



**Australian
Competition &
Consumer
Commission**

Our Ref: C2004/1417
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28 September 2004

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Dear Sir or Madam

Applications for Authorisation A30233, A30234 and A30235 lodged by GrainCorp Operations Limited and AWB Limited: export freight and logistics joint venture

On 27 September 2004 the Australian Competition and Consumer Commission received applications for authorisation (A30233, A30234 and A30235) from GrainCorp Operations Limited and AWB Limited (the applicants). The applications have been made pursuant to subsections 88(1), 88(8) and 88(9) of the *Trade Practices Act 1974* for conduct which may result in a substantial lessening of competition or which may be exclusive dealing.

Please note that the matters covered by the applications are very similar to the arrangements recently submitted to the Commission under its informal merger process, upon which you may have already provided comments. However the Commission is obliged under the Act to consider applications for authorisation separately and so must seek comments on the merits of the applications anew. The process and timeline for this consideration is set out below.

The applicants have also requested urgent interim authorisation for the proposed arrangements which, if granted, would allow the applicants to implement the arrangements for a specified period of time. The Commission seeks your comments on the request for interim authorisation by this **Friday 1 October 2004** – comments can be provided by email or fax to the contacts shown at the end of this letter. The request for interim authorisation is discussed further on pages 3-4 of this letter.

Authorisations

The ACCC is the Commonwealth agency responsible for administering the Trade Practices Act, a key objective of which is to prevent anti-competitive conduct, thereby encouraging competition and efficiency in business, resulting in a greater choice for consumers in price, quality and service.

The Act, however, recognises that the public interest may not always be met by the operation of competitive markets. The authorisation process in the Act addresses this eventuality by allowing the ACCC to grant immunity from the application of many of the restrictive trade practices provisions of the Act in certain circumstances. In order to grant authorisation the ACCC must generally be satisfied that the public benefit arising from the particular conduct outweighs any detriment, particularly anticompetitive detriment, arising from the conduct.



In assessing the public benefits and detriments of an authorisation application, the ACCC undertakes a public consultation process seeking comments on the application from interested parties such as yourself. Following an initial consultation process, the ACCC will issue a draft decision for comment. Further information regarding the authorisation process is available from the ACCC's website (www.accc.gov.au).

Overview of the AWB/Graincorp proposal

The applicants have formed a joint venture company, Export Grain Logistics Pty Ltd (identified as "JVCo") which will provide transport and logistics services to GrainCorp and AWB in Queensland, New South Wales and Victoria for export bound grain. The applicants state that the purpose of forming JVCo is to improve efficiencies and to achieve logistics costs savings for grain exports, through improved co-ordination of export grain storage and transport activities and increased access to information to facilitate the export grain task.

The applicants have requested authorisation for:

- the acquisition of the ordinary shares of JVCo, a special purpose company with a share capital of \$2.00 with each of AWB and GrainCorp having a 50% shareholding
- the export collaborative arrangements between GrainCorp and AWB pursuant to a Joint Venture Shareholders Agreement between GrainCorp, AWB and JVCo ("Joint Venture Agreement"), also referred to by the parties as the "Transaction", for the management and co-ordination of the supply chain for the export of grain from Queensland, New South Wales and Victoria
- the operation and supply of services by the JVCo on the condition that neither AWB nor GrainCorp conduct, carry on or promote a separate export logistics business in Queensland, New South Wales and Victoria.

The parties seek authorisation for a period of not less than five years. The parties have also offered to provide an Undertaking to the effect that the Commission may review the Transaction, in the event that the export wheat market is deregulated under the Wheat Marketing Act. A copy of the proposed undertaking is attached.

The Undertaking is proffered on the basis that while the parties do not believe there is an anti-competitive effect from the Transaction, it provides the Commission with an opportunity to review the matter in the event of deregulation, while also giving the parties the opportunity to demonstrate that the Transaction has had no such anti-competitive effects based on actual performance and conduct.

Attached to this letter is a copy of the application, supporting submission and a copy of the Joint Venture Agreement received by the ACCC.

In addition a copy of the application and related documents can be viewed by following the "Authorising anti-competitive conduct" and "Authorisations" links on the ACCC's website at <http://www.accc.gov.au>. Alternatively, please contact Jewel Gilbert on 02 6243 1225 to arrange for a copy of the submission to be forwarded to you.

Request for submissions on application for authorisation

As a potentially interested party you are invited to make a written submission to the ACCC regarding the likely public benefits and effects on competition of the arrangements for which authorisation is sought.

In support of their application, the applicants have identified a range of efficiencies and improvements in the storage and handling, transport, logistics and export grain task and claim that the proposed arrangements will result in a number of public benefits, including:

- cost savings from more efficient transport of grain destined for export from up-country grain accumulation silos to port;
- better information and increased transparency on which to base investment decisions about grain storage and transport infrastructure; and
- improved use of existing infrastructure by improving train scheduling and co-operation.

The applicants also claim that the proposed arrangements will not have a significant effect on competition and have provided responses to a number of identified competition concerns.

To assist the ACCC in its consideration of the application it would be helpful to obtain your comments on the applicants' claims. Please note, the ACCC recommends that you access a copy of the applicants' supporting submission before making a submission.

The ACCC asks for submissions to be in writing so they can be made publicly available. They are placed on a public register for this purpose.

Persons lodging a submission with the ACCC may request that information included in the submission be treated as confidential and not placed on the public register. If confidentiality is granted in respect of information the ACCC may take it into account, even though not publicly available. Guidelines for seeking confidentiality are attached (Attachment A).

If you wish to lodge a submission, please address your submission to:

The General Manager
Adjudication Branch
Australian Competition & Consumer Commission
PO Box 1199
DICKSON ACT 2602

Submissions can also be lodged by email to: adjudication@acc.gov.au.

Please ensure that your submission reaches the ACCC by **cob Friday, 22 October 2004**.

Request for submissions on request for interim authorisation

As previously mentioned, the applicants have also requested urgent interim authorisation for the proposed joint venture arrangement.

Interim authorisation is only granted by the ACCC in exceptional circumstances. The ACCC is not required to assess the merits of the application for authorisation in reaching its decision on a request for interim authorisation. Generally, the ACCC is unlikely to grant interim authorisation in the absence of any urgent need for protection or where the effect of allowing

the proposed conduct to occur would prevent the market being able to return to substantially its pre-interim state if the ACCC later denied authorisation.

The parties consider that an interim authorisation for the 2004/2005 season is imperative given the:

- impending, above average, harvest in New South Wales and Victoria;
- need to publish Estimated Silo Returns in October 2004; and
- need to put in place logistics arrangements for this harvest with Pacific National and Queensland Rail.

Further details of the applicants' request is at section 1.12 of the submission.

The ACCC would also appreciate your views in relation to the request for interim authorisation. To facilitate this, you may wish to provide your views in writing to the above email address; by faxing your comments to the General Manager, Adjudication, (02) 6243 1211; or by calling the officers responsible for this matter, David Hatfield or Paul Hutchison (contact details provided below), by **Friday 1 October 2004**.

I recognise this is a short timeframe for making comments, but the ACCC is seeking to respond to the urgency of the request by the applicants for the reasons given above.

Should you have any queries or if you wish to discuss any aspect of the applications for authorisation please contact David Hatfield on (02) 6243 1266 or Paul Hutchison on (02) 6243 1242.

A copy of this letter will be placed on the public register.

Yours sincerely



Tim Grimwade
General Manager
Adjudication Branch

GUIDELINES FOR CONFIDENTIALITY CLAIMS

The process whereby the Commission assesses applications for authorisation or notification is very public, transparent and consultative. The *Trade Practices Act 1974* (the Act) requires the Commission to maintain a public register in respect of authorisation and notification applications.

Applicants and interested parties can request that a submission, or part of a submission, be excluded from the public register.

The Commission is required under the Act to exclude from the public register upon request details of:

- (i) secret formulae or process;
- (ii) the cash consideration offered for the acquisition of shares in the capital of a body corporate or assets of a person; or
- (iii) the current manufacturing, producing or marketing costs of goods or services.

However, even if a document does not meet these technical requirements, the Commission may still grant confidentiality where, in the Commission's view, it is desirable to do so.

The Commission also has the discretion, under s89 of the Act, to exclude material from the public register if it is satisfied that it is desirable to do so, either by reason of the confidential nature of the material or for any other reason. The Commission expects that a party claiming confidentiality on these grounds will present a case for its treatment in this manner.

Under Regulation 24 of the *Trade Practices Regulations*, when a request for confidentiality is made to the Commission:

- (a) where the request is that a whole document be excluded, the words "**Restriction of Publication Claimed**" should appear in red writing near the top of each page; and
- (b) where the request is that part of a document be excluded, the words "**Restriction of Publication of Part Claimed**" should appear in red near the top of the first page of each document, and the part for which confidentiality is claimed should also be marked in red. A submission of more than 5 pages should also include a description of the whereabouts of the parts for which confidentiality is claimed.

Applicants, as a matter of course, should remove headers claiming "confidential communication" from all Emails and otherwise, unless they have a particular piece of information that they justify to the Commission deserves exclusion from the public register. If confidentiality is not requested but a header cannot be removed, it should be clearly stated at the beginning of the communication that confidentiality is not requested.

If the Commission denies a confidentiality request, the requesting party may ask that the material be returned. As a matter of practice, the Commission will specify a period (usually 14 days) in which they can request the return of such material. Upon response, the Commission will return the original material and destroy all associated copies. The Commission will not consider this material when reaching its decision.

If the Commission does not receive a response within the specified period, the original material will be placed on the public register.

Information or documents granted confidentiality may be used by the Commission pursuant to its powers generally under the Trade Practices Act.