



Mr Tim Grimwade
General Manager - Adjudication Branch
Australian Competition & Consumer Commission
470 Northbourne Avenue
DICKSON ACT 2602

Attention: Mr David Hatfield

Dear Mr Grimwade,

**GrainCorp Operations Limited, AWB Limited and Export Grain Logistics Pty Ltd -
Applications for Authorisation A30223, A30224, A30225**

1 Introduction

- 1.1 Thank you for the opportunity to respond to third party submissions to the Commission concerning the Parties' applications for authorisation. By forming the proposed Joint Venture, GrainCorp Operations Limited ("**GrainCorp**") and AWB Limited ("**AWB**") (together, the "**Parties**") are committed to improving co-ordination and to introducing efficiencies in the movement of export grain. Accordingly, the Parties appreciate the time taken by farmers, growers and other industry participants to respond to the Commission, and value the feedback provided by those submissions.
- 1.2 The Parties note that the vast majority of the submissions the Commission has received with respect to the applications for authorisation are in favour of the proposed joint venture arrangements and to this extent, the Parties appreciate the industry's support for their proposal. Moreover, consistent with the Parties' submissions to the Commission, the Parties believe that these market participants' responses demonstrate that the proposed Joint Venture is likely to give rise to a number of public benefits, without any adverse impact on competition.
- 1.3 However, the Parties acknowledge that a small number of third party submissions to the Commission raise issues which require further explanation, or clarification. As such, the Parties have already taken on board many of the points raised by market participants and are willing to work with those participants during the harvest period to alleviate any concerns they may have. For example, with respect to Pacific National's request for access to certain material relating to the Parties' applications for authorisation (set out in Pacific National's letter to the Commission dated 20 October 2004), the Parties have discussed those issues with Pacific National at a commercial level.
- 1.4 Similarly, in relation to comments raised by a number of market participants concerning the ring fencing of information, GrainCorp and AWB have already made some changes to the Joint Venture Agreement on this ring-fencing issue at a practical level and a new amending agreement for the public register is enclosed.

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- 1.5 Given that a very small number of submissions have raised a number of specific issues regarding the competitive impact on the proposed joint venture, the Parties believe that it is appropriate that they should respond to those concerns and explain why the Joint Venture should not give rise to any competition concerns (notwithstanding that a number of comments or concerns that have been raised are dealt with in the Parties' submission in support of their applications for authorisation dated 27 September 2004).
- 1.6 Outlined below is a summary of the specific issues raised and corresponding section in our submission dated 27 September 2004 that addressed this issue.

No	Issue	Queensland Agricultural Merchants	ABB Grain	Barrett Burtson	Ridley	AWB and GrainCorp Submission
(a)	Access to storage			Point 1.2, 9.1-9.5, 11.1-11.4	Para 4-11	Sect 8.2-8.5
	Access to ports		Para 6	Point 8.2		Sect 8.2
	Access to rail		Para 3			Sect 6.2 & 6.4
(b)	Confidentiality		Para 2 & 5			Sect 9.4 & 9.5
(c)	Impact on domestic grain	Point 2.4	Para 4	Point 1.3 Point 9.9 - 9.10	Para 12-14	Sect 9.2, 11.2 & 11.3
	Increase in grain prices	Point 4		Point 9.6 - 9.8		Sect 6.4
(d)	Advantage AWB export wheat and other export grains	Point 1,6,7,8,		Point 8.2, 10.1		Sect 9.3
	Returns to growers	Point 3.5				Sect 6.4

- 1.7 As outlined in the table above the submissions focus on four issues as follows:
- (a) whether the proposed Joint Venture will hinder access to the Parties' storage and handling services, as well as to "scarce rail rolling stock resources";
 - (b) the ring-fencing of confidential information;
 - (c) the impact of the Joint Venture on the domestic market -- in particular, whether third parties will have access to the preferential freight rates negotiated by the Joint Venture, and whether the Joint Venture will raise barriers to entry; and
 - (d) whether the Joint Venture will have the effect of enhancing AWB's monopoly position with respect to export wheat.

We now look at each of the issues in turn.

2 Access issues

2.1 A number of third party submissions to the Commission argue that the proposed Joint Venture may have the effect of impeding access to:

- GrainCorp's and AWB's storage and handling services;
- port services, in accordance with "established industry and maritime experience and practice" (see ABB's submissions dated 1 October and 19 October 2004); and
- "scarce rail rolling stock resources, in competition with the unprecedented power of the proposed joint venture" (ABB's submissions dated 1 October and 19 October 2004).

2.2 However, the Parties submit that the proposed Joint Venture will not result in any of the outcomes listed above, for the reasons set out below.

Joint Venture solely concerns the management of logistics for export grain

2.3 As set out in the Parties' supporting submission, the proposed Joint Venture will not contract or manage any grain storage or handling facilities -- it relates solely to transport logistics for managing supply chain issues in relation to the delivery of grain for export from up-country silos to port. The Joint Venture's involvement in storage services will be limited to the interface arrangements between storage and rail (that is, agreements with rail based storage operators to meet the operating requirements of the rail provider), while the grain owner will solely nominate the storage used for their grain accumulation and trading activities. The grain owner (not the Joint Venture) will also be responsible for the payment of storage fees direct to the storage provider.

2.4 Accordingly, the Joint Venture will not be involved in storage and handling arrangements and as such, will not have any impact on the existing competition dynamics between GrainCorp, AWB and other storage providers. In particular, nothing in the proposed Joint Venture arrangements will prevent, limit or restrict the ability of either party to establish or operate (independently, or in conjunction with another person) any grain receival and storage facility, or any facility for the receival, storage or loading of grain for export.

Joint Venture will have no impact on access to country storages

2.5 The proposed arrangements will not in any way limit the Parties' incentives to continue to compete against each other in relation to grain storage and handling. GrainCorp and AWB will continue to have a commercial incentive to provide storage services to all grain growers and grain buyers with a range of services.

2.6 GrainCorp has a commercial incentive, given the over supply of country (and port) storage capacity in the east coast, to continue to actively provide storage services to all parties. In this regard it should be noted that GrainCorp's share of storage for the domestic grain market, and in particular the stockfeed segment (in which Ridley operates), is not significant given the large supply of grain storage provided by farmers (on farm storage) and merchants.

2.7 Therefore, rather than limiting competition in storage and handling, or impeding access to storage and handling facilities, the Joint Venture is intended to improve transparency in rail rates and export supply chain logistics. Accordingly, the Parties believe that the

proposed Joint Venture should in fact encourage investment in new grain storages and existing silos by GrainCorp, AWB and other participants.

2.8 In any event, GrainCorp will continue to operate its "open access" policy at its silos, including the publication of its standard storage and handling agreements and tariff fees on its website. As such, there are only likely to be limitations to access to GrainCorp's facilities in a very small number of operational circumstances, where:

- the silo does not handle the delivered grain or grade type; or
- the silo is closed due to the high costs of operation of the silo, or lack of grain in the area. This applies to predominantly the smaller silos.

2.9 AWB will continue to operate in the same transparent manner as that set out in relation to GrainCorp immediately above. AWB emphasises that it has not denied access to any party that has entered into a storage and handling agreement. Instead, AWB has expanded storage capacity in circumstances where there has been additional demand and also in more marginal areas for the purpose of reducing storage and handling costs, as required under its mandate.

2.10 For these reasons, therefore, the Parties submit that the proposed Joint Venture should not have any impact whatsoever on fair and reasonable access to storage or handling facilities. In particular, with regard to ABB's comments, the Parties note that GrainCorp and AWB each currently provide, and compete for the provision of, such services to ABB. As a valued customer of the Parties, AWB and GrainCorp will each continue to have a commercial incentive to do so, irrespective of the implementation of the Joint Venture.

2.11 In conclusion on the issue of transparency raised by ABB, the very point that ABB makes on transparency is a fundamental objective of the Joint Venture from GrainCorp's perspective. As such, this criticism by ABB in fact supports the positive benefits of the Joint Venture as put forward by GrainCorp.

Joint Venture will have no impact on access to export port facilities

2.12 Contrary to the view expressed in one submission, the Joint Venture will have no impact on the fair and competitive access to port services "in accordance with established industry and maritime experience and practice".

2.13 The Joint Venture does not involve the acquisition or common management of any competing export port facilities and expressly preserves the ability of either party to operate a competing port. Accordingly, the proposed joint venture arrangements will not have any impact on access to export port facilities - particularly in circumstances where there is substantial excess capacity at port terminals in New South Wales, Queensland and Victoria, with more than 15 million tonnes of shipping capacity for an average of 7.5 million tonnes of grain for export.

2.14 In addition, GrainCorp (as an owner of the port terminals) is in quite a different position from other industry participants which own and operate port terminals and have single desk export rights. From April 2005, GrainCorp will no longer have a statutory monopoly for the export of barley from New South Wales and, in the meantime, has also expanded its permit system for those barley exports. In these circumstances, GrainCorp submits that it has no commercial incentive to restrict access to export port facilities as it will have no single desk rights.

2.15 In any event, the Parties note that the undertakings recently provided to the Commission in the context of ABB's merger with AusBulk, merely impose a negative, or passive, obligation not to hinder or deny access where to do so would be unfair or unreasonable. It is assumed that this undertaking was required given ABB Grain's monopoly export rights for South Australian export barley and its role as Australia's largest domestic barley maltster. This form of undertaking is not necessary in this transaction given:

- (a) the parties are only seeking Authorisation for a limited purpose Joint Venture company, not informal approval for a merger, while AWB holds its single desk wheat exports powers; and
- (b) GrainCorp, as the operator of the relevant port terminals, will very shortly have no single desk export rights and therefore no incentive to hinder or deny access.

Access to rail rolling stock

2.16 As noted above, the Joint Venture concerns solely managing the logistics of the supply chain for export grain from Eastern Australia. As with access to grain storage and handling, and access to port terminals, the Joint Venture will have no direct impact on access to rail rolling stock. This is because the Joint Venture will operate at the interface between rail and storage, with a view to facilitating the more efficient use of silos through improved information flows.

2.17 The Parties acknowledge there is a lack of rail resources and this has been one of the drivers to form the Joint Venture. As outlined above the objective of the Joint Venture is to improve storage and rail interface and rail co-ordination. This in turn would increase train turnaround and wagon utilization which would increase the availability of rail for all users.

2.18 In any event, in light of the recent merger between Pacific National and Freight Australia, the Parties submit that there has been an increase in the countervailing constraints exercised by rail freight providers, such that in most parts of Australia, AWB and GrainCorp now negotiate with a single freight provider. This will continue to be the case with the Joint Venture. In these circumstances, the Parties believe that there are no grounds for ABB's submission that the proposed Joint Venture will have "unprecedented power", particularly as:

- the Joint Venture will not have any assets of a substantive nature -- it will have only 4 -5 staff;
- the Joint Venture does not combine ownership of any assets; and
- as previously found by the Commission in the Pacific National/Freight Australia merger, bulk rail freight involves the transport of many commodities, not only grains. As such, it is difficult for ABB to argue that the aggregation of "market power" in the Joint Venture will prevent entry, or access, to bulk rail freight markets.

2.19 In any event, the Joint Venture will continue to face the competitive constraints exerted by ABB itself, which with its barley export monopoly powers in South Australia and its export joint venture with the Grain Pool of Western Australia, will be the largest exporter of Victorian barley. In light of its market position, and ABB's existing arrangements in

South Australia, the Parties submit that ABB will continue to be well placed to have access to rail freight services.

3 Ring fencing of confidential information

3.1 ABB's submission to the Commission dated 1 October 2004 also noted:

"[t]he perceived inability of Graincorp [sic] systems to "ring fence" information for confidentiality purposes".

3.2 However, as set out in the Parties' submission to the Commission, the information that GrainCorp holds in relation to grain held at its sites is not confidential and will certainly not deliver to it any competitive advantage, given that:

- stock information does not reflect a grain trader or grain owner's position, or reveal their marketing strategy, as it only reflects one part of the trading equation. The other information elements, such as open purchases and open sales executed by title transfers or under delivered contacts, will continue to be confidential to the grain owner;
- storage operators are not aware of, or privy to, sale and purchase arrangements where a grain owner may hold all or part of its grain stocks in another grain owner's name;
- GrainCorp already has knowledge of AWB and other party's stock information. GrainCorp, as demonstrated by history and as previously reviewed by the Commission, does not derive an advantage from this information; and
- information held by a bulk handler as to grain quality and market prices is also generally available. The same applies to shipping program information.

The Parties also wish to point out that ABB Grain also holds substantial information on AWB (and GrainCorp's) stock information in South Australia and Victoria.

3.3 As such, the information that GrainCorp already holds is highly unlikely to give it a competitive advantage which it may then use to the detriment of other market participants. As only this information will be disclosed to the Joint Venture, the Parties submit that they will gain no competitive advantage vis-à-vis other market participants by implementing the Joint Venture. Indeed, as AWB and GrainCorp remain competitors on grain marketing and trading, there is every incentive for the Parties to ensure that this information is tightly held within the Joint Venture and gives neither party an advantage. Finally, from an assessment of the impact on competition of the Joint Venture or any associated detriment, even if this assertion made by ABB was correct (which it is not), the Parties would already have this ability and therefore the Joint Venture does not create any additional competitive harm. If anything, it improves the competitive position.

4 The impact of the Joint Venture on the domestic market

4.1 The impact of the Joint Venture on the domestic market was raised in submissions to the Commission by Ridley Agriproducts, Queensland Agricultural Merchants and Barrett Burston. In particular, those submissions focused on:

- whether the Joint Venture would have an impact on domestic costs and raised the prospect of “possible collusion on storage/freight costs”;
- whether third parties would be able to have access to the freight rates negotiated by the Joint Venture; and
- whether GrainCorp’s freight advantage would raise barriers to entry in the domestic market.

4.2 The Parties submit, however, that the Joint Venture will have no impact on domestic grain, given that the Joint Venture simply concerns the management of the logistics supply chain for export grain from the East Coast of Australia. As discussed in the Parties’ submission supporting their applications for authorisation, the Joint Venture has been carefully structured such that it will not affect the Parties’ respective activities in relation to domestic grain or grain storage. GrainCorp and AWB will remain free to compete with each other in relation to the provision of grain storage and handling services and export port facilities, as well as grain marketing to both domestic and overseas customers (of non-regulated grains).

4.3 In particular, the Joint Venture will not be in a position to leverage a commercial advantage in relation to transport arrangements for domestic grain, as there is an existing structural separation in the transport of domestic and export grain, as follows:

- over 80% of domestic grain is moved by road, compared to 5% for export grain. Accordingly, the Joint Venture will only be a small contractor for road services with its relatively small export road task. It should be noted that most of Ridley’s mills (and the same for most other stock feeders) do not have rail receipt facilities at most of its mills and many are located in areas where road has an advantage over rail;
- domestic end-users, who do have access to rail, will continue to have access to the lowest rail rates given their ability to control the tonnes received and the unloading of trains and their ability to contract dedicated trains based on domestic specific wagons.

In these circumstances, the Parties find it difficult to envisage a situation where the Joint Venture would result in an adverse impact on domestic transport costs or, alternatively, would have the effect of raising barriers to entry to the domestic market.

4.4 Instead, the Parties believe that the Joint Venture could have an indirect positive benefit for the domestic grain market insofar as improvements in rail efficiency, through improved storage and infrastructure and operations, may provide flow on benefits for domestic rail logistics, if the rail providers choose to pass these on. Whether rail providers choose to pass on the benefits is uncertain at this stage, but the Parties submit that these benefits would be industry wide.

- 4.5 Finally, the Parties note that the industry participants which have demonstrated particular concerns in this respect are well placed to protect their own interests in the domestic market.
- 4.6 Since its merger with AusBulk, ABB has become the second largest listed grains agribusiness in Australia and as such, it is a significantly larger company than GrainCorp. ABB also has barley export monopoly powers in South Australia and in light of its export joint venture with the Grain Pool of Western Australia, it will be the largest exporter of barley from Victoria. ABB has significant interests in malting operations in Australia, including the East Coast. It also enjoys the benefit of rail freight arrangements with AWB in South Australia. The Parties will commercially address some of the issues raised by ABB, but otherwise as ABB is a larger company than GrainCorp, the Parties submit that ABB can look after itself commercially in relation to domestic operations.
- 4.7 In the case of Barrett Burston, it is part of ConAgra, one of the largest agricultural companies in the world. Barrett Burston is the largest buyer of malt barley in Victoria and potentially has the ability to use this strength to facilitate its position in the export market through domestic and export grain arbitrage.
- 5 The Joint Venture will not have the effect of entrenching AWB's market position**
- 5.1 Given that AWB already holds the export rights for bulk wheat under the *Wheat Marketing Act* ("WMA") and is the only party that acquires rail and storage services for export wheat, AWB already enjoys a number of benefits associated with its wheat export volumes. The creation of the proposed Joint Venture will not, therefore, change this arrangement, or the benefits which flow from it.
- 5.2 Accordingly, the Parties do not accept that the arguments that the creation of the Joint Venture will enhance the 'market dominance' of AWB are valid. Nevertheless, as the Commission will be aware, given that the Parties recognise that the Joint Venture may raise competitive issues in a deregulated wheat market, the Parties have offered a section 87B undertaking to the Commission, which would could enable the Commission to require the Joint Venture to be 'unwound' in the event of deregulation. In some respects the only criticism of the proposed undertaking is that it reflects a review/position that the Commission may be able to undertake in any event in an authorisation context. However, as with the Parties seeking to ensure that the Joint Venture only affects exports, the point of the undertaking is that the Parties have sought to address in an equally upfront manner the Commission's ability to review the Joint Venture without any debate should deregulation occur.
- 5.3 Furthermore some submissions (in particular Queensland Agricultural Merchants) have raised a concern that the Joint Venture could generate 'profits' or a benefit for the Parties between the contracted rail rate and the published rail deduction in the Estimated Silo Return. As stated in the Parties' submission the Joint Venture is a non-profit vehicle with all 'profits' rebated back against the grain transport rates.
- 5.4 Efficiencies gained, from lower rail rates or improved services or lower demurrage costs, would flow through to grain growers as improved net returns. This will have a neutral impact on the domestic market as domestic prices follow export prices. To the extent that domestic prices are influenced by export prices at all, increased efficiency and reduced costs with respect to export grain would result in domestic prices becoming more reflective of competitive export pricing – a desirable competitions outcome. Efficiencies

gained will have a positive effect, despite the assertion in Queensland Agricultural Merchant's submission, of increasing farm incomes and jobs in rural communities.

6 Conclusion

6.1 Contrary to the very small number of submissions made to the Commission which expressed specific competition concerns with the proposed Joint Venture, the Parties believe that the Joint Venture will not have any material, adverse impact on competition in any relevant market, given the very discrete nature of the Joint Venture (being limited to managing the supply chain logistics for export grain) and the provision of a section 87B undertaking to the Commission, which would take effect should de-regulation occur.

6.2 Instead, as set out in the Parties' supporting submission to the Commission, the Parties consider that the proposed Joint Venture will give rise to a number of public benefits. These public benefits, which would be industry wide, include:

- increased transparency in the setting and presentation of export rail rates;
- efficiencies and reduced supply chain costs from improved integration and operating arrangements in areas which give rise to increased exports and international competitiveness, areas to which the Commission is directed to give particular weight under the TPA; and
- commercial incentives for increased investment in infrastructure, in order to service improved rail operations.

6.3 As the submissions made by grower groups indicate, there are substantial public benefits associated with the Joint Venture and the Parties will seek to ensure that these efficiencies and benefits assist Australian grain growers in the export grain task. The small number of submissions opposing the Joint Venture have come from competitors of the Parties -- in many respects a fact that should give the Commission some comfort. To the extent that the submissions raise issues in relation to information, the Parties will seek to address those issues commercially with those parties. However, to the extent those parties assert that the Joint Venture may lessen competition because it may cause the Parties to be more effective competitors, this is part of the competitive process. As such, these complaints should not be given much weight, particularly when such complaints arise in circumstances where the Parties are seeking to achieve efficiencies.

6.4 Finally and perhaps most importantly, the submissions to the Commission which expressed concerns with the competitive impact of the Joint Venture did not, however, contest the nature or quantum of such public benefits. As such, even if the Commission were to accept the validity of arguments that the Joint Venture would give rise to a competitive detriment, the public benefits which flow from the Joint Venture would clearly outweigh any such detriment.

6.5 We trust this information will be helpful to the Commission. Please let us know if you have any questions or would like to discuss the contents of this letter further.

Yours sincerely

Neil Johns
GrainCorp

John Crosbie
AWB

AGREEMENT SUPPLEMENTING AND AMENDING THE JOINT VENTURE SHAREHOLDERS AGREEMENT

DATE

PARTIES

GrainCorp Operations Limited ABN 52 003 875 401 (**GrainCorp**)**AWB Limited** ABN 99 081 890 459 (**AWB**)**Export Grain Logistics Pty Ltd** ACN 109 812 197 (**JV Company**)

The parties entered into a Joint Venture Shareholders Agreement on or about 13 October 2004 (**Joint Venture Shareholders Agreement**). They have agreed to supplement and amend that agreement as follows:

1. The parties acknowledge and agree that the Commencement Date was on 18 October 2004.
2. The parties agree that the interim authorisation which has been received from the Australian Competition and Consumer Commission (ACCC) satisfies the condition precedent in clause 2.1(a) of the Joint Venture Shareholders Agreement.
3. The parties acknowledge that the ACCC has given its authorisation on an interim basis and may withdraw it. If the ACCC withdraws its authorisation, the parties agree to:
 - (a) terminate the Joint Venture Shareholders Agreement; and
 - (b) do everything necessary to restore the parties to the positions they were in before the Commencement Date of the Joint Venture.
4. Clause 2.1(b) of the Joint Venture Shareholders Agreement is deleted. The parties agree to put in place interim arrangements which will apply pending finalisation of the AWB and GrainCorp Supply Agreements. The parties agree that the AWB and GrainCorp Supply Agreements must be executed and take effect by 31 March 2005. Unless otherwise agreed by the parties, if either Supply Agreement has not been executed and taken effect by that date, either party can terminate the Joint Venture Shareholders Agreement.
5. In clause 3.2(a) of the Joint Venture Shareholders Agreement, "after the Commencement Date" is deleted and replaced with "after final authorisation by the ACCC".
6. At the end of clause 4.1(b) of the Joint Venture Shareholders Agreement, add "or Melbourne, Victoria".
7. In clause 4.4(b) of the Joint Venture Shareholders Agreement, "Initial Business Plan and Budget" is deleted and replaced with "Implementation Business Plan".
8. Clause 6.2(a) of the Joint Venture Shareholders Agreement is amended to read as follows: "The Initial Business Plan and Budget must be adopted before the expiration of the Implementation Business Plan referred to in clause 4.4(b), and will apply as the Business Plan and Budget for the period ending 30 September 2005 provided that the Board may amend the Initial Business Plan and Budget from time to time".

- 9. Clause 18.2(a)(i) of the Joint Venture Shareholders Agreement is amended to read: "the information described in part A of schedule 2 is not disclosed to AWB or its related bodies corporate, other than the Directors appointed by AWB to the Board of the JV Company;"
- 10. Clause 18.2(a)(ii) of the Joint Venture Shareholders Agreement is amended to read: "the information described in part B of schedule 2 is not disclosed to GrainCorp or its related bodies corporate, other than the Directors appointed by GrainCorp to the Board of the JV Company; and"
- 11. Clause 18.2(a)(iii) of the Joint Venture Shareholders Agreement is amended to read: "any other Ring-Fenced Information provided by a Shareholder is not disclosed to the other Shareholder, other than to the Directors appointed by the other Shareholder".
- 12. The words "a Director or" are deleted from Clause 18.2(b)(i) of the Joint Venture Shareholders Agreement.
- 13. In clause 18.2(c) of the Joint Venture Shareholders Agreement, "immediately" is deleted and replaced with "as soon as practicable".

Terms in this document have the same meaning as those in the Joint Venture Shareholders Agreement.

EXECUTED as an agreement.

SIGNED for GRAINCORP OPERATIONS LIMITED, by its duly authorised officer, in the presence of:

Signature of authorised officer

Signature of witness

Name and title

Name

SIGNED for AWB LIMITED, by its duly authorised officer, in the presence of:

Signature of authorised officer

Signature of witness

Name and title

Name

SIGNED for EXPORT GRAIN LOGISTICS PTY LTD, by its duly authorised officer, in the presence of:

Signature of authorised officer

Signature of witness

Name and title

Name