue and valuation of units in the Fund; and the circumstances and conditions regarding repayments of equity, and the re-sale or annulment of redeemed, paid-out and vested equity.

Subregulation 4.3 clarifies the present implied requirement for approval of the Annual Business Plan by the Grains Council of Australia (GCA) before it becomes operative. A new provision is inserted to ensure that decisions by the AWB in respect of the additional matters in the Annual Business Plan (see subregulation 4.2) operate fairly and without preference to any one person. Those parts of a Plan which set out guidelines related to unitisation of the Fund, repayments of equity and the resale of equity, will be available on request to the AWB, to persons affected by the AWB's decisions in these matters.

Regulation 5 - is a technical correction to ensure consistency with the new definition of "WIF financial year". The financial year for the Fund remains the year starting on 1 October.

Regulation 6 - Replaces Regulation 8 regarding the determination and allocation of equity in the Fund, with new Regulations 8, 8A and 8B to provide for the conversion of equity of the Fund to a units basis. The conversion and future creation of units will be on the basis that at the end of any WIF financial year all units will have equal value (subregulation 8(1)). The amendments do not vary the principles nor the requirement that earnings and losses of the Fund, together with changes in the value of the net assets of the Fund, be allocated proportionately among equity holders.

The subregulations 8(2) and (3) provide for the *conversion to* units of existing equity from previous WIF financial years, and deem such units to have been issued in the WIF *financial years* in which the relevant levy and earnings were credited to the Fund. Units are deemed to have been proportionally allocated to equity holders in those years in the same manner as new units will be issued.

The subregulations 8A(1) and (2) require the AWB to determine the number of new units to issue in respect of each WIF financial year taking account of the amounts of levy and the time they were credited to the Fund, as well as the share of earnings and losses, including the change in value of the net assets of the Fund, attributable to that WIF financial year. New and existing units must have the same value after the distribution of earnings and losses at the end of a WIF financial year.

The new subregulations 8A(3) and (4) require the AWB to issue such new units to equity holders on the basis of levy or transferred equity in respect of that WIF financial year, credited on behalf of the person, and taking account of the time of payment of levy.

The subregulation 8A(5) provides that new units will be identified by the WIF financial year for which the associated levy and earnings have been credited to the Fund.

Regulation 8B provides for the AWB to have entitlement to equity for which an owner cannot be found. The proper equity holder can claim such equity within 2 years of when such units would otherwise have been issued to the person.

Regulation 7 - Substitutes the current Regulation 9 regarding the issue of equity statements to take account of the conversion of the equity of the Fund to units. Under Regulation 9 the annual statement issued to equity holders must include details of the person's opening balance, the number of units issued, equity acquired, sold or transferred, and the person's closing balance. Units, except in the case of those sold, must be identified by their WIF financial year of issue, and the value of each unit must be shown.

Regulation 8 - Replaces subregulations 10(1), (2), (2A) and (3) to take account of the conversion of the Fund to units and to clarify the mechanism for revolving the Fund as distinct from the operation of the equity reduction scheme. The principle, that any determination by the AWB to revolve equity must be made only after consultation with the GCA and must apply equally to all holders of a class of equity, has been maintained (subregulation 10(1)).

Subregulations 10(2) and (3) provide that the oldest class of equity, based on the WIF financial year of issue of units as recorded on the Register, must be revolved before a later class. The new subregulation 10(3A) continues the current provisions that a determination must fix payment as a percentage of equity held, taking account of the conversion of the Fund to units, and set a date after which payment must be made by the AWB.

Subregulations 8(2) and 8(3) are consequential amendments.

Regulation 9 - Inserts new regulations 10A, 10B and 10C to respectively implement an optional equity reduction scheme; to allow the AWB to re-sell or annul redeemed, paid-out or vested equity; and to identify equity holders by a unique number on the Register.

The new subregulations 10A(1) and 10A(2) will provide for the AWB, with the approval of the GCA and in accordance with the Annual Business Plan, to make a determination to enable all equity holders to redeem a fixed percentage of their equity. The determination must fix the price to be paid for each unit redeemed and may fix a separate price for additional equity redeemed over and above the fixed percentage. The determination must set a date for the commencement of payments.

Subregulations 10A(3), (4) and (5) provide that an offer would be made in writing to each equity holder who would have the option of taking up all, a nominated part or none of the fixed percentage reduction in equity offered, and the AWB must make payments to those accepting the offer and reduce the person's equity accordingly. Equity holders may also indicate if they

wish to redeem additional equity, if all offers are not accepted within 30 days of the date of the offer.

Subregulations 10A(6) and (7) provide that if at the end of that period the balance of money remaining under the determination is insufficient to fully meet any requested additional reduction in equity, a pro-rata allocation would be made so that the unsatisfied portion of all requests is equal.

The new subregulation 10A(8) provides that for each equity holder accepting either the fixed percentage reduction on offer or redeeming more or less equity, their equity is reduced by progressive redemption of their oldest units of equity as shown on the Register.

The new regulation 10B provides for the AWB to resell or annul any equity which has been redeemed under the equity reduction scheme, paid out under regulation 16 in the case of death, *bankruptcy* or leaving the industry, or vested in the AWB and unclaimed, subject to consultation with the GCA and any guidelines in the Annual Business Plan.

If the AWB wishes to utilise the equity trading powers under this regulation it will be subject the prescribed interest and secondary market provisions of the Corporations Law. However, advice from Attorney-General's Department is that the Corporations Law is broadly based and was not intended to apply to schemes such as the Wheat Industry Fund. To this end the Law allows for exemptions to be obtained from the prescribed interest and secondary market provisions and the AWB does not intend to engage in equity reselling activities until the necessary exemptions from have been obtained from the Attorney-General.

The new Regulation 10C provides a substantive requirement, not currently included in the Regulations, that the AWB allocate a WIF number to a person when the person first becomes an equity holder or rejoins the Fund after relinquishing any previous holding.

Regulation 10 - Removes the current requirement for the AWB to issue certificates of equity on request or otherwise. Conversion of Fund equity to units and changing practices in the financial securities industries, will render the need for certificates obsolete.

Regulation 11 - Replaces Regulation 12 concerning the transfer of equity to take account that transfer of equity will be administered without the issue of certificates. The new subregulation 12(2) provides that a transfer is only effective if the AWB has been given specified information about both parties and the transferred equity, on a form approved by the Board. A transfer form will be included as part of the annual equity statement to be issued under Regulation 9 The AWB must then promptly register the transfer (subregulation 12(3)).

Regulation 12 - Provides for consequential amendments to subregulation 13(2) concerning the Register of equity holders to take account of definitional changes, conversion of the Fund to units, the equity reduction scheme and provisions for pay-out of equity, and the transfer of equity without the use of certificates. Sufficient information must be kept on the Register to meet the requirements for the issue of equity statements under the new Regulation 9. The new subregulation 13(3) provides for details of the transferor and transferee to be recorded on the register.

Regulation 13 -

Subregulation 13.1 inserts new subregulations 14(2A) and (2B) to provide that persons who have left the industry, either by ceasing to produce leviable wheat for 3 years, or under provisions of the Farm Household Support Scheme or the Rural Adjustment Scheme, may apply for a pay-out of their equity.

Subregulation 13.2 is a consequential amendment.

Subregulation 13.3 incorporates provisions regarding documentary evidence when applying for repayment of equity on leaving the industry, while retaining the intent of existing provisions relating to death and bankruptcy. The option of deferring repayment to the end of the WIF financial year is retained for each of the above situations under which a pay-out may be made.

Subregulation 13.4 inserts a new subregulation 14(4) to exclude corporations, partnerships etc from repayment of equity on leaving the industry except where each person of a partnership meets this criteria. A new subregulation 14(5) provides that a statutory declaration shall be regarded as evidence that a person has ceased to be a grower.

Regulation 14 - Replaces the present Regulation 15. The new subregulation 15(1) corrects an inconsistency in the current Regulations with the Bankruptcy Act 1966, regarding the time limit for applying for repayment of equity. A consequential amendment is made to subregulation 15(2) to reflect that this provision regarding the time limit for pay-out claims in the case of death commenced on the date of gazettal of the previous amendments to the Regulations.

A new subregulation 15(3) incorporates a three year time limit on claims for repayment of equity on leaving the industry, similar to existing provisions relating to death.

A new regulation 15A excludes from any pay-out in the case of death, bankruptcy or leaving the industry, equity which was acquired by transfer, if the AWB considers that there is the possibility of impropriety in that such transfer was intended to provide a benefit to the transferor. This is to discourage people who may not otherwise be eligible for a pay-out of equity, setting up contrived transfer arrangements to obtain such equity. Transferred equity will be eligible for participation in any revolving of the Fund and in the optional equity reduction scheme.

Subregulations 15A(2) and(3) provide for a review of the AWB's decisions, in the first instance by the AWB and if necessary for that decision to be reviewed by the Administrative Appeals Tribunal.

Regulation 15 - Expands the present Regulation 16 to take account of applications for pay-out of equity based on leaving the industry. The current review provisions in subregulation 16(3) are replaced by a two stage review process as provided for by the subregulations 15A(2 and 3) to maintain consistency.

Regulation 16 - Makes consequential amendments to Regulation 17.

Regulation 17 - Makes consequential amendments to Regulation 19.