Determination

Applications for Authorisation

Lodged by

GrainCorp Operations Ltd, AWB Ltd and Export Grain Logistics Pty Ltd

In respect of

Proposed Joint Venture arrangements for export grain freight and logistics in the eastern states of Australia

Date: **15 April 05**

Commissioners: Samuel, Sylvan, King, Martin, Smith

Authorisation nos. A30233, A30234, A30235

Public Register no. C2004/1418

Summary

The ACCC has decided to grant authorisation until 31 December 2009 for:

- the acquisition of the ordinary shares of Export Grain Logistics, 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 the Joint Venture Shareholders Agreement between GrainCorp, AWB and Export Grain Logistics

on condition that within three months, the applicants develop and implement measures designed to ensure that confidential information provided to Export Grain Logistics by third parties will not be provided to or used inappropriately by its shareholders. These measures must be developed in conjunction with and to the satisfaction of an independent person with expertise in ring fencing arrangements.

On 27 September 2004, GrainCorp Operations Limited (GrainCorp), AWB Limited (AWB) and Export Grain Logistics Pty Ltd lodged applications for authorisation A30233, A30234 and A30235 with the Australian Competition and Consumer Commission.

GrainCorp is the major provider of grain storage, handling and port facilities in the eastern states of Australia as well as the holder of export rights for barley, canola and sorghum in NSW. AWB holds sole rights for the bulk export of wheat from Australia, operates a number of storage and handling facilities and has an interest in the Melbourne Port Terminal.

The applicants sought authorisation for the creation and operation of a joint venture (namely Export Grain Logistics) to manage and co-ordinate the movement of their export grain in Queensland, New South Wales and Victoria.

The applicants have sought authorisation until November 2010 to allow for five full harvests and provide sufficient commercial certainty to enter into appropriate contracts to obtain the public benefits claimed.

Background

A large proportion of Australian grain is exported and the majority of grain exports on the east coast are owned, handled and marketed by the applicants. The applicants submit that the proposed joint venture will achieve much-needed efficiencies in freight and logistics in the movement of grain from silo to port, through enhanced co-ordination between the providers of storage and handling, transport and marketing services.

Consultation

The ACCC received submissions from a number of interested parties including grain growers and their representative bodies, grain traders and exporters, rail operators and grain customers. Grain growers, through their representative associations, predominantly support the arrangements. Some industry participants have opposed the arrangements or raised concerns. The issues typically regard the potential for the arrangements to enable AWB and GrainCorp to negotiate lower grain freight and/or storage and handling charges and to use this to restrict competition in the grain industry in eastern Australia. The other primary concern relates to the potential for confidential third party information provided to the Joint Venture to be passed back to its shareholders to the detriment of competition in grain storage and handling and rail freight.

Interim authorisation

On 5 October 2004 the ACCC granted interim authorisation to the joint venture arrangements. This now remains in place until the earlier of the final determination by the ACCC coming into effect or the ACCC or the Tribunal (should the determination be reviewed) deciding to revoke or amend the interim authorisation. Interim authorisation allowed the joint venture to commence during October 2004.

The authorisation test

GrainCorp, AWB and Export Grain Logistics have lodged three applications. There are technical differences in the authorisation test that applies to each application. These differences relate to the scope of the public detriment that the ACCC may take into account.

However, given that all public detriment generated by the joint venture arrangements is, directly or indirectly, related to a lessening of competition, in practice, these technical differences do not affect the ACCC's decision. That is, in the circumstances of this case, the test the ACCC is required to apply reduces in practice to whether the joint venture generates a public benefit outweighing any public detriment from a lessening of competition.

Draft Determination and Pre Decision Conference

The ACCC released a Draft Determination on these applications on 16 December 2004, proposing to grant authorisation until December 2009.

A Pre Decision Conference was called on 24 January 2005 by Austport. The PDC was held in Sydney on 14 February 2005. A number of submissions were also provided to the ACCC by interested parties prior to and following the PDC. These have all been taken into account by the ACCC in reaching this Final Determination.

Assessment

Public benefit

The ACCC considers the joint venture arrangements are likely to result in public benefit from:

- improvements in economic efficiency from reducing export grain supply chain costs by better coordination
- increasing the returns to grain exporters
- avoidance of some additional costs such as demurrage
- greater transparency in pricing, which will provide more appropriate signals for investment.

Over all, the ACCC considers it is likely the proposed arrangements will result in significant public benefits. The ACCC notes that the actual level of benefits likely to flow from the proposed arrangements will vary (potentially significantly) depending on the size of the harvest year by year. The estimate of potential public benefits provided by the applicants, $10 to $30 million per annum, appears reasonable – given it is based on the average harvest size. Any ongoing reluctance by rail freight providers to seek to achieve potential efficiencies is likely to result in benefits being towards the lower end of this range.

Public detriment

Broadly, the ACCC considers the joint venture is likely to result in public detriment due to:

- reduced incentives for AWB and GrainCorp to compete in grain storage and handling

- the joint venture may allow the parties greater access to information held on behalf of third parties which could be used to discriminate against those parties as competitors.

The ACCC believes there are a number of factors in the proposed arrangements that mitigate against these detriments, including the restricted focus of the joint venture on export grain and ring fencing arrangements.

Balance of benefit and detriment

While the ACCC considers that the likely public benefits flowing from the conduct for which authorisation is sought outweigh the likely detriments, significant detriments may arise as a result of misuse of confidential third party information provided to the Joint Venture. These detriments could significantly erode the net benefits identified.

It is difficult to quantify the level of anti-competitive detriment that may arise as a result of ineffective ring fencing of confidential third party information by the Joint Venture from its shareholders. While the likelihood and extent of detriment is likely to be low to moderate, it is conceivable that, in some circumstances, the anticompetitive detriment could be sufficiently high to exceed the identified net public benefit. As a result, in order for the ACCC to be satisfied that the identified net benefits are not eroded in this manner, the ACCC considers it appropriate to impose a condition that effective ring fencing measures be developed and implemented.

List of Abbreviations

ABA	Australian Bulk Alliance
ABARE	Australian Bureau of Agriculture and Resource Economics
ABB	Successor to the former Australian Barley Board, recently merged with SA storage and handler Ausbulk
ACCC	Australian Competition and Consumer Commission
ASX	Australian Stock Exchange
AWB	Successor to the former Australian Wheat Board
AWBAU	Australian Wheat Board Australia
AWBI	Australian Wheat Board International
AWBS	Australian Wheat Board Services
BBM	Barrett Burston Malting
CBH	Co-operative Bulk Handling (the main grain storage and handler in Western Australia)
Cth	Commonwealth
EGL	Export Grain Logistics
ESR	Estimated Silo Return
ETA	Estimated Time of Arrival
FOB	Free on Board
GC	GrainCorp
IMCA	International Malting Company of Australia
JVCo	Joint Venture Company
JKI	J.K. International
MPT	Melbourne Port Terminal
Mt	million tonnes
QAM	Queensland Agricultural Merchants
SAP	Site Assembly Plan
TPA	*Trade Practices Act 1974*
Tph	Tonnes per Hour
WMA	Wheat Marketing Act 1989 (Cth)

CONTENTS

1. INTRODUCTION

Authorisations

1.1 The Australian Competition and Consumer Commission (ACCC) is the Australian Government agency responsible for administering the *Trade Practices Act* 1974 (the TPA). A key objective of the TPA 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.

1.2 The TPA allows the ACCC to grant immunity from legal action for anti-competitive conduct in certain circumstances. One way in which parties may obtain immunity is to apply to the ACCC for what is known as an 'authorisation'.

1.3 Broadly, the ACCC may 'authorise' businesses to engage in anti-competitive conduct where it is satisfied that the public benefit from the conduct outweighs any public detriment.

1.4 The ACCC conducts a comprehensive public consultation process before making a decision to grant or deny authorisation.

1.5 Upon receiving an application for authorisation, the ACCC invites interested parties to lodge submissions outlining whether they support the application or not, and their reasons for this.

1.6 The TPA requires that the ACCC then issue a draft determination in writing proposing to either grant the application (in whole, in part or subject to conditions) or deny the application. In preparing a draft determination, the ACCC will take into account any submissions received from interested parties.

1.7 Once a draft determination is released, the applicant or any interested party may request that the ACCC hold a conference. A conference provides interested parties with the opportunity to put oral submissions to the ACCC in response to a draft determination. The ACCC will also invite interested parties to lodge written submissions on the draft.

1.8 The ACCC then reconsiders the application taking into account the comments made at the conference (if one is requested) and any further submissions received and issues a written final determination. Should the public benefit outweigh the public detriment, the ACCC may grant authorisation. If not, authorisation may be denied. However, in some cases it may still be possible to grant authorisation where conditions can be imposed which sufficiently increase the public benefit or reduce the public detriment.

GrainCorp and AWB Applications

1.9 On 27 September 2004, GrainCorp Operations Limited (GrainCorp), AWB Limited (AWB) and Export Grain Logistics Pty Ltd lodged applications for authorisation A30233, A30234 and A30235 with the ACCC.

1.10 Application A30233 seeks authorisation to make and give effect to a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of the TPA.

1.11 Application A30234 seeks authorisation to engage in conduct that constitutes or may constitute the practice of exclusive dealing within the meaning of section 47 of the TPA.

1.12 Application A30235 seeks authorisation to acquire shares in the capital of the body corporate, or to acquire assets of the person (including a body corporate) named in the application as Export Grain Logistics Pty Ltd (ACN 109 812 197).

1.13 More detail on the conduct for which authorisation is sought is contained in Chapter 3.

1.14 The applicants applied for authorisation for the proposed export freight and logistics joint venture for the stated purpose of managing, co-ordinating and optimising the transport of export grain from silo to port. The nature and operations of the joint venture and are set out in detail in Chapter 4. A copy of the related joint venture agreement between GrainCorp and AWB is available from the ACCC's website.

1.15 In addition, in the event that the export wheat market is deregulated under the Wheat Marketing Act 1989 (Cth) (WMA), the parties indicated that they were prepared to provide an Undertaking to the effect that the ACCC may review the arrangements.

1.16 The applicants have sought authorisation for the period where AWB has power for export wheat under the WMA or for a period of not less than five years, subject to the terms of the Undertaking proposed by the applicants.

1.17 Pursuant to subsection 90(12) of the TPA, the applicants agreed that the ACCC may take a specified longer period for the determination of the application under subsection 88(9) of the TPA (the merger application). The agreed specified period being the period up till 31 March 2005 – to enable the ACCC to consider all three applications concurrently. This period was subsequently extended until 30 April 2005.

Interim authorisation

1.18 At the time of lodging the application, the parties requested interim authorisation for the joint venture arrangements. Interim authorisation protects conduct from court action for breaching the TPA until the merits of the application for authorisation for that conduct can be assessed by the ACCC.

1.19 The parties argued that interim authorisation was required because of the:

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

1.20 The applicants also argued that granting interim authorisation would enable them to prevent losses from inefficiencies in freight and logistics over the coming harvest.

1.21 They also stated that the effects of any interim authorisation were not irreversible as, should the ACCC subsequently deny authorisation, the joint venture arrangements could be easily dismantled at minimal cost.

1.22 On 6 October 2004, the ACCC granted interim authorisation to the arrangements. In deciding to grant this interim authorisation, the ACCC took into account the following:

- the size and proximity of the upcoming harvest and the need for improved co-ordination between the applicants and rail providers in managing the harvest and export task

- the potential for losses to the applicants and growers if the expected efficiencies are not achieved (or inefficiencies corrected) this season

- the small size, lack of assets and simple structure of the joint venture suggests that it can be dismantled fairly quickly and effectively with any contracts assigned back to the applicants as principals.

Chronology

1.23 Below is a chronology of significant dates in the consideration of the application.

DATE	ACTION
27 September 2004	Applications for authorisation lodged with the ACCC
1 October 2004	Closing date for submissions from interested parties in relation to the request for interim authorisation
5 October 2004	Responses from applicants to interested parties' submissions
6 October 2004	ACCC grants interim authorisation
22 October 2004	Closing date for submissions from interested parties in relation to the substantive applications
25 October 2004	Submissions on the substantive applications forwarded to applicants for comment
12 November 2004	Applicants' comments on submissions received by the ACCC
November 2004	Various meetings/discussions held with interested parties and applicants
16 December 2004	Draft determination issued
24 January 2005	Pre-decision conference requested
9 February 2005	Submissions due from interested parties in response to Draft Determination
14 February 2005	Pre-decision conference held in Sydney
24 March 2005	Response by the applicants to submissions by interested parties
15 April 2005	Final Determination

Previous consideration

1.24 In June 2004 the parties requested the ACCC's view of the joint venture arrangements under the ACCC's informal merger process.

1.25 In discussions with the parties the ACCC raised competition issues beyond the s.50 merger concerns and noted that certain arguments put by the parties may be more appropriately considered within the authorisation context. The parties decided to apply for authorisation. The formal authorisation process supersedes the previous informal merger process.

2. INDUSTRY BACKGROUND TO THE APPLICATION

The Australian grain industry

2.1 Australia produces on average 36-38 million tonnes of grain each year. The main grains are wheat, barley and other coarse grains (eg sorghum, oats, maize and triticale), oilseeds (eg canola, soybean) and pulses (eg lupins, field peas, chickpeas).

2.2 Nationally about 60% of Australian grain is exported. Over 90% of grain produced in SA and WA is exported whereas on the east coast, about 50-60% is exported.

Wheat

2.3 Wheat is grown in each State and represents Australia's largest grain crop (55%) and largest grain export (62%). Average production is around 22 million tonnes a year, of which about 16-17mt is exported, with 5-6mt consumed domestically.

2.4 Western Australia is the major wheat producing state with an average annual production of 7.9mt. Average production in other states is: New South Wales 6.9mt; South Australia 2.9mt; Victoria 2.0mt; and Queensland 1.6mt. Around 20,000 tonnes per year is produced in Tasmania.

2.5 Wheat is produced and marketed in a variety of grades.[1] Its uses in the domestic market are human consumption (eg flour), industrial (eg starch), stockfeed and seed.

2.6 Over 98% of wheat exports are managed by AWB under the single desk rights conferred by the *Wheat Marketing Act* 1989. Further information on AWB and wheat exports is provided below.

Barley and coarse grains

2.7 Coarse grains account for 30% of total grain production. Barley, the major winter coarse grain, is grown in all states in wheat-producing areas and production averages 6 million tonnes per year. It is used for both malting and livestock feed. Exports account for around 65% of production and are worth around $1 billion. Statutory export arrangements apply in NSW, Queensland, SA and WA.

2.8 The other coarse grains - sorghum, oats and triticale - are largely used by the feed industry. Sorghum is the main summer coarse grain and is grown in NSW and Queensland. Oats and triticale are important winter grains while only small amounts of maize, the world's major coarse grain, are produced in Australia.

Oilseeds and pulses

2.9 Oilseeds are grown for vegetable oil. Canola is the main oilseed crop, accounting for 90% of oilseed production, followed by soybean, safflowers and sunflowers. About 50% of oilseeds are exported, the rest is processed domestically.

2.10 Pulses are the fourth largest category of grain. The largest crop is lupins, mostly produced in WA for export as stockfeed. Other pulses include chickpeas, faba beans field peas and lentils, grown mostly for human consumption but also for feed.

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1 The main grades are Premium White, Prime Hard, Durum and ASW (Standard White/General Purpose).

Industry structure and markets

2.7 The grain industry is comprised of grain growers, providers of grain receival, storage and handling services, providers of grain transport (both road and rail), grain traders and exporters, providers of grain port services, and domestic and export customers.

2.8 Over the last two decades the industry has undergone change and consolidation:

- While the number of grain farms has declined, average crop sizes and output have increased while producing a greater variety of grain types and grades.
- The statutory marketing authorities have been corporatised and privatised so that provision of grains services and marketing is now largely conducted by publicly listed companies owned and run by grower and other shareholders, or in the case of CBH, a grower cooperative.
- Most of the state-based bodies have merged. They operate in several regions and some have vertically integrated into downstream marketing and processing.[2]
- International grain companies have entered the Australian market and formed alliances with local traders for accumulation and marketing purposes.
- Controls over domestic markets and exports have been either removed, modified or are subject to regulatory scrutiny and licensing arrangements. The current holders of single desk export rights are AWB, GrainCorp, ABB and CBH.
- Rail operations have been privatised, rail networks leased, access regimes introduced and in some areas new rail providers have entered the market.

Grain production and grain growers

2.9 The main growing regions are central and south Queensland, inland NSW, north and western Victoria, South Australia and the south of Western Australia, also known as the wheat belt or the sheep/wheat zone. There are approximately 30,000 grain industry farms nationally and about 10,000 growers across the eastern states.

2.10 Collectively growers are also the majority or significant shareholders in the main grain companies, including AWB, GrainCorp, ABB/Ausbulk and CBH. In addition, their interests are represented through state and national farming bodies.

2.11 Growing follows a seasonal cycle. For example wheat, barley, canola and chickpeas are winter crops and sorghum, oats, soybean and most pulses are summer crops.[3]

2.12 Once harvested, grain is transported by road to regional silos operated by storage and handling operators (including GrainCorp and AWB) where the grain is weighed, classified and binned. Growers can sell their grain at silo in response to pool and cash prices posted by different traders and customers, or sell prior to harvest on contract, or warehouse their grain at the silo for later sale.

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[2] For example, the mergers of GrainCorp and Grainco, CBH and GrainPool, ABB and Ausbulk. GrainCorp has interests in flour milling through Allied Mills and ABB/Ausbulk has interests in malting through Ausmalt.

[3] Winter crops are sown in autumn/winter and harvested in spring/ summer whereas summer crops are sown in spring/summer and harvested in late summer/autumn.

2.13 A factor affecting farm viability, production and downstream markets is the impact of the recent drought which reduced the national crop by almost two thirds in 2002-03.

Grain traders, customers and exports

2.14 Grain trading and marketing is conducted by private grain traders, marketing bodies with statutory powers and the ultimate buyers of grain (being the millers, maltsters and feedlot operators) who compete against each other to acquire grains.

2.15 Traders and marketing bodies acquire grains to sell to end users. These traders generally buy grain for cash and run marketing pools. They acquire bulk quantities and blend and co-mingle grain and endeavour to add value to accumulated grain. They offer a range of price risk management/sales alternatives and logistics solutions to growers including cash sales, forward prices and pools in a range of commodities. In effect they provide a range of marketing alternatives for growers as well as competing against growers and other traders to sell grains. They also trade across a range of grain types as a means of diversifying risk while increasing volumes.

Domestic markets

2.16 Domestic grain is destined for human consumption, livestock feed or seed. Grains for human consumption are mostly processed by milling, malting, crushing, refining or other means into food products. The majority of feed grain goes to the beef, dairy, pig and poultry and livestock export industries.

2.17 The ACCC understands the major domestic grain buyers include:

- Wheat: Allied Mills; Manildra; George Weston Foods
- Barley: Ausmalt; Barret Burston Malting; IMCA; Kirin; Glencore
- Oilseeds: Cargill; Riverina Oilseeds; Mitsui
- Pulses: JKI; Pulse Australia
- Stockfeed and feedlots: Ridley Agriproducts; Wesfeeds.

Exports

2.18 Grain is Australia's fifth largest export commodity in value, worth $4-6 billion per year. Wheat dominates grain exports, accounting for 62% in volume. Barley is next at 16% of export volumes; other grains (canola, sorghum and pulses) account for the remaining 22%.

2.19 Nationally about 70% of wheat, 65% of barley and more than half of the oilseed and pulse crops are exported to human consumption or feed grain customers. About 95% of grain exports are bulk exports with the remainder in containers and smaller parcels for specific markets.

2.20 The major grain export markets for Australia are in the Asia Pacific region, the Middle East, South America and Europe.

2.21 Despite being one the five largest grain producers and exporters, Australia is a price taker in most export markets and Australian grain exports face strong competition from the USA, Canada, Russia and the European Union.

The grain storage and handling and export supply chain in the eastern states

2.22 Grain goes through several steps between farm and port or domestic customer.

Receival at silo: classification, segregation & quality control	⇒	Title transfer of grain within silo. Cargo & site assembly plans	⇒	Outturn of grain from silo for transport by rail (or road)	⇒	Receival by customer or storage and handling at port	⇒	Loading & shipping of grain from port

Receivals, storage and handling

2.23 According to the applicants, there is approximately 33 million tonnes of independent storage capacity on the east coast, mostly provided by GrainCorp, AWB and ABA (compared to an average winter crop of 14.5 mt (16.5 mt including sorghum). In addition they state there is over 10 mt of on-farm storage and that grain storages are poorly utilised. More detail on the grain storage market is provided in Chapter 7.

2.24 As stated earlier, growers deliver their grain to a regional receival site or silo. If not pre-sold on contract, the grain may be sold for cash, into a marketing pool or warehoused. Title to the grain remains in the grower's name until sold.

2.25 At silo, the grain is weighed, sampled, analysed and classified according to pre-set receival standards so it can be segregated based on type and quality. Each parcel of grain is monitored to ensure the integrity of segregation. Quality is also maintained through pest and disease control and through the extensive use of stock information covering quantity, location, quality and accessibility of the grain.

2.26 Stock control also enables in-silo sale and title transfer of grain as well as stock swaps of similar grain between silos. This makes frequent trading of grain possible.

2.27 **Figure 1** depicts the GrainCorp storage and freight network in eastern Australia.

The process of delivering the grain from silo to port

2.28 According to the applicants, the arrangements for moving grain from specific silos to meet the customer's shipping requirements involves the following for GrainCorp:

- The customer provides its export plan and shipping programs to GrainCorp.
- The customer nominates specific vessels and estimated times of arrival together with cargo assembly plans specifying grain type, quantity and quality parameters.
- GrainCorp selects the specific silos for a customer's export order against its nominated quality specification. GrainCorp chooses a range of silos, within a port zone, based on its knowledge of stock inventory to meet its silo requirements - eg grain is not blocked or under fumigation or outloading configuration.
- Based on its selection, GrainCorp provides the customer with a site assembly plan (SAP).
- The customer as grain owner accepts or modifies the SAP and may include grain under its ownership in the SAP from non-GrainCorp sites. The customer provides final approval by issuing an order number before movements can occur.
- GrainCorp outturns grain to freight trains in accordance with the order and negotiated arrangements between the transport provider and the customer.

- Grain owners conduct a similar process themselves for grain being accumulated at Melbourne Port Terminal.

Grain transport

2.29 Rail freight is the primary means of transporting bulk grain, especially for export. Traders organise and pay for their own freight, which is then co-ordinated with the storage and handling system and rail providers.

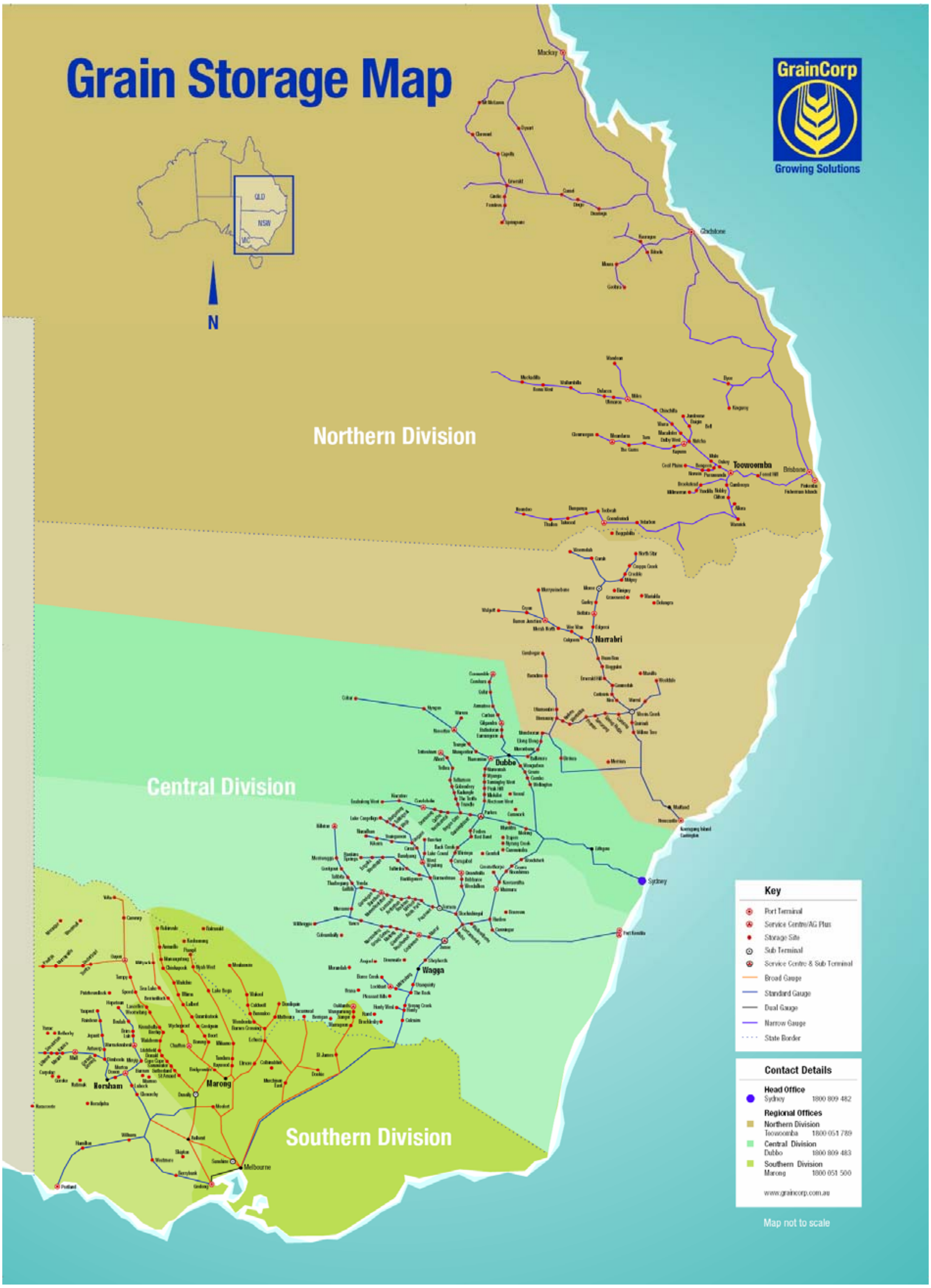
2.30 Freight contracts are typically negotiated over one or more seasons and are based on a range of incentives, operational efficiency targets and volume discounts. Freight costs are a major cost deduction from grain prices and growers' income.

2.31 The main providers of grain rail freight are: Pacific National (which recently acquired the Victorian grain freighter Freight Australia); Queensland Rail; the Australian Rail Group; and smaller operators such as Silverton and Lachlan Valley. GrainCorp also owns a train and wagons that it uses for grain freight.

2.32 The average length of haul from receival point to export terminal is about 350 km, but this varies considerably between the states. South Australia has a long coastline close to grain growing areas and has more terminals than other states, so average haulage distances are lower (around 160 km) and many growers deliver direct to the terminals. In NSW the average rail haulage distance to terminal is about 500 km.

2.33 Road freight is used to varying degrees in the eastern states but is mostly focused on small domestic loads from farm to silo or from farm / silo to domestic customers. Transport from farm to country receival point has traditionally been undertaken by growers using their own trucks. Contract haulage may also be used in this task.

Figure 1: Grain storage and freight routes in eastern Australia



Source: GrainCorp website ***http://www.graincorp.com.au***

Ports and shipping

2.34 According to the applicants there are 8 grain port terminals on the east coast to handle a grain export task of around 7.5 million tonnes. Approximately 70% of this grain task comprises AWB's wheat exports.

2.35 GrainCorp operates seven of these grain port terminals. The other grain terminal is operated by ABA under an agreement with ABB. AWB has a 50% interest in this terminal but does not have operating control or influence over this terminal.

2.36 The management of export grain at port involves a number of inter-related processes and facilities to move and eventually load grain onto ships:

- receival which includes weighing, quality testing, grading, pest inspection, unloading and transport to port storage
- storage which includes use of silos, grain elevator towers and conveyer belts to enable handling, blending and further movement at port
- weighing of grain about to be shipped (by the ship weigher) to ensure the correct amount is loaded and invoiced
- ship loading by way of conveyor (or shipping) belts and ship loaders.

2.37 When vessels are required to wait longer than a specified time to load goods (such as grain) the vessel owners charge demurrage to the exporter. The longer the waiting period, the greater the demurrage payments.

3. APPLICATION FOR AUTHORISATION BY GRAINCORP AND AWB LTD

The application

3.1 On 27 September 2004, GrainCorp Operations Limited (GrainCorp), AWB Limited (AWB) and Export Grain Logistics Pty Ltd lodged applications for authorisation A30233, A30234 and A30235 with the ACCC.

3.2 Application A30233 was made under subsection 88 (1) of the TPA, and sought authorisation to make and give effect to a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of the TPA.

3.3 Application A30234 was made under subsection 88 (8) of the TPA, and sought authorisation to engage in conduct that constitutes or may constitute the practice of exclusive dealing within the meaning of section 47 of the TPA.

3.4 Application A30235 was made under subsection 88 (9) of the TPA, and sought authorisation to acquire shares in the capital of the body corporate, or to acquire assets of the person (including a body corporate) named in the application as Export Grain Logistics Pty Ltd (ACN 109 812 197).

3.5 The applicants describe Export Grain Logistics as being a special purpose company with a share capital of $2.00 with each of AWB and GrainCorp having a 50% shareholding. Its task will be to implement the export collaborative arrangements between GrainCorp and AWB pursuant to a Joint Venture Shareholders Agreement between GrainCorp, AWB and Export Grain Logistics.

The applicants

GrainCorp Operations

3.6 GrainCorp is an Australian agribusiness company which is listed on the Australian Stock Exchange. Its core business lies in bulk commodity storage and handling, marketing, merchandising and logistics for domestic and export markets. GrainCorp has been through an extensive program of modernization, geographic expansion and supply chain diversification – including listing on the ASX in 1998, the merger with Vicgrain in 2000, the purchase of Allied Mills in 2002 in a joint venture with Cargill Australia, and most recently the merger with Grainco Australia in 2003.

3.7 GrainCorp's other products and services include:

- grain accumulation and grain marketing, to both domestic and overseas customers
- flour milling and mixing through Allied Mills, a joint venture between GrainCorp and Cargill Australia Limited
- merchandising activities (eg, GrainCorp operates 27 rural service centres which offer farm input needs such as fertiliser, agricultural chemicals, seeds and seasonal finance).

Grain storage, handling and export facilities

3.8 GrainCorp operates approximately 355 grain receival facilities in Queensland, NSW and Victoria with an estimated capacity of 22 million tonnes. GrainCorp advises that in the 2002/2003 harvest season, it received approximately 11.5 million tonnes of grain, including approximately 6 million tonnes of grain for export.

3.9 Subject to a divestiture process agreed with the ACCC in relation to the GrainCo transaction, GrainCorp currently has an interest in six storage and handling facilities in New South Wales and Victoria through Australia Bulk Alliance, a joint venture (held in equal shares) with AusBulk.

3.10 GrainCorp operates seven export terminals, these being in Newcastle, Port Kembla, Brisbane, Mackay, Gladstone, Portland and Geelong.

3.11 GrainCorp is also divesting as part of its undertaking to the ACCC following its acquisition of GrainCo, its indirect 25% interest in the Melbourne Port Terminal, which is owned in equal shares by ABA and AWB.

Grain trading

3.12 On 1 October 2003, GrainCorp merged its grain trading activities with those previously conducted by GrainCo (through MarketLink, a joint venture between GrainCo (75%) and Con Agra (25%)).

3.13 Accordingly, following that merger, GrainCorp now holds the exclusive rights to administer the legislated vesting and export rights of the NSW Grains Board and, therefore, the exclusive right to market domestic malt barley and export barley, canola and sorghum produced in NSW as the NSWGB’s agent until October 2005.

3.14 With the consent of the NSW Government and farmers, GrainCorp has now voluntarily deregulated domestic malt barley and export canola and sorghum through an open permit system.

Flour milling and mixing and merchandising

3.15 In 2002, GrainCorp and Cargill established a joint venture to purchase Goodman Fielder’s flour milling business which was then called Milling Australia and now trades as Allied Mills. GrainCorp has a 60% interest (with equal control rights) in Allied Mills with Cargill owning the remainder.

3.16 Allied Mills consumes about 1,000,000 tonnes of grain annually and operates 12 milling facilities across Australia.

3.17 GrainCorp operates a network of 27 rural service centres which offer farm input needs such as fertiliser, agricultural chemicals, seeds and seasonal finance.

AWB

3.18 The Australian Wheat Board was established as a statutory authority in 1939. In June 1998, the assets and liabilities of the Australian Wheat Board (other than the Wheat Industry Fund) were transferred to AWB and AWB International (AWBI), then wholly-owned subsidiaries of the Australian Wheat Board.

3.19 On 1 July 1999, the Australian Wheat Board ceased to be a Government-controlled entity and AWB became a grower-owned and controlled corporation. AWB listed on the Australian Stock Exchange in August 2001 and is now Australia's major national grain asset manager and one of the world's largest wheat managers and marketers.

National Pool management services

3.20 AWBI is a separate, wholly-owned subsidiary of AWB which is responsible for the operation of the National Pool on behalf of growers and other suppliers who deliver wheat to it. As such, it is the exclusive manager and marketer of all Australian bulk wheat exports.

3.21 The Single Desk is established by the WMA, under which AWBI is appointed as the sole marketer of Australian export bulk wheat. AWBI is under an obligation to accept all wheat that is offered to it for inclusion into the National Pool and that meets the quality standards set by it.

3.22 Under the WMA, AWBI's responsibility is to maximise net pool returns for growers who deliver wheat into the National Pool, by securing, developing and maintaining export markets for wheat and minimising costs. The company markets wheat and other grains to more than 40 countries and is the world's second largest wheat exporter with a 16% global market share. The National Pool is a significant contributor to the Australian economy, being around 3% of the total value of Australia's exports.

3.23 In general, AWBI's management of the National Pool involves the following six activities:

- aggregating grain parcels for sale on international markets
- managing commodity (eg wheat) price risk through physical sales and financial hedging on global commodity exchanges
- managing currency risk
- providing market and service information to grain growers and AWB customers
- optimising logistics (including storage, handling and transport costs)
- managing accounts and other services for growers who deliver to each pool.

3.24 These services are provided to AWBI by AWB, through its wholly owned subsidiary AWB Services Pty Ltd.

Grain acquisition and trading

3.25 AWB and AWB (Australia) Limited participate in grain acquisition and trading in a number of ways. First, the companies provide growers with a number of services functions. Pre-harvest, the companies provide a range of contract products that give growers greater price flexibility. The companies also provide growers with cash sales options before and during the harvest. Second, the companies themselves actively participate by acquiring and trading deregulated domestic grain and non-wheat export grain including barley, sorghum and oilseeds.

Finance and risk management products

3.26 AWB also provides various funding, treasury and risk management products to growers including:

- finance products - the provision of limited recourse finance secured against a grower's wheat delivery to an AWB managed pool
- risk management products - the provision of derivatives that manage pool risk exposures and cash flows, that allow growers to tailor their risk exposure.

Storage, handling and export facilities

3.27 AWB owns and operates grain storage and handling facilities at 21 locations in Queensland (3), NSW (10), Victoria (4) and South Australia (4). In the 2003/2004 harvest season, AWB grain storage and handling facilities received approximately 1.7 million tonnes of grain.

3.28 AWB also has a 50% interest in the grain export terminal at Melbourne Port Terminal which operates as a joint venture with ABA. It is operated by AusBulk (itself a participant in the ABA joint venture).

Landmark acquisition

3.29 On 29 August 2003, AWB announced that it had acquired Landmark from Wesfarmers Limited. Landmark is Australia's largest supplier of farm inputs including fertiliser and chemicals. It also has significant interests in wool and livestock marketing, rural property and real estate sales, and finance and insurance. It operates from 430 outlets throughout Australia, about half of which are company-owned, with the balance owned and operated by franchisees, agents and affiliates.

Export Grain Logistics

3.30 Export Grain Logistics is a special purpose company established as a joint venture between GrainCorp and AWB. It is the acquisition of shares in this entity that is, in part, the subject of authorisation. Export Grain Logistics is incorporated for the purpose of the contracting of supply chain services for, and the management and coordination of, grain for export in bulk or in containers from silos in Queensland, NSW and Victoria.

3.31 The terms on which GrainCorp and AWB will operate the joint venture are set out in a Joint Venture Shareholders Agreement which has as a condition precedent that the parties have received a letter from the ACCC confirming that it does not propose to intervene in the proposed transactions, or authorising the relevant arrangements.

4. THE EXPORT GRAIN LOGISTICS JOINT VENTURE

4.1 The applicants state that the formation of Export Grain Logistics is necessary to facilitate improved co-ordination in the movement of export grain and introduce efficiencies in the export of that grain. To achieve this, the joint venture will be set up as an independent company with a small number of expert staff. Export Grain Logistics will operate as a break-even business in the sense that that it will not be a separate profit centre.

4.2 The applicants further submit that the purpose of forming Export Grain Logistics is, first and foremost, to improve efficiencies and to achieve logistics costs savings in grain exports, through improved co-ordination of export grain storage and transport activities and increased access to information to facilitate the export grain task.

4.3 GrainCorp and AWB have finalised arrangements under the Joint Venture Agreement in relation to the creation of Export Grain Logistics which would, subject to authorisation, provide various export logistics services for export grains.

4.4 GrainCorp and AWB propose to appoint Export Grain Logistics as the exclusive provider of export logistics services to their respective businesses.

Responsibilities of the Export Grain Logistics Joint Venture

4.5 The applicants state that the joint venture will:

- be responsible for procuring transport logistics services for export grain

- manage export supply chain activities and provide logistics planning and co-ordination services, including grain allocation and optimisation, cargo aggregation, service provider management and monitoring of performance and operational management

- acquire information from each of AWB and GrainCorp in relation to export grains to enable it to improve co-ordination and achieve efficiencies in the fulfilment of the above functions. Confidential information as between AWB and GrainCorp where these parties compete, will be subject to ring-fencing obligations as between the joint venture and the principals.

Main features of the joint venture

4.6 The applicants summarised the main features of the joint venture as follows:

- It will be incorporated and jointly owned by the parties.[4]

- It will only employ a small number of staff (4 to 6) to provide specific services. The joint venture, to minimise costs, may contract support services (eg accounting and systems) from the parties.[5]

- It will contract exclusively with AWB Services Limited ("AWBS") and GrainCorp to manage and co-ordinate export transport activities in eastern

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[4] Clauses 4.1 and 4.3, Joint Venture Shareholders Agreement.
[5] Clauses 4.5 and 4.6.

Australia with the objective of achieving supply chain and logistics efficiencies and cost savings.[6]

- The joint venture will not seek to be a separate profit centre, with all rail and operating costs to be paid by AWBS and GrainCorp in proportion to the tonnage of grain serviced by Export Grain Logistics.[7]

- It will enter into service contracts as principal in relation to the movement of grain with all rail providers (and limited road contracts if rail is not available).[8] These contracts could include a combination of take or pay or spot rail services. These services will be sourced from Pacific National in New South Wales and Victoria and Queensland Rail in Queensland and other rail providers.

- Export Grain Logistics will nominate the rail provider for a particular task and will be responsible for the payment of rail rates. Export Grain Logistics will determine rail rates for all silos receiving AWB and GrainCorp export grain, based on the rates and contracts provided by the relevant rail providers.[9]

- It may enter into agreements in relation to grain outloading operations with GrainCorp, AWB Grainflow and Australian Bulk Alliance and other entities that provide grain storage services to improve storage and rail interface and to set performance criteria and financial incentives to flow between rail and storage.

- It will manage and co-ordinate grain logistics for AWBS and GrainCorp in relation to export grain in Queensland, New South Wales and Victoria and will be responsible for the payment of rail invoices. However, as noted earlier, Export Grain Logistics will not service domestic grain. Export Grain Logistics will have access to AWBI, AWBAU and GrainCorp Marketing stock information as part of this function on a ring fenced and strictly confidential basis.[10]

- It will operate as a neutral and independent operator, keep all confidential information confidential and distribute any cost savings to the shareholders in accordance with the volumes of each shareholder's grain handled by Export Grain Logistics.[11]

Exclusivity and exceptions

4.7 As stated above, both AWB and GrainCorp, on behalf of themselves and their related bodies corporate, appoint the joint venture company as their (and those related bodies corporate) sole and exclusive provider of the services referred to in the respective AWB and GrainCorp Supply Agreements in Queensland, New South Wales and Victoria.

4.8 Both AWB and GrainCorp also commit not to conduct, carry on or promote, establish purchase or obtain any ownership, management or other interest (whether direct or indirect) in, or provide any form of financial or other assistance to, any other Export Grain Logistics Business in any Relevant Area.

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6 Clauses 4.8, 11.1-11.7.
7 Clause 8.
8 Clauses 3.1-3.2, 4.7; Section 5.2, applicants' submission.
9 Clause 4.7; Section 5.2.
10 Clause 18.2 and Schedule 2.
11 Clauses 4.7 (b) and 18.2.

4.9 However AWB acknowledges and agrees that the exception clause does not apply to Allied Mills Australia Pty Limited or Allied Mills' related bodies corporate. In addition both parties: may hold up to 5% of the shares in a public company, even though that company carries on an Export Grain Logistics Business; and are not prevented from establishing, owning or operating (independently or in conjunction with another party) any:

- silo or other facility for the receival, storage or outloading of Grain
- port facility for the receival, storage or loading of Grain for export.

Ring-fencing

4.10 Clause 18.2 of the Joint Venture Shareholders Agreement sets out the following ring fencing obligations:

(a) The parties must direct the Board to establish and enforce procedures and protocols which ensure that:

(i) the information described in part A of schedule 2 is not disclosed to AWB or its related bodies corporate; and

(ii) the information described in part B of schedule 2 is not disclosed to GrainCorp or its related bodies corporate

(iii) any other Ring-fenced Information provided by a Shareholder is not disclosed to the other Shareholder.

(b) The protocols must include (but not be limited to) the following requirements:

(i) that any information to be provided by the JV Company to a Director or a Shareholder must be vetted by the General Manager of the JV Company in order to ensure it complies with the protocols;

(ii) that all employees and Directors of the JV Company must sign an undertaking to be bound by the protocols;

(iii) that any breach of the protocols must be immediately reported to the Board; and

(iv) that the parties comply fully with their obligations under the *Trade Practices Act* 1974 (Cwlth).

(c) The Board must provide the protocols to the Shareholders for approval and must make such alterations as the Shareholders (acting together) direct. The initial protocol must be put in place immediately after the Commencement Date. The protocols must be reviewed annually and any amendments shall be subject to approval of the Shareholders.

(d) The Board must certify to the Shareholders, within 10 Business Days after 30 September each year, whether or not the protocols were complied with during the immediately preceding year.

4.11 Originally, the applicants claimed confidentiality for Schedule 2 to the Joint Venture Shareholders Agreement – which lists the categories of information to be ring fenced. In response to requests from interested parties through the ACCC, the applicants have agreed to make its contents public. Schedule 2 is divided into two parts:

PART A: INFORMATION TO BE RING-FENCED FROM AWB

- Specific market and buyer information, including product requirements, specifications, pricing arrangements, customer contract information, market analysis and forecasts, funding mechanisms and end-user demand

- GrainCorp Group marketing and risk management strategies, grain accumulation strategies or transactions

- Any GrainCorp Group information unrelated to GrainCorp's Queensland, New South Wales and Victorian supply chain requirements

- Information relating to the GrainCorp Group's supply chain operations in other states

PART B: INFORMATION TO BE RING-FENCED FROM GRAINCORP

- Specific market and buyer information, including product requirements, specifications, pricing arrangements, customer contract information, market analysis and forecasts, funding mechanisms and end-user demand

- AWBI National Pool marketing and risk management strategies and transactions. National Pool's wheat physical and covered positions and any information relating to tender sales not publicly available

- Pool performance Benchmarking (WIB) and Attribution model(s)

- AWBA's marketing, risk management and grain accumulation strategies or transactions. AWBA's individual grain positions and information pertaining to the application for relevant export licences

- Any AWB Group information unrelated to AWB's Queensland, New South Wales and Victorian supply chain requirements

- Information relating to AWB Group's supply chain operations in other states including AWB Grainflow Pty Ltd[12]

4.12 Under the Joint Venture Shareholders Agreement, the confidentiality and ring fencing arrangements survive the termination of the Agreement – unless the Shareholders agree otherwise in writing.[13]

4.13 On 12 November 2004, the applicants advised the ACCC of an agreement between them that supplements and amends the Joint Venture Shareholders Agreement. With respect to the ring fencing arrangements, the following amendments have been made:

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"

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12 AWB and GrainCorp submission, 22 November 2004, p. 5.
13 Clause 13.3.

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".[14]

Consequences of deregulation

4.14 Consistent with the proposed undertaking, the joint venture agreement also states that:

(a) If at any time before this agreement is terminated, AWB ceases to hold the statutory monopoly on export of wheat under the *Wheat Marketing Act 1989* (Cth), the parties agree that they will:

(i) seek confirmation from the ACCC that it does not intend to challenge or oppose the Joint Venture on the basis that the continued operation of the Joint Venture would contravene the *Trade Practices Act 1974* (Cth); and

(ii) if necessary, enter into good faith negotiations with the ACCC in relation to any undertakings required by the ACCC (and which are commercially acceptable to the parties) to address any concerns that the ACCC may have in relation to the continued operation of the Joint Venture.

(b) If the ACCC and, following any appeal, the relevant appeal body do not accept any undertakings offered by any or all of the parties … and the Joint Venture cannot otherwise be restructured to address any ACCC concerns, the parties agree to terminate this agreement ….[15]

Termination of the joint venture agreement

4.15 Clause 13 of the Joint Venture Shareholders Agreement sets out that the agreement terminates on the date:

- of 1 April 2005 if the conditions precedent have not been met
- agreed by the Shareholders in writing
- the Joint Venture company is wound up (if not terminated on an earlier date)
- referred to in a notice of termination in the event of default by a shareholder
- a single Shareholder becomes the beneficial owner of all the Shares
- the later of:

  the day on which the AWB Supply Agreement or the GrainCorp Supply Agreement terminate

  the day on which all disputes or claims between the Joint Venture Company and AWB or the Joint Venture Company and GrainCorp arising in relation to the AWB

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14 Agreement supplementing and amending the joint venture shareholders agreement, p. 2, attached to GrainCorp and AWB submission, 12 November 2004.

15 Clause 16.

Supply Agreement or the GrainCorp Supply Agreement and their termination have been finally determined or settled.

The rationale for the joint venture arrangements

4.16 The applicants state that by working together on the logistics of export grain, they can improve efficiencies and reduce costs to the benefit of growers and all users of the export grain supply chain.

4.17 The applicants also state that it is important to explain the individual perceptions and issues that GrainCorp and AWB have with respect to the export grain supply chain and the grain industry in general. This also involves understanding the interactions between GrainCorp and AWB as service provider and customer as well as competitors.

AWB and GrainCorp relationship

4.18 The applicants submit that AWB and GrainCorp's primary relationship is one of service provider and customer, rather than as competitors. By virtue of the AWB export wheat rights, it is GrainCorp's largest customer, accounting for over 60% of GrainCorp's current business.

4.19 As service provider and customer, GrainCorp and AWB have to work together to organise the movement of export grain from the country silo to the port terminal. This creates a close working relationship which is normal in a service provider and customer relationship. For example:

- AWB has significant information about GrainCorp's storages, operation and intentions for investment at storages as the largest buyer of GrainCorp's services.
- AWB is fully aware of GrainCorp's storage and handling terms and conditions before harvest as part of its storage and handling pricing negotiations. GrainCorp must provide all of its charging rates to AWB as they are deducted from growers' Pool payments.
- GrainCorp has to work with AWB's storages for export grain movements. This includes the management of export wheat from AWB Grainflow's and other storages through GrainCorp's Site Assembly Plans.

4.20 GrainCorp and AWB also compete in some areas in relation to grain storage and handling. While both parties agree that improvements can be made to supply chain co-ordination in the export grain supply chain on the east coast (not including South Australia) of Australia, the transaction has been structured so that it does not involve any of the parties' operations in relation to domestic grain, where they will continue to compete.

GrainCorp's commercial rationale

4.21 GrainCorp's commercial rationale for entering the arrangements is to drive efficiencies in export supply chain logistics services.

4.22 Given AWB's ownership of all export wheat under the WMA and GrainCorp's industry position, GrainCorp believes that it does not have access to the same level of transparency of rail rates for its silos as AWB Grainflow silos. This disparity is occurring in the context of an industry which is seeking greater transparency for freight rail rates and where freight rail companies are consolidating. Increased transparency is traditionally viewed as facilitating competition.

4.23 Both parties have their individual views of how the Australian grain industry operates and GrainCorp expressly acknowledges that AWB does not accept GrainCorp's views of some aspects of the operation of the Single Desk which are inherent in the application.

4.24 GrainCorp has summarised its rationale for entering the arrangements as follows:

- GrainCorp believes that it does not have full access to information which would enable it to assess whether the same level of rail rates for GrainCorp's silos as AWB Grainflow silos are being applied based on Pacific National's views of those silos and their respective individual operating characteristics (eg location, size, hours of operation and loading speeds).

- GrainCorp believes that the joint venture will facilitate more transparency in the negotiation and presentation of export rail rates for regulated wheat exports to growers and other industry participants. Currently export rail rates are solely negotiated by AWB. The joint venture company will create an independent process in setting these rates, which would address GrainCorp's concerns that there is not sufficient clarity with respect to how AWB negotiates those rates with respect to its own, and others' facilities.

- The increased transparency and associated efficiencies would provide GrainCorp with better information and certainty as to whether to invest in upgrading grain storage.[16]

AWB's commercial rationale

4.25 AWB submits its commercial rationale involves putting in place arrangements to achieve supply chain cost savings for Australia's growers and to secure the medium to long term competitiveness of its export grain trading business in the international markets, through:

- lower supply chain costs - AWB as manager of the National Pool has an obligation to minimise supply chain costs. To date this has been largely achieved through more efficient bulk handling services and lower rail rates through the introduction of competitive rail operators. There is a significant opportunity for further efficiency gains and cost savings through better coordination.

- increased confidence in rail freight determinations by Pacific National and AWB providing clear rewards for grain storage handlers such as GrainCorp (and other participants) in increasing investment in grain storage by creating a clear link to rail costs

- supply chain investment - AWB has made a significant investment in 21 silos and a 50% share in MPT. Further significant investment to obtain a commercial return, particularly in ports, will be difficult. In any event, however, more efficient information flows allow industry participants to make independent, informed decisions as to the optimal use of capital.[17]

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16 GrainCorp and AWB supporting submission, 27 September 2004, p. 10.
17 Ibid, p. 11.

The undertaking offered

4.26 In seeking authorisation for the joint venture arrangements for a period of not less than five years, the applicants recognise the potential (without assigning any probability to it) that the export wheat market might be deregulated under the Wheat Marketing Act within this period. To address any uncertainty arising from this, the parties indicated that they were prepared to provide an Undertaking to the effect that the ACCC may review the arrangements in the event of deregulation.

4.27 The applicants describe the Undertaking in the following terms:

> The Undertaking is proffered on the basis that while the parties do not believe there is an anti-competitive effect from the Transaction [the joint venture arrangements], 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.[18]

4.28 The operative provisions of the proposed Undertaking are set out below:

> 4.1 If at any time during the term of the Joint Venture, AWB ceases to hold the statutory monopoly of export of wheat under the *Wheat Marketing Act 1989* (Cwlth), the Parties agree that they will:
>
> (i) seek confirmation from the Commission that it does not intend to oppose the Joint Venture on the basis that the continued operation of the Joint Venture after the Deregulation Date would contravene sections 45 and 50 of the Act; and
>
> (ii) if necessary, enter into good faith negotiations with the Commission in relation to any undertakings required by the Commission (which are also acceptable to the Parties), to address any concerns that the Commission may have in relation to the continued operation of the Joint Venture after the Deregulation Date.
>
> 4.2 If the Commission and, following any appeal, the relevant appeal body do not accept any undertakings offered by any or all of the Parties in accordance with paragraph 4.1(ii) above, and the Joint Venture cannot otherwise be restructured to address any of the Commission's concerns, the Parties agree that they will terminate the Joint Venture in accordance with the terms set out in the Joint Venture Shareholders Agreement.[19]

Long term open access arrangement

4.29 GrainCorp and AWB also intend to enter into an Open Access Deed under which GrainCorp will provide AWB with non-exclusive long term rights of access to its upcountry and port facilities.

4.30 The applicants describe the Open Access Deed as providing AWB with an opportunity to access GrainCorp's up-country storage and port facilities on a non-exclusive basis, on terms commensurate with the volumes AWB chooses to put through those facilities. AWB will continue to have the flexibility to decide to what extent it will use GrainCorp's services. The terms essentially reflect AWB's position as GrainCorp's largest customer under the WMA and will be on a non-exclusive basis.

4.31 The terms on which that access is provided will be commensurate with the volumes of grain that AWB chooses to pass through GrainCorp facilities and largely reflect the existing commercial position of AWB's ownership of export grains passing through those

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18 GrainCorp and AWB submission 27 September 2004, p. 6.

19 Draft Undertaking provided by GrainCorp and AWB on 27 September 2004, p. 2.

facilities. In this sense the Open Access Deed does not alter the dynamics as between the parties or other industry participants having regard to the operation of the WMA.[20]

4.32 Authorisation has not been sought for the Open Access Deed.

[20] GrainCorp and AWB submission 27 September 2004, p. 5.

5. SUBMISSIONS RECEIVED BY THE ACCC

5.1 The applicants provided a supporting submission with their application for authorisation.

5.2 The ACCC also sought submissions from around 50 interested parties involved in the grain industry, including grain growers, grain traders, rail operators and customers. The ACCC received thirteen submissions in response: eight on the issue of interim authorisation and five on the substantive application.

5.3 Broadly, grain growers/producers (through their peak representative associations) support the proposed joint venture arrangements, as does the Flour Millers' Council of Australia and ANL Container Line.

5.4 The following market participants expressed opposition to or raised concerns with the proposed joint venture arrangements: Queensland Agricultural Merchants, Barrett Burston Malting, Manildra Flour Mills, ABB Grain, Ridley Agriproducts and Pacific National.

5.5 The applicants provided a submission in response to issues raised by interested parties. In response to a request by the ACCC for further explanation of the methodology and assumptions underlying the proposed public benefits, the applicants provided additional information.

5.6 Following the release of its Draft Determination, the ACCC received submissions from Pacific National, Australian Bulk Alliance, Brooks Grain and Elders, Austport and the NSW Farmers Association. All of these submissions raised issues with the proposed Joint Venture arrangements. The applicants provided a further submission on 24 March 2005 in response to the Draft Determination and issues raised in these submissions.

5.7 The views of the applicants and interested parties are outlined in the ACCC's evaluation of the proposed joint venture in Chapter 7.

6. THE PUBLIC BENEFIT TEST

6.1 The ACCC may only grant authorisation where the relevant public benefit test in section 90 of the TPA is satisfied.

Application A30233

6.2 The applicants lodged application for authorisation A30233 under subsection 88(1) of the TPA to make and give effect to a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of the TPA.

6.3 The relevant public benefit test for this application is found in sub-section 90(6). This section provides that the ACCC may grant authorisation to a provision of a proposed contract, arrangement or understanding, other than an exclusionary provision, if it is satisfied that:

- the provision of the proposed contract, arrangement or understanding would be likely to result in a benefit to the public; and
- this benefit would outweigh the detriment to the public constituted by any lessening of competition that would be likely to result if the proposed arrangement was made and the provision concerned was given effect to.

Application 30234

6.4 The applicants lodged application for authorisation A30234 under subsection 88 (8) of the TPA to engage in conduct that constitutes or may constitute the practice of exclusive dealing within the meaning of section 47 of the TPA.

6.5 Section 90(6) applies to authorisations lodged pursuant to section 88(8). The test set out in s 90(6) is discussed at 6.3 above.

Application 30235

6.6 The applicants lodged application for authorisation A30235 under subsection 88 (9) of the TPA to acquire shares in the capital of the body corporate, or to acquire assets of the person (including a body corporate) named in the application as Export Grain Logistics Pty Ltd (ACN 109 812 197).

6.7 An authorisation granted pursuant to subsection 88(9) provides a statutory exemption from the operation of section 50 of the TPA, which may otherwise prevent the proposed acquisition.

6.8 The relevant public benefit test for this application is found in sub-section 90(9). This section provides that the ACCC may grant authorisation in respect of a proposed acquisition of shares in the capital of the body corporate, or to acquire assets of the person (including a body corporate), if it is satisfied in all the circumstances that the proposed acquisition would result, or be likely to result, in such a benefit to the public that the acquisition should be allowed to take place.

6.9 In making its determination the ACCC gives consideration to both the public benefits and public detriments that are likely to result from the proposed acquisition. In particular, subsection 90(9A) provides that:

> In determining what amounts to a benefit to the public for the purposes of subsection (9):
>
> a) the Commission must regard the following as benefits to the public (in addition to any other benefits to the public that may exist apart from this paragraph):
>
>   i. a significant increase in the real value of exports;
>
>   ii. a significant substitution of domestic products for imported goods; and
>
> b) without limiting the matters that may be taken into account, the Commission must take into account all other relevant matters that relate to the international competitiveness of any Australian industry.

6.10 Paragraph 90(11)(a) of the Act provides that the ACCC has a period of 30 days to consider an application for authorisation under subsection 88(9) of the Act. This period may be extended to 45 days for complex matters.[21] The period may also be extended with the agreement of the applicant.[22] If the ACCC has not made a determination in the relevant period, the authorisation is deemed to have been granted.

6.11 In the application and a subsequent email dated 27 September 2004, the applicants advised that for the purposes of subsection 90(12) of the Act, AWB and GrainCorp agreed to the Commission taking a longer period for the determination under subsection 88(9), being the period ending 31 March 2005. The applicants have since agreed to further extend this period until 30 April 2005.

The relevant test

6.12 While there is some variation in the language between the test in s 90(6) and the test in s 90(9), the ACCC had previously adopted the previous view of the Trade Practices Tribunal (now the Australian Competition Tribunal) that, in practical application, the tests are essentially the same.[23]

6.13 This view has been reconsidered by the Australian Competition Tribunal (the Tribunal) and it found that the two tests are not precisely the same.[24] In particular the Tribunal considered that the test under section 90(6) was limited to a consideration of those detriments arising from a lessening of competition. It was the Tribunal's view that the test under section 90(9) was not so limited.[25]

6.14 However, with respect to these applications from AWB and GrainCorp, the ACCC is satisfied that any public detriment from the proposed arrangements arises from a lessening of competition. Consequently, the differences in the tests identified by the Tribunal do not affect the assessment of the current applications.

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21 Subsection 90(11A).

22 Subsection 90(12).

23 *Re Media Council of Australia (No 2)* (1987) ATPR at 40-774; *Re 7-Eleven Stores Pty Ltd* (1994) ATPR 41-357.

24 *Australian Association of Pathology Practices Incorporated* [2004] ACompT 4; 7 April 2004.

25 Apart from the explication of public benefit in merger authorisations in section 90(9A), the test in section 90(9) is similar in phrasing to the test in section 90(8).

6.15 The ACCC has applied the additional requirements set out at subsection 90(9A) in relation to application A30235.

Common assessment

6.16 The ACCC has applied a common assessment of the Applications and considered each of them within this Determination. This is consistent with the Act.

6.17 Subsection 90A(13) provides that where the ACCC is of the opinion that two or more applications for authorisation that are made by the same person involve the same or substantially similar issues, it may treat the applications as if they constitute a single application and may prepare one determination covering them all.

Definition of public benefit and public detriment

6.18 Except in section 90(9A), public benefit is not defined by the TPA. However, the Tribunal has stated that the term should be given its widest possible meaning. In particular, it includes:

> …anything of value to the community generally, any contribution to the aims pursued by society including as one of its principle elements … the achievement of the economic goals of efficiency and progress.[26]

6.19 Similarly, public detriment is not defined in the TPA but the Tribunal has given the concept a wide ambit. It has stated that the detriment to the public includes:

> …any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.[27]

Future with-and-without test

6.20 The ACCC also applies the 'future with-and-without test' established by the Tribunal to identify and weigh the public benefit and anti-competitive detriment generated by arrangements for which authorisation has been sought.

6.21 Under this test, the ACCC compares the public benefit and anti-competitive detriment generated by arrangements in the future if the authorisation were granted with those generated if the authorisation were not granted. This requires the ACCC to predict how the relevant markets will react if authorisation is not granted. This prediction is referred to as the counterfactual.

Term of authorisation

6.22 Section 91(1) of the TPA allows the ACCC to grant authorisation for a specific period of time.

6.23 The ACCC may authorise different aspects of conduct for which authorisation is sought for different periods.

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[26] *Re 7-Eleven Stores; Australian Association of Convenience Stores Incorporated and Queensland Newsagents Federation* (1994) ATPR ¶ 41-357 at 42677.

[27] Ibid at 42683.

Conditions

6.24 Section 91(3) allows the ACCC to grant authorisation subject to conditions.

7. EVALUATION

Market definition

7.1 The first step in assessing the effect on competition of the conduct for which authorisation is sought is to consider the relevant market(s) in which that conduct occurs.

7.2 However, depending on the circumstances, the ACCC may not need to comprehensively define the relevant markets as it may be apparent that a net public benefit will or will not arise regardless of the scope of the defined market.

7.3 The applicants stated that they consider the relevant markets to be:

- the separate Queensland, New South Wales and Victorian markets for grain storage and handling

- the market for grain marketing services, which is at least national, if not international

- the markets in Queensland, New South Wales and Victoria, for the acquisition of bulk freight rail services.

7.4 In respect of the current applications, the ACCC considers the key relevant markets are associated with storage and handling, grain rail freight and grain trading. These are discussed in turn below. The ACCC notes there are a number of potentially affected downstream markets, particularly flour milling, in light of GrainCorp's interest in Allied Mills.

Storage and handling facilities

7.5 The ACCC considers the market associated with storage and handling facilities to have two components – up country and at port. The focus of this joint venture is likely to create greater interaction between up-country and at port storage and handling services as it seeks to increase the efficiency of the grain export task.

7.6 Up-country, the relevant service can broadly be described as the supply of grain receival, storage and loading services at up-country locations. The geographic markets appear to be, in broad terms, the states of Queensland, New South Wales and Victoria.

7.7 The table below shows GrainCorp's ongoing dominance of grain storage and handling on the east coast. The low utilisation rates are indicative of the significant excess capacity in the system, although this varies across the year.

Up country Storage Capacity in Eastern Australia (excl on-farm storage)

	Capacity				No of Silos			
	QLD	**NSW**	**VIC**	**Total**	**QLD**	**NSW**	**VIC**	**Total**
GrainCorp	4.4Mt	12.4Mt	7.0Mt	23.8Mt	65	189	119	373
AWB	0.4Mt	1.4Mt	0.8Mt	2.6Mt	3	10	4	17
ABA		0.7Mt	0.4Mt	1.1Mt		7	3	10
ABB			0.1Mt	0.1Mt			2	2
Others	0.5Mt	3.6Mt	1.0Mt	5.1Mt	42	105	62	209
Total	**5.3Mt**	**18.0Mt**	**9.3Mt**	**32.6Mt**	**110**	**311**	**190**	**611**
Average Production	2.4Mt	8.0Mt	4.1Mt	14.5Mt				
Utilisation	**45%**	**44%**	**44%**	**44%**				

Source: GrainCorp and AWB

7.8 At port, the relevant service can broadly be described as the supply of grain receival, storage and loading services at various port terminals. The geographic market appears to be state based. GrainCorp is at present the only provider of storage and handling and loading services at ports on the east coast except at the Port of Melbourne.

7.9 As the applicants note, the eight grain port terminals on the east coast handle around 7.5 million tonnes per annum. Approximately 70 per cent of this comprises AWB's wheat exports.

Export grain volume in Eastern Australia (tonnes)

Grain	2000/01	2001/02	2002/03	3 YR AVG	Percent
Wheat	6,942,708	6,315,088	1,724,377	4,994,058	69%
Barley	1,251,015	1,333,981	400,279	995,092	14%
Canola	787,049	668,300	48,380	501,243	7%
Other	1,155,029	749,637	186,126	705,291	10%
Total Grain	**10,135,801**	**9,067,006**	**2,359,163**	**7,195,683**	**100%**

Source: GrainCorp and AWB

Grain rail freight

7.10 Rail freight is the foremost means of transporting bulk grain, expecially for export. Traders organise and pay for their own freight, which then has to be co-ordinated with the operations of the storage and handling system. In particular, transport from country receival point to terminal port is the more substantial component of the land transport export task, and for the most part, this is done by rail.

7.11 The ACCC understands that over 95 per cent of all export grain is moved by rail. The applicants submitted that road haulage is generally not substitutable with rail for the transport of bulk grain over medium to long distances for the following reasons:

- In order to meet shipping requirements, grain is required to be transported to ports in large volumes. While road haulage is able to transport a proportion of those volumes, bulk freight rail services is significantly better placed to manage those volumes in a more cost effective manner; and

- Grain can be moved faster to the port by rail than road to meet shipping orders given the capacity of rail to move large tonnages within a short time period.[28]

7.12 When it considered the Pacific National/Freight Australia merger, the ACCC defined a national market for rail haul tasks where road is not price competitive. This market covered most rail bulk tasks involving commodities tipped/poured loose into rail wagons, including most rail haulage of grains.

7.13 The primary focus of this joint venture is on grain freight in NSW, Victoria and Queensland. Pacific National advised the ACCC that there are few economic alternative uses for its grain freight rolling stock, citing its use of lighter 48 Class locomotives and grain-specific rolling stock on branchlines throughout NSW.

7.14 The ACCC agrees with the applicants view that grain rail freight markets are likely to continue to be state-based in the medium term, due to different rail gauges and State based access regimes. As the applicants note:

> Export rail transport is dominated by Queensland Rail in Queensland with 100% share of this rail task and dominated by Pacific National in New South Wales and Victoria with over 95% of this rail task.
>
> The only competing rail operators for the haulage of grain in New South Wales are GrainCorp (with one leased train in New South Wales) and ARG for domestic grain to Manildra.[29]

Grain trading

7.15 The relevant service includes buying grain from growers and other traders and then selling grain to domestic and export customers. Grain traders also offer financial services to growers and buyers, such as forward contracts and can provide grain accumulation services.

7.16 The ACCC considers the market associated with grain trading to have domestic and international components. Domestically, consumers acquire over 50 per cent of grain produced in eastern Australia. The ACCC considers that the effects of the joint venture on domestic grain trading is likely to be restricted to the east coast. This view is supported by Co-operative Bulk Handling, which currently only operates in Western Australia.[30]

7.17 Internationally, grain trading is very competitive and encompasses a large number of participants. Export grain prices are set in international markets in which Australia is a price taker. Estimates of the relative shares held by traders of Australia’s grain exports and domestic grain are set out in the table below.

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28 GrainCorp and AWB supporting submission, 27 September 2004, p. 32.

29 GrainCorp and AWB supporting submission 27 September 2004, p. 33.

30 CBH submission, p. 1.

Estimated Grain market shares

	National Export Grain				National Domestic Grain		
	Export share for wheat	**Export share for barley**	**Export share for sorghum/ pulses (8)**	**Export share for canola**	**Domestic share for wheat**	**Domestic share for barley /sorghum /other (2)**	**Domestic share for canola**
AWBI	99%	Nil	Nil	Nil	5%	Nil	Nil
AWBAU	Nil	Negligible	9%	20%	18%	12%	13%
GrainCorp	Nil	8%	27%	10%	8%	13%	2%
ABB	Nil	55%	15%	15%	10%	15%	1%
CBH	Nil	32%	40%	40%	2%	5%	5%
Other	1%	5% (4)	9%	15% (3)	57%(7)	55%(6)	78% (5)
Total (1)	**17mt**	**4.2mt**	**1mt**	**1mt**	**5.6mt**	**4.8mt**	**0.77mt**

Note: (1) Estimate of exports is based on average grain production less estimated domestic consumption. Domestic consumption has first claim and exports represents residual sales.
Note: (2) It is difficult to break up barley from other grains as the stock feed segment can substitute grains
Note (3) Other major exporter of canola include Mitsui, Cargill, Sumitomo
Note (4) Other major exporter of barley/other include Glencore and JK International
Note (5) Other traders of domestic canola include Cargill and Riverina Oilseeds
Note (6) Other traders of domestic barley/other include feedlots and stockfeeders
Note (7) Other traders of domestic wheat include flour millers, traders, stockfeeders
Note (8) Most of sorghum is from QLD

Source: AWB and GrainCorp

The counterfactual

7.18 As noted at Chapter 6, in order to identify and measure the public benefit and public detriment generated by conduct, the ACCC applies the 'future with-and-without test'. This involves identifying a counterfactual: that is, making a prediction as to what is likely to happen if authorisation is denied. The ACCC makes a judgement as to what, on the information and evidence before it, is the most likely situation without the authorisation, as in some cases there may be debate about which of a number of different alternative scenarios is the most likely outcome if authorisation is not granted.

7.19 The ACCC then compares the public benefit and public detriment arising in the future if authorisation is granted with the public benefit and detriment arising under the counterfactual.

7.20 As regards the applications, the first issue relating to the counterfactual is whether the proposed efficiency gains would be realised in the absence of the joint venture.

7.21 Brooks Grain and Elders submitted that the proposed JV structure may be:

> An unnecessary and inappropriate structural approach to pursing benefits. Experience in other parts of Australia with grain, and in non grain bulk commodity industries demonstrate that benefits can be achieved and even be improved upon without taking the structural path of the EGLJV[31]

7.22 The applicants state they considered alternative approaches to a joint venture to achieve efficiencies in export grain transportation. In particular, whether individual

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[31] Brooks Grain and Elders submission, 21 February 2005, p. 1.

contracts between the rail freight service providers and AWB and storage providers (as occurs in Western Australia) would be sufficient.

7.23 The applicants concluded that:

> … the efficiencies and logistics cost savings which JVCo will deliver could not be effectively achieved by individual agreements between the parties and the rail freight providers. The JVCo will provide the best vehicle to bring together GrainCorp (as the operator of infrastructure) and AWB (as the manager of the National Pool and holder of the rail contracts). The parties decided that forming a joint venture to manage export grain logistics would be the preferred route given:
>
> - the requirements to ring fence this task to meet AWBI's pool management policies;
> - the need for JVCo to operate as an independent and neutral party (i.e. pay the invoices) with the services providers, to enable incentives and other pricing criteria to be passed through to the parties; and
> - the need to put in place a neutral party to execute and independently co-ordinate rail and related storage and supply chain activities, to ensure rail contractual obligations are met.[32]

7.24 Manildra submitted that GrainCorp would be "constantly analysing the upgrading of its infrastructure, regardless of the joint venture proceeding".[33]

7.25 The ACCC understands that GrainCorp has made ongoing investments in upgrading its infrastructure and would be likely to continue to do so in the absence of the joint venture. Similarly, the recent Wheat Marketing Act review observed that AWB had improved supply chain efficiency.

7.26 GrainCorp has submitted, however, that the joint venture arrangements would provide greater transparency as to how rail rates for its silos (as opposed to AWB's silos) are being applied based on Pacific National's views of those silos and their respective individual operating characteristics.[34]

> From GrainCorp's perspective this will encourage GrainCorp investment at its sites to improve rail elevation and outloading infrastructure to meet the future requirement of rail. Up to now, GrainCorp has been reluctant to make this investment given GrainCorp's perceived uncertainty of obtaining lower export rail rates at a silo (for AWBI National Pool Wheat) for this investment.[35]

7.27 This greater transparency would provide GrainCorp with better information and certainty as to whether and where to invest in upgrading grain storage. The joint venture arrangements allow for clearer commercial drivers to make investments in storage facilities, as greater efficiency with resultant lower freight costs can be rewarded contractually.

7.28 The creation of the joint venture as a separate legal entity that contracts for rail freight services enables it to offer financial incentives to encourage better coordination between storage and handling operations and rail freight. One example of this type of conduct offered by the applicants would be the joint venture company accessing rail freight incentives from Pacific National to offer as compensation to facility operators for undertaking activities to better match the rail timetable. For

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32 GrainCorp/AWB supporting submission, 27 September 2004, p. 11.
33 Manildra submission, 1 October 2004, p. 3.
34 GrainCorp and AWB supporting submission, 27 September 2004, p. 10.
35 GrainCorp and AWB submission, 27 September, p. 24.

example, offering increased remuneration for loading or unloading trains outside normal business hours where additional costs are incurred.

7.29 The 'pre-positioning' of grain in sub-terminals, for example, can smooth the transport task and deliver significant efficiency savings. The applicants submit, however, that this practice has been:

> … avoided in the past due to the additional double handling costs levied by the storage operator and rail charges. The Joint Venture has provided an independent mechanism to support the necessary planning required for such a decision, and brokered the arrangement across all parties.[36]

7.30 For improved coordination of the transportation of export grain, information held separately by AWB and by GrainCorp needs to be brought together. Without the joint venture arrangements, and the information ring fencing provisions in particular, the parties are unlikely to share this information.

7.31 The fact that the parties have not been able to achieve much of the proposed efficiencies up to this point tends to support the claim that the joint venture is necessary for them to be achieved.

7.32 This view is further supported by the NSW Farmers Association in its submission:

> The Association's Grains Committee has seen the urgent need and the potential benefits that could be achieved from a greater co-ordination between the two major participants in the supply chain for some time.[37]

7.33 Concerns have been raised regarding the potential for the joint venture arrangements to decrease competition in grain storage and handling and to make entry into the grain export market more difficult.

7.34 The applicants state that the joint venture will not lessen competition in the grain storage and handling market, and that GrainCorp and AWB will continue to compete in this market. Both parties independently provided information (including board documents) to the ACCC on a confidential basis in support of their statements.

ACCC view

7.35 The ACCC considers the most likely counterfactual is that without the joint venture arrangements, few of the proposed efficiencies described by the applicants would be achieved. This is significantly due to the separate nature of the joint venture entity and the ring fencing arrangements. These provide sufficient confidence for both applicants to provide the joint venture with the strategic market and operational information required to enable efficient coordination of the transportation of export grain. In the absence of such ring fencing arrangements, the applicants have thus far been unwilling to share the information necessary to enable better coordination of grain transportation.

7.36 Having identified procedural efficiency improvements, the joint venture entity is in a unique position to negotiate with various industry participants to undertake actions to

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36 GrainCorp and AWB submission, 24 March 2005, p. 24.
37 NSW Farmers Association submission, 1 October 2004, p. 1.

achieve those efficiencies and to ensure appropriate compensation is provided where additional cost is incurred.

Public Benefits

7.37 The public benefits the applicants claim result from the proposed joint venture arrangements are set out below in two sections: reduction in supply chain costs and increased investment in grain storage to service exports of grain by rail. Following a description of the applicants' views, the views of interested parties are set out. The ACCC's view on the issues raised is at the end of each section.

Reduction in supply chain costs

The applicants' view

7.38 The applicants believe that efficiencies and logistics cost savings can be achieved in the grain export supply chain by the joint venture company (JVCo) developing commercial solutions to address the inefficiencies that currently exist in the export supply chain.

7.39 The applicants believe that significant inefficiencies currently occur in the export grain supply chain due to its fragmented nature. There is a 'disconnect' between the owners of individual parcels of grain, the owner and operator of grain storage and handling infrastructure and the acquirer of rail transport services. This means that some of the decision makers (i.e. in this case GrainCorp and AWB) lack:

- the ability to link the two functions involved with rail movements - that is placing orders for rail freight of grain and the loading of grain onto trains
- commercial incentives to minimise the overall grain export supply costs
- access to all information that is relevant for the efficient co-ordination of the export grain task.

7.40 The parties state that specific examples of these inefficiencies include:

- poor rail cycle times as trains wait many hours for loading and/or unloading
- poor use of (limited) rail resources with uneven month to month demand for rail transport by the AWB
- lack of investment at GrainCorp silos to load trains faster
- delays in loading ships after their arrival, with significant demurrage costs incurred by AWB.

7.41 The applicants submit these inefficiencies are being exacerbated by the current problems experienced with merger integration issues as between Pacific National and Freight Australia, which mean that GrainCorp and AWB must take a greater involvement as customers and supply chain participants in ensuring an efficient export grain task.

Improved coordination

7.42 The applicants submit that the joint venture will co-ordinate loads to match and optimise transport, storage and shipping arrangements by:

- creating an alignment of "commercial drivers" to ensure optimal supply chain decision making (for example, hours of rail discharge at ports)
- matching export loads and sites to achieve full train loads against different rail operators
- taking into account supply chain costs in allocating transport.[38]

Information flows

The applicants claim[39] that one impediment to optimising the export grain supply chain is that decision makers currently do not have access to all relevant information to enable the efficient co-ordination of the export grain task.

7.43 For example, GrainCorp could more efficiently manage its export grain infrastructure if it had access to information from AWB including:

- rail transport requirements and performance criteria
- shipping programs for export wheat
- marketing information about the level of export demand
- demurrage penalties and dispatch rewards for ship-loading.

7.44 Similarly, AWB could more efficiently undertake its grain export tasks with a better understanding of GrainCorp's operations including:

- up-country grain storage operations and performance criteria
- readiness for shipping status of each parcel of grain
- costs of expanding storage and creating more segregations
- shipping program for export grain sold by GrainCorp to export customers (in the sense that this facilitates train logistics movements and silo outloading.

7.45 The applicants state that efficiencies and logistics costs savings that will be achieved by the proposed arrangements through enhanced access to information include:

- improved planning and scheduling of the bulk grain handling, transport and shipping arrangements in relation to export wheat
- more detailed pricing of bulk handling and transport services that allows cost driven decision making in relation to each component of the export grain supply chain

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38 GrainCorp and AWB supporting submission, 27 September 2004, p. 20.
39 Ibid, pp 20-21.

- optimal investment and innovation decisions.

Common transport operating criteria

7.46 The applicants submit[40] the joint venture will incorporate transport costs and minimise supply chain costs through the joint negotiation of common operating criteria, for example:

- rail discounts for storage services, such as 24 hour loading
- rail discounts for speed of loading, such as 400 tonnes per hour ("TPH") and 1,000TPH
- rail discounts for unit train operations, such as balloon loops
- grain buyer performance in terms of loading orders and order timing
- incentives for rail performance.

Domestic grain market

7.47 The applicants believe that the joint venture arrangements 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.[41]

7.48 Because Australian grain prices are generally underpinned by export prices, the parties note that a reduction in export pool costs will not only increase pool returns but will increase the floor price for the grain market in general. This will benefit all grain growers including those selling their grain by cash into the domestic market.

Views of interested parties

7.49 The ACCC has received submissions from a number of interested parties with respect to the public benefits the applicants claim will flow from the proposed conduct.

7.50 The Flour Millers' Council of Australia supports the commercial rationale for the joint venture company as a "vehicle to improve coordination, efficiencies and negotiating strength of the parties involved in the logistics of the export grain supply chain." The Council believes that "the improvements proposed can be achieved".[42]

7.51 The NSW Farmers Association submitted that:

> History has continually shown that there have been major inefficiencies along the supply chain for many years, a result of an obvious lack of cooperation between both AWB and GrainCorp (also lack of Government spending). This has caused a reluctance to invest along the supply chain.

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40 Ibid, p. 21.
41 GrainCorp and AWB submission, 12 November 2004, p. 7.
42 Flour Millers' Council of Australia submission, 21 October 2004.

> … the Association is of the view that this joint venture has the potential to deliver benefits in the movement of grain from farms to the export market.[43]

7.52 The NSW Farmers Association based its support for the joint venture in part on the proviso that "… any savings achieved will be eventually passed down to grain producers."[44] The Association further qualified its support for the Joint Venture in a subsequent submission, expressing some uncertainty that there would be benefits to growers and recommending that authorisation only be granted until the 2004/05 national pool returns are finalised and reported to growers – at which time a more informed decision could be made.[45]

7.53 AgForce Grains, as the representative of Queensland grain producers strongly supports the joint venture arrangements:

> AgForce Grains views this Joint Venture as a key step in creating critical efficiencies within the export grain supply chain, with the potential to reduce the current expense incurred by our growers in accessing premium export markets.[46]

7.54 The Victorian Farmers Federation believes the joint venture arrangements will provide benefits that would flow through to its 5000 grain growing members:

> The VFF Grains Group believe the proposal provides a number of opportunities for Victoria's grain growers to experience reduction in supply costs. …Greater cooperation along the export grain supply chain will not only reduce storage and handling costs but should also reduce the occurrence of unnecessary costs such as demurrage. …
>
> The proposed Joint Venture will increase the coordination of export grain movements this will in turn drive improvements in supply chain services such as rail turn around times. The VFF Grains Group believe the Joint Venture will also provide clear investment signals to companies throughout the supply chain.[47]

7.55 Submissions that raised objections to the joint venture by and large still recognised that it would be able to make efficiency savings and hence would be able to negotiate lower freight rates for AWB and GrainCorp. The general concern, however, was how this price advantage would be used. This issue is discussed further in the detriments section below.

7.56 Pacific National agrees that there are significant potential efficiency savings, but does not believe that the current structure of Export Grain Logistics can achieve the bulk of them. This is discussed in the Quantum of benefits section below.

ACCC view

7.57 It appears to be broadly accepted that the joint venture can generate efficiency savings and potentially lower grain freight rates for the applicants.

7.58 The ACCC considers that, in principle, better coordination of the grain supply chain constitutes an increase in economic efficiency. Improvements in economic efficiency constitute public benefits.

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43 NSW Farmers Association submission, 1 October 2004, p. 4, p. 1.
44 Ibid, p. 2.
45 NSW Farmers Association submission, 21 February 2005, p. 1.
46 AgForce Grains Ltd submission, 5 October 2004.
47 Victorian Farmers Federation submission, 30 September 2004.

7.59 To the extent that these efficiency savings translate into lower costs and hence higher returns for grain exporters, they appear to be public benefits as defined in subsection 90(9A) – namely ‘a significant increase in the real value of exports’.

7.60 In addition, should the joint venture result in a more efficient use of existing rail stock and infrastructure that increases overall availability and timeliness for all users, that will be a public benefit. Likewise, should the realignment of operations and service pricing encourage additional investment and improvements in the rail system and its interaction with storage and handling and ports, that would also create lasting benefit.

7.61 The ACCC considers that efficiency savings passed through to the thousands of grain growers should be given greater weight as public benefits than efficiency savings retained by particular companies.

7.62 It may also be the case that the existence of Export Grain Logistics and the better co-ordination of the export grain task could better facilitate competitive entry in the provision of grain rail freight services as existing contracts expire.

7.63 The applicants note a reduction in export pool costs will not only increase pool returns but will increase the floor price for the domestic grain market in general. It is claimed that this will benefit all grain growers selling into the domestic market. While this is true, increased domestic grain prices will also have a negative impact on buyers and downstream consumers of grain products – e.g. cereals and flour, as they now have to pay a higher price. The ACCC considers that the claimed public benefit of higher domestic grain prices must be discounted to reflect that it also creates a detriment to purchasers of domestic grain.

7.64 The potential quantum of the benefits is discussed below.

Quantum of benefits from reduction in supply chain costs

The applicants’ view

7.65 The applicants state that the joint venture arrangements will allow the parties to reduce the cost of export logistics and increase rail capacity to service the variable export grain task between seasons and within a season.

Reduction in transport costs

7.66 In the submission supporting the application, the parties estimated that, based upon discussions with Pacific National and Queensland Rail, the coordination of export grain movement activities between AWB, GrainCorp and the rail freight provider will reduce rail freight supply chain costs in the order of 5-15%. Based on an average export task of 7.5 million tonnes, costing in excess of $200 million per annum, these efficiencies equate to approximately $10 - 30 million pa, or an estimated $1.33 to $4 per tonne of export grain moved.

7.67 The applicants point out that these efficiencies almost entirely arise through increased co-ordination of export grain transportation, rather than any aggregation of volumes of export grain as between AWB and GrainCorp. It is uncertain whether the aggregation of export grain volumes will deliver any cost benefits to the parties because of the differing characteristics of the grain that AWB and GrainCorp export and whether the rail freight service provider will agree to provide reductions. Any such benefits would be in addition to the co-ordination and efficiency estimates provided above.

7.68 The parties anticipate that these savings will be shared between the owners of the grain and the rail provider by negotiation, where:

- The rail provider may retain some of these savings to:
  - improve the viability of providing rail services, particularly on branch lines
  - minimise future rail rate increases, particularly in New South Wales at the end of the rail contract in 2007 put in place by the New South Wales Government for the sale of FreightCorp to Pacific National
  - provide incentives for increased re-investment in locomotives and wagons.
- The JV could provide a mechanism, where there is a net cost saving, to reimburse the storage provider to provide agreed services to reduce rail costs. For example, this might constitute a payment to operate grain storages 24 hours a day.
- All savings in transport costs obtained by the joint venture will be passed back to the owners of grain, as it is a non-profit entity, in the form of lower rail rates and rebates.
- AWB's National Pool has an obligation to pass back any savings through its pool payments. Reduced supply chain costs generated by the joint venture's activities across Victoria, New South Wales and Queensland will provide improved returns for over 9,000 grain growers.

7.69 The applicants submitted that:

> … given the relative strength of the major rail providers compared to the position of JVCO and the grain owners, we believe it will be largely up to the major rail providers to decide how much of this benefit will pass through to the JVCO.[48]

7.70 The applicants submit that the experience of the Joint Venture since it began operating under interim authorisation in October 2004 appears to support this view:

> To the extent that these benefits have not been fully reflected at this time, this is because rail freight logistics providers have not yet reflected these benefits as lower rail rates. For example Pacific National has arguably enjoyed efficiency benefits in dealing with Export Grain Logistics, but because they have existing contracts which retain current pricing or even allow them to increase prices ***and*** because Export Grain Logistics has not any ready alternative providers at this time, these savings have not been obtained by the Joint Venture.[49]

Increase in rail export capacity

7.71 The applicants submit that the joint venture, through improved co-ordination, will be an important vehicle for increasing utilisation of rail assets and increasing rail capacity for all exporters of grain.

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48 GrainCorp and AWB submission, 22 November 2004, p. 2.
49 GrainCorp and AWB submission, 24 March 2005, p. 11.

7.72 AWB and GrainCorp submit they now face a dominant provider of bulk rail freight services in New South Wales and Victoria following Pacific National's acquisitions of ATN and Freight Australia. Furthermore this company has sole access to Victorian rail track given the access arrangements in that State, in respect of which the parties have expressed their concerns to the ACCC.

7.73 The applicants submit that:

> … one benefit not anticipated at the outset of the Transaction is that the finalisation of the Joint Venture has provided a counter-balance to the powerful rail service providers (made more important because of recent aggregation in the rail freight industry). *The ability to provide a counter to price increases or lack of train availability that may otherwise have occurred, even if it is not possible to achieve as great a quantum of benefits as originally anticipated in the short term or in fact quite possibly simply at least holding the current position, is a substantial public benefit.*[50]

7.74 The applicants also submit that the grain export task is variable. It can vary from an average task of 7.5 million tonnes per annum to a peak of over 11 million tonnes per annum in between seasons and vary up to 1 million tonnes per month within an average season. Given the nature of the grain task, grain exporters and grain growers are exposed to a lack of capacity to service the peak seasons and peaks within a season.

7.75 The parties hold the view that Pacific National, as the dominant provider of export grain rail services in New South Wales and Victoria, does not have the capacity nor, as the sole provider at this time, the commercial incentive to put in place sufficient capacity to handle peak movements.

7.76 Private rail operators only have a commercial incentive to supply capacity to service average grain production and not the peaks. The parties acknowledge it is expensive to provide additional rail capacity to service peak exports and may be a poor use of limited assets.

7.77 Both GrainCorp and AWB incurred significant costs in the 2003/04 harvest in Victoria from lack of rail capacity for that year alone. GrainCorp incurred $1.2 million in demurrage and additional road costs (to replace rail). AWB also incurred $1.24m in demurrage arising from ship loading delays due to lack of rail capacity. These costs are borne by grain growers who delivered into the National Pool as reduced pool returns. Further, the applicants claim that additional road costs have been met by Freight Australia to meet AWB's ship loading programme.

7.78 The applicants estimated that in the 2004/2005 season, with a potentially larger harvest than the previous year, this lack of rail capacity could have cost New South Wales and Victorian grain growers over $20 million in higher costs.

7.79 In the context of the National Pool, these costs would be passed onto all growers through lower pool returns, impacting upon over 20,000 grain growers. However, the joint venture provides AWB and GrainCorp with the opportunity to address this issue and avoid such costs being incurred.

7.80 The applicants also submit that:

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[50] GrainCorp and AWB submission, 24 March 05, p. 11.

> Given rail transport capacity is often one limiting factor in terms of how much grain can be shipped in any one month, another area of potential benefit arising from improved rail asset capacity is that more grain will be able to be sold and shipped during periods of high demand and prices. The benefits that would accrue to growers through being able to make more sales during periods of higher demand include:
>
> i. Potential to capture a higher sale price resulting in a higher return for growers, and
>
> ii. Lower storage and carry costs – this includes exporters avoiding time-based storage charges of around $1.20 per tonne per month.[51]

7.81 The applicants describe efforts by Export Grain Logistics to assist with the loading performance of rail wagons, in recognition that previous loading performance has resulted in achievement of only 90% of potential wagon capacity. By providing more information to sites about the types of wagons being presented and how they should be correctly loaded, the applicants estimate efficiency savings of up to 5% are achievable. The applicants submit that:

> While it is too early to definitively quantify this benefit, a 5% improvement in loading performance means that Pacific National enjoys a 5% higher utilisation rate, and revenue earned, for its fleet. Whether this will be passed back to users as a financial benefit is still to be seen, but regardless, there is potentially a 5% efficiency benefit for all users of the rail system.[52]

Experience of the Joint Venture in operation

7.82 The applicants submit that since the Joint Venture commenced operations in October 2004 under the interim authorisation, it has provided GrainCorp and AWB with substantial opportunities to reduce supply chain costs for export grain with no impact on the domestic industry.

7.83 The applicants consider that benefits arise in four forms:

- **Better supply chain co-ordination** - from developing commercial solutions to address the inefficiencies and dis-connects that exist in the current supply chain.

- **Cost savings** - from lower overall supply chain costs. These will flow back to National Pool participants. Since the grant of the interim authorisation, Export Grain Logistics has saved at least $1 million in rail costs.

- **Revenue enhancement** - from lower shipping / demurrage cost / improved sales. This will pass through to National Pool participants through increased pool returns at end of pool life.

- **Cost savings to Pacific National (or any other rail operator)** - from improved and more efficient operations. Since the grant of the interim authorisation, Export Grain Logistics has enabled Pacific National to save 2 trains and increase the loading capacity of its wagons. Most of these benefits have not translated into lower costs yet, as this requires:

  (i) negotiation with Pacific National to obtain a fair share of these in lower rail rates; and/or

  (ii) increased competition with the introduction of new rail providers to obtain rail rate savings.[53]

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51 GrainCorp and AWB submission, 22 November 2004, p. 4.

52 GrainCorp and AWB submission, 24 March 2005, p. 25.

53 Ibid, p. 19.

7.84 The applicants submit that the Joint Venture has resulted in public benefits through a more efficient use of existing rail stock and infrastructure in the following ways:

- Reduction in export logistics costs – the Joint Venture has entered into arrangements with GrainCorp and negotiations with Pacific National that it believes will result in a reduction in rail freight rates in the medium to longer term. The Joint Venture has also been able to change a number of traditional arrangements with Pacific National for the 2004/05 harvest that have delivered benefits. These changes include:
    - that single trains must be loaded at no more than three sites on a single continuous line from port
    - provision of information to assist Pacific National to better plan the rail task
    - cost savings initiated in the Port Kembla zone (reduction of the number of trains)
    - alignment of hours of work at ports with demand for resources.
- Use of sub-terminals – In November and December 2004, Export Grain Logistics arranged to accumulate stock into Werris Creek from various regional locations to assist with: harvest receivals; smoothing demand for rail resources; contingency planning and better utilisation of rolling stock (capacity of wagons). This 'pre-positioning' of grain smooths out the transport task and facilitates the faster loading of vessels.
- More efficient loading of rail wagons – Pacific National has collected data that shows incorrect loading of wagons results in only 90% capacity being achieved from the rail fleet. Export Grain Logistics is providing information to sites about the types of wagons being presented and how they should be loaded against the loading capacity for each different wagon for the relevant rail line.
- Efforts to address lack of rail capacity – the export grain freight task from northern New South Wales for the 2004/05 harvest exceeded Pacific National's forecast capacity based on its resources of 11 trains and crews. Export Grain Logistics examined a number of ways to increase this capacity, including road movements, relocating Pacific National trains from the Port Kembla zone to haul grain into Newcastle, Pacific National hauling Newcastle zone grain to Port Kembla, and seeking spot rates from other operators with capacity. This last option[54] has delivered the best outcome for the applicants, with significant freight savings.
- Improved co-ordination - Prior to the formation of Export Grain Logistics, the bulk of cargo accumulations occurred when nominations were received - generally 14 days before vessel arrival. With the formation of Export Grain Logistics, all parties can now plan with a higher level of confidence that any stock moved for these clients will be shipped in the planned period. As a result of this greater certainty, GrainCorp have removed the specific port storage

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54 The ACCC understands Export Grain Logistics contracted with the GrainCorp train to provide these services.

charging regime for all clients. There is therefore an opportunity for grain marketers to trade-off improved vessel accumulation and loading with the cost of grain storage charges. It is estimated that these new arrangements have saved grain marketers 11 days of vessel waiting time, for which AWB and GrainCorp would have incurred either a loss of despatch or incurred demurrage.[55]

7.85 The applicants recognise that some of these efficiencies were "… urgent short term requirements in relation to the most recent harvest", but submit that:

> In the medium to long term, the increased efficiencies will deliver significant and additional public benefits to participants at all levels of the export grains supply chain, as well as enhancing the competitiveness of Australia's grain exports and the international competitiveness of Australia's grain industry in general.[56]

7.86 The applicants identified cost savings of just over $1 million and revenue enhancements of just over $1.5 million that have been achieved, noting that these estimates are intended to give an indication of the nature of efficiencies, without attempting to quantify and aggregate them all. The applicants submit there are also significant cost saving benefits that have accrued to Pacific National, which they are unable to quantify.

7.87 The applicants concluded that:

> In these circumstances, even with lesser than hoped for co-operation by some rail freight service providers, the Parties experience under the interim authorisation confirms their view and also confirms the Commission's initial assessment of likely public benefits of $10 to $30 million under the authorisation.[57]

Views of interested parties

7.88 Prior to issuing its Draft Determination, the ACCC received little comment from interested parties with respect to the quantum of public benefits claimed by the applicants to flow from the conduct.

7.89 The Flour Millers' Council of Australia expressed its support for the application, stating:

> We support the commercial rationale for the joint-venture company in that it is a vehicle to improve coordination, efficiencies and negotiating strength of the parties involved in the logistics of the export grain supply chain. It is our view that improvements proposed can be achieved.[58]

7.90 Manildra Flour Mills, in a submission opposing the grant of interim authorisation, stated that the benefits claimed to flow from increased confidence to invest in out-loading infrastructure would not eventuate for at least 12 months:

> Such infrastructure improvements take an extended time frame to introduce (i.e. budgeting, planning, tenders sought, structures built). Any infrastructure improvements that GrainCorp wishes to implement as a result of a joint venture going ahead would only apply for the 2005/06 season (i.e. 12 months and beyond).[59]

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[55] GrainCorp and AWB submission, 24 March 2005, pp 21-29.
[56] Ibid, p. 29.
[57] Ibid, p. 14.
[58] Flour Millers' Council of Australia submission, 21 October 2004.
[59] Manildra Flour Mills submission, 1 October 2004, p. 3.

7.91 In response to the Draft Determination, a number of parties have disputed the quantum of public benefits proposed by the applicants.

7.92 For example, Pacific National submitted that it:

> … does not dispute … that the Joint Venture will potentially result in some efficiency savings and a possible lowering of grain freight rates for the applicants and that this would constitute a public benefit.
>
> … Pacific National disputes the claimed *quantum* of these benefits without an integrated grain logistics chain in which the rail operators participate. Furthermore, cost reductions may arise from non-rail components of the supply chain, depending on the decisions made by in an integrated supply chain, which will not be realised under the current proposal. The EGL proposal cannot achieve these integrated savings since EGL deals only with one component of the grain logistics chain and cannot coordinate all of the components of that chain necessary to do so.[60]

7.93 Pacific National believes that efficiency savings of around $15 million can be achieved by addressing:

> a) the sub-optimal trade-off between rail efficiencies and storage capacity;
>
> b) the sub-optimal trade-off between storage operating hours/times and rail assets and resources;
>
> c) surplus labour as between Pacific National and (usually) GrainCorp at all interfaces;
>
> d) the lack of consideration of the cost of intra-seasonal variability; and
>
> e) the lack of co-ordinated short term planning of grain accumulation and delivery.
>
> While Pacific National believes the Joint Venture may go some way towards addressing (d) and (e) above, it does not believe that the Joint Venture is any more capable of achieving these efficiencies than under the previous arrangements.[61]

7.94 In response to the applicant's claim that efficiency savings of between $10 million and $30 million are achievable based on an estimated 5%-15% reduction in transport costs, Pacific National believes that:

> … only in the area of improved co-ordination of short term planning can EGL reduce transport costs. Since this represents only one of the five areas of improvement identified by Pacific National, representing approximately 2.5-5% of the total task, we believe that 5-15% is overstated.[62]

7.95 Pacific National also questions the estimated cost savings on the basis that existing contractual haulage arrangements between Pacific National and AWB do not expire until the end of 2006. Further, Pacific National submits that its arrangements with respect to grain haulage in NSW with the NSW Government expire at the end of 2007 – which renders predictions beyond that date about relative detriment and benefit unsafe.[63]

7.96 Brooks Grain and Elders expressed concern that:

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60 Pacific National submission, 9 February 2005, p. 12.
61 Ibid, p. 14.
62 Ibid, p. 3.
63 Ibid.

the perceived cost savings may be illusory. For example, Graincorp noted that they see a potential for $15 million reduction in Pacific National costs, which would equate to around $2 - 3/tonne in the Victoria - NSW export freight task. However to achieve such savings, there may need to be a smoothing of export sales patterns to take out the seasonal and more short term volatility in export movements that are currently major drivers of rail freight costs: this would mean on average taking longer to export each season's crop.

Australia is a contra seasonal supplier compared to most grain exporting nations. Accordingly over the long term Australia enjoys its highest export prices in a 6-month period beginning from harvest. Selling in the second half of the year delivers lower returns and higher storage and financing costs.

In the above case, a smoother flow of grain exports over the year may be able to produce rail cost savings of $2 - 3/tonne, but would result in a lengthening of the average holding time for grain. This would see growers incur far more significant storage costs (apx $1/month), funding costs for growers (apx $0.75/tonne/month), and lower sales prices for grain held over to the second half of the season ($0 to $25/tonne depending on the year and commodity).[64]

7.97 Brooks and Elders also cast doubt on claimed efficiencies achieved by the JV thus far:

… since preliminary authorisation, the EGLJV has done nothing more novel in coordinating supply chain activities than has occurred prior to the EGLJV, and that there is no real evidence of improvement to date.

At the PDC, the Applicants noted steps like prepositioning grain at the Werris Creek sub terminal to accelerate the passage of grain to port, and consideration of moving rail wagons from Victoria to NSW. Exactly these activities have occurred in the past without the EGLJV framework.[65]

7.98 Australian Bulk Alliance submitted that

In its draft determination, the ACCC acknowledged the existence of issues causing public detriment but that these are offset by what are seen to be public benefits. With operation of EGL commencing prior to the recent grain harvest there have been rail freight increases of up to 7-8% - not an auspicious start to supposed benefits to the industry.[66]

7.99 Similarly, the NSW Farmers Association submitted that:

The Association monitored supply chain costs at several NSW receival sites and has noted that costs have risen considerably over the recent harvest. [Evidence was provided of] … supply cost increases at GrainCorp- Temora, GrainCorp – Walgett, AWB – Stockinbingal and BFG Grain at Temora when compared to the previous year. This result conflicts with the applicants' public claims in June 2004 of '*lower supply chain costs*' as a result of the JV.[67]

7.100 The NSW Farmers Association suggested that some form of monitoring or reporting of the actual benefits achieved by the joint venture is desirable. Similarly, Brooks Grain and Elders submitted:

Use of a "public asset" (i.e., the use of single desk volumes, qualities, and market geographical spreads) via two private entities to drive a net public benefit, requires a measurable and transparent process to ensure those benefits are delivered, and to the intended beneficiaries. The EGLJV arrangements as presented and the interim authorisation contain no mechanisms to

64 Brooks Grain and Elders Limited submission, 21 February 2005, p. 4.
65 Brooks Grain and Elders Limited submission 21 February 2005, p. 11.
66 Australian Bulk Alliance submission, 4 February 2005, p. 2.
67 NSW Farmers Association submission, 21 February 2005, p. 2.

> measure the benefit, nor a mechanism to review or hear complaints during the course of the authorization period.[68]

Experience of the Joint Venture in operation

7.101 Pacific National does not agree with the applicants claims regarding reductions in supply chain costs achieved by the Joint Venture:

> Pacific National's experience over the summer harvest is that there has not been an improvement in efficiency during EGL's initial period of operations. In fact, Pacific National is of the view that there have been considerable problems during that period, particularly in Victoria and in the Newcastle zone …
>
> As an example, Pacific National is required by EGL to provide 4.5 trains per day capacity into Newcastle, equivalent to 1.3m tonnes, harvest year to date. So far in 2005 the volume of grain hauled to this port has been 760,000 tonnes. This difference has largely been the result of orders for grain (from EGL) not nearly matching the stated required capacity. The estimated cost attributable to the under utilisation of trains by Pacific National is $2.1m into Newcastle.
>
> In addition, an estimated $1.1m in cost has been incurred owing to EGL cancelling a number of trains after ordering them owing to insufficient space at port which is an EGL logistics management responsibility.[69]

7.102 With respect to claimed efficiency savings due to the use of sub-terminals, Pacific National submitted that in its experience:

> … any reasonably sized harvest in northern New South Wales in the past has resulted in the use of Werris Creek sub-terminal as an intermediate grain storage location. However, it is only appropriately used to overcome a failure or restriction elsewhere in the system (usually lack of storage up country and in particular, lack of storage at the port) when it then becomes preferable to moving no grain at all. Use of this facility is not a new idea and cannot properly be attributed to EGL.[70]

7.103 Pacific National also disagrees with the applicants' submission that Export Grain Logistics has been responsible for any improvement in the loading of wagons, claiming that:

> … any improvements in the loading of wagons are due to Pacific National's consistently raising and pursuing this issue with the marketers and grain loaders and is not attributable to the actions of EGL.[71]

ACCC view

7.104 A number of parties expressed the view that the current joint venture structure may not deliver the maximum level of achievable public benefits. However, the ACCC's role in assessing an application for authorisation is not to seek to redesign a proposal with a view to maximising public benefits. The Act requires the ACCC to assess whether the public benefits flowing from the proposal put forward by the applicants are likely to outweigh any detriments.

7.105 The ACCC considers that efficiency savings identified by the applicants of 5 to 15 per cent are likely to be achievable over the medium term. Some of the potential benefits that were foreshadowed in the original application may not yet have been

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68 Ibid, p. 2.
69 Pacific National submission, 7 April 2005, pp 2-3.
70 Pacific National submission, 7 April 2005, p. 3.
71 Ibid.

achieved due to difficulties in securing participation by rail freight providers. The ACCC expects that if authorisation were granted, rail freight providers would recognise that achievement of many of these potential efficiencies can be beneficial to both the applicants and themselves. Further, motivation to participate in these arrangements may be increased in the medium term as contracts expire and there is potential for greater competition in the provision of rail freight services.

7.106 While Pacific National disputes the applicants' claims, the ACCC considers there is evidence of some public benefits of substance having been achieved by the Joint Venture from increased efficiencies and cost savings upstream and downstream of the grain freight market since it began operating under interim authorisation in October 2004.

7.107 The ACCC understands that the rail freight increases in some locations that parties expressed concern about have arisen as a result of the operation of provisions of pre-existing contracts rather than as an outcome of the operation of the joint venture.

7.108 Over all, the ACCC considers it is likely the proposed arrangements will result in significant public benefits. The ACCC notes that the actual level of benefits likely to flow from the proposed arrangements will vary (potentially significantly) depending on the size of the harvest year by year. The estimate of potential public benefits provided by the applicants, \$10 to \$30 million per annum, appears reasonable – given it is based on the average harvest size. Any ongoing reluctance by rail freight providers to seek to achieve potential efficiencies is likely to result in benefits being towards the lower end of this range.

7.109 This quantum of public benefit would be increased (potentially significantly) by any storage and demurrage costs that can be avoided due to an increase in rail export capacity. The ACCC notes the significant benefits that have been achieved by the joint venture operating under interim authorisation.

7.110 The precise distribution of these public benefits is not clear. The applicants have expressed the view that the rail freight providers are in a position of relative market power such that they can effectively determine what proportion of the benefits flowing from efficiencies in rail freight will pass through to the joint venture company, and then on to AWB and GrainCorp. Other benefits, such as demurrage savings, flow straight through as increased revenues to the National Pool.

7.111 The ACCC believes that cost savings flowing through to a large number of growers should be given more weight as public benefits than those retained by a single company – but recognises that if rail freight providers re-invest cost savings, that can create ongoing efficiency improvements and additional benefits potentially enjoyed by a wide range of industry participants.

7.112 The fact that the joint venture company is established as a non-profit entity gives the ACCC confidence that any reduction in transport charges it is able to capture will be passed back to the owners of the grain.

7.113 The ACCC understands that AWB's National Pool arrangements create an obligation upon it to pass back any savings to growers through its pool payments. Concerns have been expressed that AWB Ltd, which is the joint venture entity, may not have the same obligation to pass back savings that AWB International has. The applicants have clarified that AWB Ltd is 'acting as a slave' to AWB International in this instance and shares the same obligation.

7.114 In addition, some lower freight costs would be passed on to GrainCorp, as an owner of grain. The ACCC expects that GrainCorp would have to post higher silo prices to compete with the higher prices that AWB was posting to be able to attract sufficient quantities from grain producers. To the extent that GrainCorp did not pass on freight reductions in this way, it could either reinvest the revenue in improvements to storage and handling facilities or provide it as a dividend to shareholders. Both these alternatives would appear to provide some public benefit.

7.115 As a result, the ACCC does not consider new monitoring and reporting arrangements are required to measure the level of benefits achieved and the proportion passed through to growers. With respect to wheat, the ACCC notes that the Wheat Export Authority (an independent Commonwealth Government statutory authority) already conducts a detailed annual assessment of the export performance of AWB (International) and the resultant benefit to growers. This includes an assessment of supply chain costs. The ACCC expects that future WEA Growers' Reports will include an assessment of the impact of the Export Grain Logistics joint venture on export wheat supply chain logistics and costs and whether it has been of benefit to growers.

Increased investment in grain storage to service exports of grain by rail

The applicants' view

7.116 The applicants submit that the joint venture will create an independent and transparent process for determining the freight deductions that will apply at each silo for export grain owned by AWB and GrainCorp. These export rail rates are published by the AWB pool before harvest for the use of growers and grain traders. They are therefore transparent and available to all industry participants.

7.117 While both applicants have their own views on the way in which export rail rates are currently negotiated and presented to industry participants, they believe that through appropriate co-operation and exchange of appropriate information, transparency can be further improved.

7.118 The applicants argue that transparent export rail rates and pricing signals for performance standards will create an improved environment for investment in up-country silos by all existing and potential competitors. This will enable storage providers to determine the viability of investment with certainty and security.

7.119 From GrainCorp's perspective this will encourage GrainCorp investment at its sites to improve rail elevation and outloading infrastructure to meet the future requirement of rail. Up to now, GrainCorp submits it has been reluctant to make this investment given its perceived uncertainty of obtaining lower export rail rates at a silo (for AWBI National Pool wheat) for this investment. GrainCorp has planned a number of investments:

- A new rail discharge facility at Newcastle Port on the balloon loop would reduce discharge time by one half and increase port receival capacity from 3-4 trains a day to up to 7 trains a day. This facility would cost approximately $12 million.

- Fast rail discharge pits at all sub-terminals will enable grain to be transhipped from the rail branch lines to main lines efficiently. This would cost approximately $8 million for 4 sub terminals.
- Fast outloading spouts (from 200tph to 800tph) at all major silos will reduce loading time to 3 hours for a unit train. This would cost around $20 million for 40 major silos.
- Unit train siding to handle 40 wagon trains at selected major silos will enable block train operation. This would cost $10 million at 10 silos.
- A joint review of the Project Broadacre concept to explore the potential to maximise the joint venture for the use of branchlines and existing GrainCorp sub-terminals.

7.120 The applicants also consider the joint venture will enable the railways and industry to generate savings and encourage rail-based investment (e.g. in rail outloading equipment). This will be achieved through:

- information exchange to explain and discuss fully the information that allows rail freight companies to determine performance/investment in rail outloading
- performance payments that link rail, storage and marketing to minimise supply chain costs
- improved co-ordination of rail orders
- improved interface arrangements between rail and storage.

7.121 The joint venture will also assist in co-ordination of appropriate investment in rail infrastructure in country and regional areas of Australia which will assist rural communities and also facilitate ensuring Australia has an internationally competitive grain industry.

Views of interested parties

7.122 The Victorian Farmers Federation believes the joint venture arrangements will encourage investment:

> … the Joint Venture will also provide clear investment signals to companies throughout the supply chain.
>
> Australia's aging infrastructure is clearly recognised as a key constraint to the future competitiveness of our grains industry. The Joint Venture will be contracted to enter into contracts for the receival, rail services, storage and handling with all service providers and other entities. With the task of co-ordinating supply chain activities for eastern Australia's export grains the Joint Venture company will have the ability to ensure efficiencies of scale. The negotiating power of the company will also ensure companies who wish to compete for services contracts will have clear signals should they wish to invest in areas such as faster train loading facilities.[72]

7.123 In contrast, Ridley Agriproducts is concerned that investment will be discouraged:

> In the event that the JV was approved RAP believes private storage operators will be disadvantaged as they will not have the same influence or bargain powers to negotiate freight

72 Victorian Farmers Federation submission, 30 September 2004, p. 2.

> rates as the AWB/GrainCorp have. The assertion that the JV parties will continue to compete in storage and handling is mischievous as the private storage operators will not be able to move equivalent volumes through their storages. In addition they are unlikely to receive the same treatment regarding export freight rates from the rail providers as the JV entity. This is likely to lead to higher private storage costs, which will discourage investment in this sector. RAP believes this will result in the AWB/GrainCorp becoming the sole storage operator's thereby reducing competition in this sector and more importantly pushing our raw material costs higher.[73]

7.124 Australian Bulk Alliance and Brooks Grain and Elders expressed similar concerns. These are addressed in more detail in the Detriments assessment below.

7.125 The applicants responded to some of the issues raised in submissions with respect to incentives to invest in storage and handling facilities:

> … rather than limiting competition in storage and handling, or impeding access to storage and handling facilities, the Joint Venture is intended to provide 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.

ACCC view

7.126 In principle, the ACCC considers that arrangements which promote efficient investment in grain storage and handling infrastructure that leads to more efficient operation of that infrastructure constitutes a public benefit.

7.127 It appears to the ACCC that the joint venture arrangements have been designed to facilitate appropriate sharing and use of strategic market and operational information between AWB and GrainCorp. The arrangements are likely to result in greater transparency in rail freight rates for grain transportation, which the ACCC believes will lead to improved incentives for efficient investment in storage and handling infrastructure and processes by GrainCorp and AWB. There may be broader signals for investment in storage and handling infrastructure and processes if AWB (as the primary owner of grain) seeks (and is willing to contractually 'incentivise') similar efficiency improvements from other storage and handling facilities.

Public detriment

7.128 The public detriment issues raised in submissions are addressed below according to the markets identified earlier, namely grain rail freight, grain trading and storage and handling. Attention is also given to concerns about the use of confidential information and the management of grain stocks and the impact on domestic markets. The views of interested parties that identified potential public detriments are set out, followed by the applicants' view as expressed in their submission and subsequent responses. The ACCC's view on the issues raised is at the end of each section.

Grain rail freight and the impact on silo prices

Views of interested parties

7.129 A number of submissions raised concerns that, as a result of reduced freight rates, the applicants will gain a price advantage they could use to determine rates at their own

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73 Ridley Agriproducts submission, 16 July 2004, p. 2.

and other silos. Related concerns were that other market participants will end up subsidising the applicants' reduced freight rate, which in turn would distort export and domestic grain prices, affect other grains and influence the allocation and availability of rail rolling stock. Concern was also expressed regarding the potential for the Joint Venture to favour its shareholders in the allocation of grain rail freight tasks.

Ability to secure advantage in freight rates

7.130 Barrett Burston Malting (BBM) noted that AWB enjoyed a discounted freight rate with Pacific National and stated that the joint venture will obtain a price advantage in markets for the acquisition of freight services and storage and handling in Victoria, NSW and Queensland. BBM expressed concern that it and other traders will be forced to subsidise the favourable prices enjoyed by the joint venture and the applicants.

7.131 Similarly ABB Grain, as 50% owner of ABA, expressed a concern that GrainCorp, as its major competitor and with AWB as its main customer, will be negotiating and determining actual and comparative freight rates for GrainCorp, GrainFlow and ABA sites based on the joint venture savings. It also raised concerns in this context about the confidentiality of information and transparency of rates (see para 7.225).

7.132 The Queensland Agricultural Merchants (QAM) also referred to AWB using its export wheat monopoly as leverage to obtain favourable freight rates for AWB and GrainCorp. QAM commented that the impact and subsequent effect on the grain trade will depend on how the savings and price advantage are used: through higher pool returns or as profits/dividends to non-grower shareholders. It also considered the joint venture will affect other bulk grains:

> It will be logical for the rail freight operators to provide the partners with incentives for transporting other grains, providing unfair competition to other traders in these other grains. This will once again provide unfair competition for independent traders and merchants that rely heavily on trade in other feed grains.[74]

7.133 ABB Grain expressed concern that the joint venture may hinder competition in NSW as restrictions on non-wheat grain exports are removed this year:

> One of the key detrimental anticompetitive issues resulting from the JV is that Graincorp will now have access for its export grain to the freight rates enjoyed by AWB. Other grain buyers will not enjoy the freight deals generated by the AWB's monopoly over wheat. This is not adequately addressed in the AWB/Graincorp submission and clearly has a detrimental effect on competition in the soon to be deregulated NSW market for export grain other than wheat.[75]

Effect of lower deductions on grain silo prices

7.134 Several submissions elaborated on the impact of freight deductions on grain silo estimates (which would pass part or all of the savings onto growers).

7.135 QAM argued that the freight advantage will increase the barrier to entry for other traders in domestic market. Adding the freight advantage to the price offered to growers will artificially push up the domestic price causing local consumers/end-users to increase their offers for domestic grain which will in turn impact on the price

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74 Queensland Agricultural Merchants submission, p. 2.
75 ABB Grain submission, 31 March 2005, p. 1.

paid by end-users such as the intensive livestock and feed industries and local feed-millers:

> This has become a serious concern in the feed grain market particularly in Queensland. This concern is reinforced by the partners in their submission on page 22 where it is indicated that a freight saving of between $1.33 and $4.00 per tonne could be achieved and they go on to say: "Given that Australian grain prices are generally underpinned by export prices, the parties note that a reduction in export pool costs will not only increase pool returns but will increase the price for the grain market in general."
>
> This is likely to have the effect of loss of export earnings and loss of jobs in rural communities.[76]

7.136 Alternatively, QAM thought it possible that AWB and GC could use the freight advantage to improve their competitive selling position rather than increasing returns to growers.

7.137 Ridley predicted that, as a domestic customer and producer without access to export channels, it would have to pay more for its raw material to bid grain away from the export pathway as a result of the joint venture arrangement. It indicated some of the ways this might occur:

> RAP also suggests that the domestic market requires clarification as to what the arrangements will be between the JV and the AWB/GrainCorp in terms of the AWB's Golden Rewards program.[77] RAP believes that the JV will have the capability to pay higher prices for feed/GP wheat at up-country silos due to its preferred freight and storage arrangements (via the AWB pools), then AWB/GrainCorp allowing this wheat to be blended grain at port (and growers happy to do this as they have received the higher farm gate prices due to lower export freight costs). [78]

7.138 BBM voiced its concern that the joint venture savings will be reflected in the prices AWB can offer growers at selected sites which will place BBM and other maltsters and traders at a disadvantage.

7.139 BBM considers that it and other traders will be forced to subsidise the reduced rates and the joint venture price advantage will stop BBM entering the export grain market because BBM will be unable to obtain the same freight discount.

Domestic freight impact

7.140 Several submissions considered it likely that the joint venture savings for export freight would affect domestic freight rates and grain prices.

7.141 ABB predicted that the savings would have flow-on implications for the competitiveness of domestic grain storage, accumulation and marketing. QAM stated that the freight advantages will distort pricing of domestic and export grain as movement between storages will become blurred.

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76 Ibid, p. 2.

77 Golden Rewards is a comprehensive payment and binning system for wheat marketed through the AWB National Pool. Golden Rewards is designed to provide pricing accuracy and market signals for Australia's grain growers, ensuring that they are rewarded for delivering the types of wheat demanded by AWB's international customers.

78 Ridley Agriproducts submission, p. 2.

7.142 ABB also stated that total transparency about actual freight rates and those disclosed in ESRs has been problematic in the past and should be subject to periodic and random review by appropriate bodies such as the Office of the Regulator General in Victoria.

7.143 Ridley Agriproducts stated a concern about possible collusion on storage/ freight costs going forward and a need to establish what the possible flow on costs to the domestic market will be as a result of export movements.

7.144 More generally the NSW Farmers Association stated that the joint venture must not stifle competition in supply chain and services and must not negatively impact on smaller traders negotiating export and domestic rates.

7.145 Brooks Grain and Elders expressed the following concern:

> Under the EGLJV, the rail freight cost to port (for export) will be lower than the rail cost to a flour mill in a city adjacent to the port, or a flour mill at the port. There is nothing wrong with this per se, and indeed would point to the EGLJV creating public benefits.
>
> The difficulty arises in ensuring that the benefits of the lower cost structure to port for exports is quarantined to export destined grain, and is not used to advantage The Applicants trading into the domestic market. We contend that it is not possible to segment export and domestic owned grain…indeed it is a nonsense to claim the concept, as if applied it would lead to a significant loss of public benefit. Efficient grain inventory management requires a flexible system to access least-cost paths to both domestic and export customers, not an EGLJV "contrived" system which benefits the Applicants at the expense on non-EGLJV parties, with no mechanism to measure the claimed public (grower) benefit. [79]

Availability of rail services and rolling stock

7.146 ABB advised that the allocation of scarce rail stock in Victoria and NSW is a major concern:

> The joint venture will provide services for the export of grains by the two largest operators on the east coast, including the rail rate negotiations, grain, site and cargo allocations. As a result, there appears to be a major potential for other export marketers to be squeezed out in the regular, timely and appropriate allocation of rolling stock. The issue of the availability, adequacy and allocation of rolling stock has been growing over the past year…[80]

7.147 In a later submission, the ABA referred to this concern expressed by ABB and noted that:

> While this issue has not come to a head because of the poor finish to the grain harvest in southeastern Australia, discussions with rail providers have confirmed that this is looming as a major issue. The requirement for non-discriminatory access to rail resources and transparency of any negotiations that have industry-wide flow on effects is seen as critical.[81]

7.148 Similarly, BBM were concerned that "due to its market share, the joint venture will be able to demand priority freight services which, together with the recent cutbacks

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79 Brooks Grain and Elders submission, 21 February 2005, p. 9.

80 ABB Grain submission, p. 1.

81 ABA submission 4 February 2005, p. 2.

in freight services, will lead to a shortage of freight services available to other traders in all grain markets."[82]

Competitive neutrality in allocation of rail freight tasks

7.149 Pacific National expressed concern that Export Grain Logistics may favour its shareholders, when negotiating and allocating the grain rail freight tasks. Pacific National was concerned that one or more of the owners of the Joint Venture may provide rail haulage services at less than full cost, on the basis that it would still be better off from additional revenue arising from attracting greater quantities of grain to its silos. Pacific National was also concerned that the more attractive tasks could be 'cherry picked' and it may be allocated the higher cost/lower return rail freight tasks.

7.150 Pacific National has subsequently submitted that the potential risks it raised regarding the Joint Venture have now been realised:

> It came to Pacific National's attention in January 2005 that EGL had awarded to GrainCorp a contract for the haulage by rail of export grain in NSW.
>
> The way in which this contract was awarded highlights Pacific National's concerns that, without restrictions in place, EGL is able to favour the Applicants in the awarding of contracts for the provision of services to the Joint Venture.
>
> Pacific National was informed by EGL in late January 2005 that the relevant contract had been awarded to GrainCorp. Pacific National was not invited to tender, and was given no opportunity to provide a price for the services to EGL for which GrainCorp was awarded the contract.
>
> In response to Pacific National's inquiry as to why the contract was awarded to GrainCorp without seeking a competitive quote from Pacific National, EGL responded to Pacific National saying that GrainCorp's quoted prices were lower than Pacific National's contract prices with AWB (which pre-dated the interim authorisation of the Joint Venture) and therefore EGL elected to award the contract to GrainCorp.[83]

7.151 Pacific National called for the imposition of additional ring fencing measures as a condition of authorisation (if authorisation were to be granted):

> GrainCorp and Pacific National are actual and potential competitors for the provision of rail haulage services to EGL. It is clearly possible for GrainCorp to expand its haulage business, and that course of action is not prohibited by the Shareholders Agreement (and indeed the agreement seems to foreshadow that development).
>
> In the absence of safeguards to protect confidential information, Pacific National has concerns that confidential information it provides to EGL for the purposes of tendering for the rail haulage task may flow through to one of the Applicants (AWB, or more importantly GrainCorp), and could potentially be used to ensure that GrainCorp is always in a position to obtain the business and squeeze out Pacific National.
>
> In Pacific National's view, if the Joint Venture is to be authorised, it is appropriate to put in place ring-fencing arrangements to protect confidential information similar to those imposed on vertically integrated owners of essential rail infrastructure.[84]

The applicants' view

Freight rates and the impact on grain trading

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82 Barrett Burston Malting submission, pp 8-9.
83 Pacific National submission, 9 February 2005, p. 4.
84 Pacific National submission, 9 February 2005, p. 7.

7.152 The applicants state that Queensland Rail and Pacific National, the main bulk rail freight providers, support the principles of the joint venture given its ability to provide much needed co-ordination and efficiencies in the export grain supply chain.

7.153 In the context of two main rail providers, the applicants argue it is difficult to see any negative impact in the aggregation of AWB and GrainCorp export volumes for bulk freight services. They state that GrainCorp's export grain volumes are modest (and are in relation to non-wheat grains) and the improved information flows will ensure the more efficient use of silos and the rail/storage interface which also benefit the rail service provider. Instead the applicants believe the joint venture will enable the railways and industry to generate savings and encourage rail-based investment.

7.154 GrainCorp and AWB believe that the joint venture arrangement would not substantially lessen competition in the national market for grain marketing services. Following the formation of the joint venture the parties will not acquire any competitive advantage in relation to their grain marketing and other activities as this transaction only concerns export grain.

Impact on domestic grain and grain freight prices

7.155 The applicants submit the joint venture will only be involved in transport logistics (predominately rail) for export grain and will not be involved in contracting transport logistics for domestic grain. Furthermore the joint venture cannot create an advantage for AWB or GrainCorp domestic grain transport given the structural separation between domestic and export grain transport:

- over 80% of domestic grain is moved by road (compared to less than 5% of export grain). The joint venture will only be a small contractor of road services with its relatively small export road task
- domestic end-users, who do have access to rail, will continue to have direct access to the most competitive rail rates into their facilities given their ability to control the tonnes received, the unloading of trains and their ability to contract dedicated trains based on specific wagons. This is demonstrated now where AWB (and GrainCorp and most other traders) sell wheat to flour millers at up-country silos and the miller organises the movement of the grain to the mill.

7.156 The parties believe the joint venture could provide an indirect benefit to the domestic grain market as improvements in rail efficiency for export grain, through improved storage infrastructure and operation, may provide flow on benefits for domestic rail logistics.

7.157 The parties submitted that:

> Some submissions suggested that a public detriment may occur in the market for trading of domestic grain as domestic and export grain inventory management are interdependent and the Parties will obtain a competitive advantage as a result of improvements in supply chain costs. However, AWBI and AWBAU stock levels are kept separately and are accounted for separately within each bulk handler. Further, the grain marketers determine which stock is available for export and select the stock they require for export. Only then does Export Grain

> Logistics have a role in managing the movement of these stocks to the export terminal (also selected by the marketer).[85]

7.158 The applicants noted that while savings in supply chain costs through the introduction of efficiencies may result in higher prices for export grain over time, the impact of these pricing movements on domestic prices is minimal when compared with the impact of international grain and currency markets. The volatility of international grain prices is quite significant from year to year and also varies markedly within seasons.

7.159 AWBI prices the Australian base grade wheat against the US base grade and international wheat sales are conducted in $US. Australian wheat growers are therefore significantly impacted by the vagaries of the international grain and currency markets. The applicants noted prices ranged from US$120 per tonne in May 2002 to over US$200 per tonne some four months later. Over the course of 2004, prices varied by over US$40 per tonne.

Access to rail stock

7.160 The applicants state that the joint venture will have no direct impact on access to rail rolling stock 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.

7.161 The Parties do not dispute the importance of rail assets and submit the issue of rail resource availability is one for the whole industry so that anything that Export Grain Logistics is able to do to improve asset utilisation should help free up resources for all market participants.

7.162 The applicants also commented that following the merger between Pacific National and Freight Australia 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.

7.163 In this context the applicants do not agree that the joint venture will have "unprecedented power" particularly in light of its size and lack of assets and the nature of the bulk freight market. The applicants also submit they will be constrained by competitors such as ABB who will continue to be well placed to have access to rail freight services.

Competitive neutrality in allocation of rail freight tasks

7.164 The applicants see the potential 'cherry picking' of rail freight tasks as a function of competition and do not believe it is unfair, given:

- the shareholders of Pacific National acquired Freight Corp knowing the contracts it had and they would be assumed to have made their bid for the assets accordingly; and
- Pacific National owns substantial sunk capital and operates a network with significant scale that gives it unparalleled competitive and cost advantage over any new entrants.[86]

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85 GrainCorp and AWB submission, 24 March 05, p. 40.

86 GrainCorp and AWB submission, 24 March 2005, p. 12.

7.165 Further, the applicants stated that AWB's underlying incentive is to ensure that grain is transported efficiently. This means that it is in AWB's interest to ensure Pacific National is commercially viable in relation to grain transport, but does not increase prices to an extent that is detrimental to growers.

7.166 The applicants submit that concerns the Joint Venture would not choose the lowest cost rail freight operator or might unfairly favour services provided by one of its shareholders are:

> … hypothetical and not valid given the interaction of the following three commercial drivers:
>
> (a) the Joint Venture is a non-profit business that has a commercial incentive to obtain, and pass onto the National Pool, a sustainable and reliable rail freight service at the lowest cost;
>
> (b) the shareholders do not have a commercial incentive to support the other business interests of the other shareholder - eg why would AWB favour GrainCorp trains over Pacific National trains if that leads to higher supply chain costs?; and
>
> (c) the National Pool, which is subject to internal and external reviews, has an incentive to obtain the lowest rates and no incentive to provide an advantage to GrainCorp or any other party in the provision of rail freight (or other) services.
>
> In any event, if AWB sought to favour GrainCorp on a tender or have any third party do so, AWB would have been free to do that before the Joint Venture - the Joint Venture does not change that position.[87]

7.167 With respect to the specific example provided by Pacific National to illustrate its concerns, the applicants stated that:

> The example cited by Pacific National in its submission merely provides evidence of the cost savings able to be achieved by the Joint Venture and the potential that exists for more vigorous competition in the market for rail freight services.[88]

7.168 In response to Pacific National's request for conditions to address these issues, the applicants stated that:

> … the Pacific National requested conditions do not overcome the issue of whether even if GrainCorp and AWB acted as one rail freight logistics purchaser, there would be such a competitive detriment as to warrant any conditions. Given that AWB and GrainCorp in most States already face one rail freight provider, it is difficult to see the introduction of any increased competition or even balancing of competitive positions, as being anything other than pro-competitive. Accordingly, the imposition of conditions is not warranted.[89]

ACCC view

7.169 As discussed in the previous section the ACCC considers that operational and productive efficiencies that lower industry costs are likely to constitute public benefits. In this light the efficiencies and savings expected to arise from the joint venture together with an increase in the real value of exports (via higher export returns) would qualify as public benefits.

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87 Ibid, p. 33.
88 Ibid.
89 Ibid, p. 13.

7.170 The issue for several interested parties is not whether the joint venture ought or ought not achieve these efficiencies but how the resultant savings are going to be used and with what impact. It seems to the ACCC that savings from the joint venture could be applied in a number of ways including:

- at silos as lower deductions used to calculate grain price estimates
- in the applicants' services or business as investment or as savings shared with rail and other service providers for investment
- as lower business costs to increase reserves or dividends.

7.171 Most submissions expressing concerns have focused on the impact of the savings being used to lower grain freight costs at silo (through lower deductions) which will increase the net estimate of revenue to growers from grain sales and may increase the volumes of grain received at particular silos. This is emphasised by the fact that the joint venture is a non-profit enterprise that passes any gains back to its owners and the AWB national pool rules that oblige AWB to maximise returns to growers.

7.172 The expectation is that efficiency gains will enable AWB and GrainCorp to post higher estimated silo returns. As a result, other grain buyers, including domestic buyers, will have to pay more for grain to attract it away from the export pools where silo prices reflect an increase in expected returns. This is consistent with the applicants' submission.

7.173 This is partly due to the pricing structure used in grain acquisition and trading where silo estimates, cash prices and final returns are derived by deducting downstream costs (such as storage and handling and freight) from the gross expected delivered export or domestic revenue.

7.174 However the ACCC understands it is commonly accepted that:

- The floor price for grain is set by the port export price which in turn reflects international prices.
- The domestic market has always had priority over export grain because it can and does pay a premium based on the relevant delivered port or local destination price net of freight and storage deductions.
- Changes (whether increases or decreases) in international prices are reflected in port and domestic prices, as are any changes in deductions. These normally flow back to growers.

7.175 In this context it would seem that if domestic prices do change to maintain the relative premium to export prices, it will be largely because the cost base of export prices has changed through lower deductions derived from lower freight charges while presumably the domestic cost base remains unchanged.

7.176 Part of the concern voiced in submissions is that changes to grain prices will derive from the use of market power accrued from statutory export powers. However the applicants claim that the efficiency gains (hence the public benefits) do not come from scale economies based on grain volumes but are derived from better co-ordination and usage of the existing infrastructure and network and future improvements arising from investment in the supply chain.

7.177 To the extent the joint venture savings represent a more efficient cost of supplying export grain to port, relative to delivering grain to domestic destinations, this would seem to support the applicants' contention that domestic prices will become more reflective of competitive export pricing.

7.178 No-one has attempted to quantify the price impacts for domestic grain, but the Commission understands that it is not likely to be material. In the wider context of grain pricing, the ACCC expects any effect to be significantly outweighed by other factors such as the impact of overseas harvests, exchange rates and global prices on domestic prices.

7.179 The amount and allocation of efficiency savings may vary over time and between the joint venture partners and the rail providers according to their needs, priorities and the outcome of negotiations.

7.180 However, it could be said that to the extent that savings are retained and used by the applicants or the rail providers for investments and improvements to the supply chain, then those funds are not being applied to reduce silo deductions or alter grain prices. This would tend to reduce the impact and incidence of this potential detriment.

7.181 In addition it is possible that the gains arising from efficient investment may improve the operation of the supply chain for all market participants. This would also tend to reduce this potential detriment. For example, the applicants have submitted that an increase in rail export capacity will benefit all users.

7.182 Submissions have raised the concern that any reduction in the price the applicants pay for grain rail freight will lead to an increase in the rail freight charges other buyers face to maintain the freight provider's revenues. However it is not clear that this concern will eventuate, since the key driver for reduced rail freight rates is lower costs due to greater efficiency. This means that rates can be reduced without reducing the freight provider's revenue and without needing to recover any shortfall from other freight customers.

7.183 Further, for the freight provider to be able to earn additional revenue from non-joint venture parties, it would have to be able to sustainably increase its rates to those parties – i.e. without them reducing the quantity demanded and hence reducing revenue earned. If the freight provider were able to do this, it is likely it would already have done so absent the joint venture.

7.184 In addition the ACCC considers that differences in rail freight rates are not anti-competitive if they are based on genuine differences in the underlying costs of providing the service. For example, it is efficient for a freight provider to charge lower rates to customers who can load a train faster, accumulate grain from across a storage network faster or who are moving such larger volumes as to achieve economies of scale.

7.185 It seems accepted that, for a number of historical and structural reasons, the allocation, availability and adequacy of rail stock continues to be a major challenge for the grain industry in dealing with peak harvest loads, seasonal and intra-seasonal variability and co-ordination with other parts of the system.

7.186 This challenge existed prior to the joint venture and the ACCC is not persuaded that the joint venture, if it achieves its objectives, will worsen the situation as opposed to highlighting the existing issues. At the same time the ACCC acknowledges the concern that improved co-ordination through the joint venture may cause short term scarcity problems in allocating rail services between regions, grains and over the harvest period.

7.187 The ACCC understands that when Pacific National acquired Freight Corp, it knowingly took on Freight Corp's obligations to haul grain in NSW under a pre-determined pricing structure. It is this obligation that creates the potential for other parties to 'cherry pick' the more lucrative grain freight tasks in NSW. Pacific National also acquired the benefit of a NSW Government requirement that a minimum proportion of all grain transported by rail freight in NSW be with Pacific National (Freight Corp). These matters were no doubt taken into account by Pacific National in determining the level of its bid for Freight Corp.

7.188 The ACCC considers that the Joint Venture does not substantially alter the applicants' incentives or ability to 'favour' trains owned by either GrainCorp or AWB. Nevertheless, the ACCC believes there is some potential for detriment as a result of confidential information shared by rail freight providers with the Joint Venture being passed back to and used by GrainCorp or AWB. Ring fencing of third party confidential information is addressed in more detail at paras 7.249-7.257 (with respect to storage and handling) and paras 7.265-7.266 of this determination.

Receival, storage and handling

Views of interested parties

7.189 Submissions also voiced concerns about reduced access and higher fees at storage sites, the possible emergence of first and second class storage sites and the impact of preferential or proportional access to port storage facilities.

Access to and differential impact on storage sites

7.190 ABB stated that the ability to allocate prime sites and segregations to specific grain varieties which favour wheat over other grains and parties will result in lower service levels yet higher supply chain costs for other grains / parties.

7.191 Ridley stated that as a result of the joint venture:

- It must now compete for storage with companies with monopoly powers over core inputs such as storage and raw materials. Ridley says it out-turns grain on a weekly/daily basis and considers that GrainCorp and AWB already charge higher outturn fees and minimum tonnage requirements, plus GrainCorp charges excessive fees for grain/oilseeds in storage at the end of October each year.

- It could be priced/locked out of efficient export sites because it will not be able to offer high outturn rates. Ridley argued that this would create a secondary storage market for domestic customers who will pay higher receival and outturn fees (relative to the joint venture). As a consequence, Ridley will be required to source grain from less preferred supply points or less cost competitive locations.

- Private storage operators will be disadvantaged because they will not have same influence or bargaining powers to negotiate freight. Even though AWB and GC compete, private operators will not move equivalent volumes through their storages or receive same treatment on export freight rates. This is likely to lead to higher private storage costs which will discourage investment in this sector. Ridley believes this will result in AWB and GC becoming the sole storage operators in this sector, with the effect of pushing raw material costs higher.

7.192 BBM also made several comments on the impact on storage and handling:

- Although it is stated that AWB and GrainCorp will compete, it is likely the joint venture will not use any other sites for storage and handling.

- The joint venture will be able to negotiate lower storage and handling service charges, remove the arms length negotiations between AWB and GrainCorp on the price of storage and handling and may allow the joint venture to set prices to exclusion of other operators in all grain markets.

- BBM and other traders will be forced to subsidise the reduced rates for storage and handling from which the joint venture benefits.

- The joint venture will enable AWB to get preferential access ahead of others and to preferred storage sites. Other domestic and smaller traders may have to use less efficient "B-grade" storage sites due to the volumes held by the joint venture in prime AWB or GrainCorp sites.

- The joint venture will be able to selectively regionalise barley storage and accumulation sites close to ports, thus forcing other traders to buy grain further away from their own facilities, thus creating a domestic premium price for growers/expense for traders.

7.193 Brooks Grain and Elders Limited expressed concerns arising from the fact that the applicants own country receival sites, port terminals and possess rail rolling stock assets that compete with third party owners/operators:

> EGLJV will be able to choose service providers on behalf of their related export monopoly businesses, to favour there own infrastructure investments. Should this arise, The Applicants assets will benefit from reduced throughput risk and thus lower costs. Viewed holistically it may not reduce system costs, just produce risk shifts away from The Applicants. The same risks exist when the EGLJV is setting freight deductions to port from The Applicants sites compared to third party sites. While this is already a risk with Graincorp controlled NSW single desk operations and the passage of wheat through the limited number of AWB owned country sites and partially owned port terminal, the impact of such partial action will dramatically escalate once The Applicants work in tandem.[90]

7.194 The Australian Bulk Alliance (ABA) submitted that its seven country receival terminals and ownership of the Melbourne grain terminal make it a critical path in the eastern grain supply chain. ABA has previously made supply chain savings of up to 12% through fast rail loading at country sites and 24 hour train operations. However:

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90 Brooks Grain and Elders Limited submission, 21 February 2005, p. 12.

> Under the EGL arrangement, any improvements or innovations ABA wishes to pursue will need to involve EGL. The AWB have already indicated that while storage and handling negotiations can be done without EGL's involvement, this is highly impractical as the freight linkage is so important to ABA's business. Practically speaking, EGL will have to be involved in any initiative by ABA to improve supply chain efficiency because they hold the relationship with the rail provider on behalf of our biggest client, AWB International. This will mean these initiatives will be available to the management and directors of EGL and, by default, to both our largest competitors, Graincorp and AWB Ltd. This will have the effect of marginalising ABA in the storage and handling business as all initiatives are known by our competitors.[91]

7.195 Brooks Grain and Elders expressed the view that detriment arises from:

> The JV improving information transparency for Graincorp and AWB as owners of key infrastructure, without achieving any improvement for third party asset owners. This will lead to The Applicants being able to make superior investment decisions and operational improvements from a position of information supremacy compared to third parties. We applaud this effort to improve the quality of investment decisions and capital usage in the industry; however, this improvement is quarantined to The Applicants to the exclusion of all other investors in and users of grains logistics infrastructure. Transparency improves for those two dominant parties, but not for parties external to the EGLJV. This will have the impact over time of concentrating grains infrastructure further into the hands of The Applicants, with a lessening of competition for grain alternatives for growers – who are the supposed primary beneficiaries of the public benefit argued by The Applicants.[92]

Access at ports

7.196 CBH asked that the joint venture provide for on-going non-discriminatory access to the parties' storage and handling systems and (where relevant) ports, to third party traders, customers and exporters, including exporters of wheat, barley, canola and lupins under the relevant statutory export permit and licence schemes and in all future circumstances.

7.197 ABB referred to the open access deed between AWB and GrainCorp and to the CBH request regarding non-discriminatory access. ABB advocated that non-discriminatory access to port services be maintained in accordance with established industry and maritime experience.

7.198 BBM also expressed concern that in the event of a capacity shortage, "AWB will be entitled to preferential access to storage facilities based upon the volume requested to be stored for AWB compared to the total volume requested by all other traders."[93]

7.199 Austport, a proponent of a new and independent multi-user bulk handling facility at the Port of Newcastle, expressed concern that the Joint Venture would have significant detrimental impacts on the development of such a facility. Austport submit that the provision of competitive and more efficient port terminals and port terminal operations is required to deliver higher utilisation of rail rolling stock, greater reduction in rail haulage costs and rates as well as lower storage costs and port terminal costs.

The applicants' view

7.200 The applicants state that the joint venture may enter into interface agreements with storage providers for rail performance criteria and incentive payments to ensure

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91 Australian Bulk Alliance submission, 4 February 2005, p. 2.
92 Brooks Grain and Elders submissions, 21 February 2005, p. 5.
93 Barrett Burston Malting submission, p. 8.

performance criteria set by the rail provider can be met. This would only encompass a few operating issues such as outloading speed and outloading times.

7.201 However the applicants also submit that the joint venture will be discrete in its scope and relate solely to transport logistics for export grain and will not:

- give rise to any aggregation of storage and handling facilities
- contract or manage any grain storage and handling facilities
- prevent, limit or restrict either GrainCorp or AWB from establishing or operating any grain receival, storage or loading facility for export grain
- limit the incentive of GrainCorp and AWB to compete against each other in up-country grain storage and handling
- prevent AWB (if it is not satisfied with GrainCorp performance) from building its own storage facilities or contracting with other suppliers
- alter GrainCorp and AWB Grainflow's storage arrangements with other grain buyers and does not alter AWB and GrainCorp Marketing contracting other storage providers
- change GrainCorp systems / processes and 'open access' policy in providing services to all customers.

7.202 The grain owner will solely nominate the storage for their grain accumulation and trading and will pay the storage fees direct to the storage provider.

7.203 The applicants state that AWB Grainflow has not denied access to any party who has entered into a storage and handling agreement and has expanded storage capacity in circumstances where there has been additional demand.

7.204 The applicants submit that AWB has no incentive to disadvantage any of the GrainCorp, AWB, ABA and Ausbulk silos where it stores almost all of its export grain in New South Wales, Queensland and Victoria and indeed has a commercial incentive to ensure that ABA and Ausbulk silos have access to competitive rail rates. Similarly they state that they provide and will continue competing to provide storage services to valued customers such as ABB.

7.205 AWBI's National Pool will continue to 'post prices' by way of an Estimated Silo Return ("ESR") for east coast silos and will also determine an ESR for any other private storage that meets its National Pool's storage and operating standard accreditation policies. AWBAU will normally post prices and buy grain at any of the above storages where the grain is well positioned either for further domestic trade or for delivery against domestic sales contracts.

7.206 GrainCorp Marketing posts prices at GrainCorp silos in the eastern states, reflecting the quantity of storage it operates. GrainCorp does post prices at facilities where there are no GrainCorp silos, eg at AusBulk and CBH storages, and at some AWB and ABA silos for its regulated pool grains.

7.207 The applicants state that Export Grain Logistics does not:

- negotiate or have anything to do with the commercial relationship between the storage handler and the grain owner, grower or trader - it does not deal with grain storage and handling charges; and

- negotiate or set Estimated Silo Returns - they continue to be set by AWB.[94]

7.208 As a result, the applicants submit that there is no need for undertakings for non-discriminatory treatment of competitive storage sites by the Joint Venture as it has no such relationships.

7.209 The applicants also submit they will be constrained by significant and effective competition from a number of actual and potential competitors:

- The merged ABB/AusBulk as the second largest listed grain agribusiness holds a substantial share of barley sales and operates a network of approximately 111 country silos and seven export port terminals in South Australia and Victoria, with a total storage capacity of approximately 9.9 million tonnes. AusBulk has an interest in six storage and handling facilities located in NSW and Victoria, and the Melbourne Port Terminal, through its interest in ABA and ABA's MPT joint venture with AWB; and will be the successful developer of the proposed $90 million deepwater terminal at Outer Harbour near Adelaide.

- CBH is a very significant competitor in relation to grain storage and handling in Western Australia. It stores and handles up to 40% of the national average grain production annually, and more than 95% of the Western Australian crop is exported each year through CBH's four port terminal facilities located at Kwinana, Geraldton, Esperance and Albany.

- The applicants also argue that grain traders and end customers (such as Manildra and George Weston) can manage their own rail freight logistical arrangements through their own storage or rail operations or other grain storage and handling arrangements by "sponsoring" silos operated by individual growers to receive and store their grain requirements. Growers are also able to construct their own "on-farm" storage facilities.

7.210 GrainCorp also states its share of the domestic market, and in particular the stockfeed segment in which Ridley operates, is not significant given the large supply of grain storage provided by farmers and merchants.

7.211 In response to concerns raised regarding the potential for discriminatory treatment of ports by the joint venture, the applicants submitted that:

> … the Joint Venture does not select shipping terminals, only sites where grain is available within parameters. Grain marketers determine which sites are available for grain to be drawn from and where ships will load. The Joint Venture does not inhibit AWB from sending grain to any port, even a new port. Export Grain Logistics consults with AWB and then AWB directs grain to those ports which deliver the least cost supply chain.
>
> Further, one party has submitted that a perceived lack of competitive neutrality between suppliers of port services will decrease investment in ports which will discourage the modernisation of port facilities necessary for the increased effectiveness of grain transport. As noted above, the Joint Venture arrangements do not involve the acquisition or common management of any competing export port facilities, do not expressly preserve the ability of

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94 GrainCorp and AWB submission, 24 March 2005, p. 37.

either Party to operate a competing port and would not have an impact on the commercial considerations regarding whether or not to construct or operate a competing port facility.[95]

7.212 In addition, the parties note that:

- There is currently substantial excess capacity at port terminals in NSW, Queensland and Victoria, with more than 15 million tonnes of shipping capacity for an average of 7.5 million tonnes of grain for export.

- It is difficult to commercially justify investment in a new port terminal given the level of exports. A new port terminal would require at least 1 million tonnes of grain and it is not clear there is sufficient grain to warrant such an investment.

- In the absence of improved harvests and crop investment, the percentage level of grain exports is expected to decline, given increasing domestic demand from a growing population and limited excess grain. In this regard, less than 50% of grain in eastern Australia is now exported and ABARE forecasts this will decline by a further 1 million tonnes by 2007.

7.213 GrainCorp submits that from April 2005 it will no longer hold a statutory monopoly over the export of barley from NSW and hence it will have no commercial incentive to restrict access to export port facilities.

ACCC view

7.214 From the above arguments, market respondents expect that changes to silo estimates from lower deductions, together with improvements to the operation of the storage and handling system, will over time have a significant effect on grain volumes and grain flows, between sites or regions and possibly between different types of grain and consequently upon the level and quality of access different traders have to storage, handling and port services.

7.215 This assumes that silo prices are the only or a major determinant in terms of silo selection by growers, traders and buyers. Different views have been put to the ACCC about the interaction of silo price changes and storage selection and usage:

- One view is that the choice of silo by both growers and buyers is based not only on price but on a range of factors including transport options, preferred locations or regions, silo services such as the number of grain types and segregations handled as well as grain quality and grades.

- The other view is that even small increases in grain estimates/prices at a specific silo will have a dramatic effect on increasing volumes and sales of grain delivered and sold at that site, relative to alternative sites, resulting in higher revenues based on throughput for the silo owner/operator.

7.216 The concerns raised in submissions tend to follow the second view, that changes to prices and/or deductions attracts grain volumes and so a selective use of such changes at specific sites will draw grain away from other sites. As storage operators, AWB and GrainCorp may be able to price this way across their many sites if revenue

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95 GrainCorp and AWB submission, 24 March 2005, p. 42.

from the increased volumes (relative to storage costs) is likely to cover any shortfall from lower grain prices.

7.217 The ACCC believes there is merit in both views and that there may be some short-term or systemic detriment in the flow-on effects of the price changes. However, the ACCC considers that a large proportion of any such detriment would not be anti-competitive detriment – in that while it may have a detrimental impact on other storage operators, this is as a result of one group of market participants being able to achieve greater efficiencies which are expressed in the form of higher silo prices/lower deductions to the benefit of grain growers/owners.

7.218 At the same time the concern may also reflect the fact that the grain market has become more diversified with the development of a wider spread of segregations within each grain type. Consequently the storage and handling task has become more complex in accommodating competing demands and a greater array of prices, one result of which is that available capacity for each grain category may be more constrained especially at harvest.

7.219 However if, as a result of the joint venture, there are changes in the relative strengths of different storage sites based on their efficiency of handling a more diversified grain task, it may represent a benefit in that the cost of storage and handling services provides a clearer signal to growers and traders about the respective capacity of different sites. It may still be a benefit if it also identifies other sites, for example, where the management of segregations, quality or parcels sizes is more flexible.

7.220 In addition there is some suggestion in the applicants' submission that another objective of the joint venture, particularly in sharing the task and savings with rail providers, is to find viable ways in which otherwise stranded grain lines and silo sites can remain sustainable over the longer term. This suggests that the joint venture may be instrumental in maintaining the viability and availability of disadvantaged sites.

7.221 Furthermore the ACCC recognises that the applicants have structured the joint venture to limit its focus to export grain logistics. The joint venture will not make decisions about site ownership, investments or operations. Nor will it offer or contract for storage and handling services or determine the fees and service levels offered by AWB and GrainCorp at their silos.

7.222 Instead the ACCC considers there are a number of relevant indicators of the likelihood of ongoing competition between AWB and GrainCorp in the areas of storage and handling up country and at port:

- AWB and GrainCorp argue they will continue investing and competing in storage and handling and have provided the ACCC with confidential information on specific examples of their plans in this regard.

- AWB and GrainCorp have incentives to improve their site and storage efficiencies to increase grain throughput (and in the case of GrainCorp to recapture more AWB pool grain) and so earn a sufficient return on investment for their competing sites.

- AWB is not obliged to use GrainCorp receival facilities, the arrangement is non-exclusive and GrainCorp can offer its services to others. In addition GrainCorp advises it has excess capacity at its port terminals and thus an incentive to maximise usage and volumes from a range of customers.

- The access arrangement between AWB and GrainCorp reflects the current throughput of AWB grain at GrainCorp ports (and so does not require AWB to alter its present level of throughput to benefit under the arrangement). Also its level of access will be proportionate to its grain flow relative to the total throughput of all users.

7.223 Continued investment and competition from AWB would be consistent with both its interest in GrainFlow and MPT and its desired joint venture outcome for GrainCorp to maintain and improve its efficiency. Equally it would appear that a stable level of grain flow through GrainCorp facilities is likely to be more efficient in that GrainCorp will have a more predictable use of its facilities which is more likely to encourage reinvestment and so maintain its capacity to compete against the newer storage entrants AWB and ABA.

Use of grain information and management of stocks

Views of interested parties

7.224 Submissions raised concerns that the joint venture may provide opportunities for the misuse of confidential information or for the movement or swap of grain stocks against the interests of storage and handling clients or customers competing with the applicants.

7.225 ABB stated that the competitive situation depends on the absolute confidentiality of data and complete transparency of AWB and GrainCorp in relation to ESRs: "Based on past evidence of the lack of confidentiality between GrainCorp's storage and trading divisions, we believe that enforceable protocols for the ring-fencing of data should be instituted." [96]

7.226 CBH requested protection of confidential information of the parties and of third party traders, customers and exporters held by the parties, to prevent both anti-competitive co-ordination by the parties or use of the arrangements and related supply chain services to deter new entry or disadvantage the competitive position of third parties as users and competitors.

7.227 ABA submitted that:

> The current rules of confidentiality in the EGL joint venture appear to have the effect of ring fencing each party's information from the other. There does not appear to be any mechanism to protect 3rd party confidential information.
>
> … It is considered that Graincorp and AWB should be required to enter into enforceable undertakings to resolve this issue and provide reasonable assurance of effective ring-fencing of competitive information.[97]

7.228 Brooks Grain and Elders expressed a lack of confidence in the joint venture's current ring fencing arrangements:

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96 ABB Grain submission, p. 1.

97 Australian Bulk Alliance submission, 4 February 2005, p. 2.

> The Parties believe that the provisions of the Chinese Walls arrangements of the EGLJV are inadequate. These provisions contain no effective penalties for non-compliance, nor procedures for routinely ensuring compliance. Given evidence of a culture of non-compliance and the strong commercial incentives in play, the Parties have little confidence that the arrangements will be effective.[98]

7.229 BBM argued that, "despite claims that the joint venture will not affect either GrainCorp's or AWB's domestic grain activities or their competitive position on regional grain storage and handling, if the joint venture is to proceed there is little assurance that the joint venture will not use its ability to save on logistics costs to secure cheaper grain for their own domestic facilities. For example, GrainCorp may secure wheat for its jointly owned Allied Mills in order to compete in the domestic deregulated wheat market." [99]

7.230 ABA is concerned that Export Grain Logistics will not only be determining rail freight rates but also selecting grain from its various country sites for export through shipping terminals selected by Export Grain Logistics. ABA believe it is essential that that undertakings are given by the applicants for the non-discriminatory treatment of competitive storage sites and ports.[100]

7.231 Brooks Grain and Elders noted that:

> AWB maintenance of stock records within bulk handling records at a group level, which opens the potential for AWB trading operations to see the combined export Pool and trading operations stock position, especially when looking at where grain can be drawn from to meet domestic customer needs or for identification of profitable stock swap opportunities. Whilst it may seem fine for the Applicants to claim (as per PDC minutes) that stock swaps are open and accessible to any third party (and indeed they are), it is the "view of stock" (quality, location, variety, volumes, etc) which creates and enhances the ability to identify and maximize those opportunities.[101]

7.232 Brooks Grain and Elders called for the adoption of formal processes for conducting and reporting stock swaps between AWBI (and the GrainCorp export monopoly equivalent) and other parties (including AWBAU) comprising:

- Reporting of all stock swap quantities and net swap prices;
- Stock swaps to be conducted on the basis of domestic path supply chain cost deductions in the first instance, or otherwise swaps should be subject to open tender.[102]

7.233 The Flour Millers Council of Australia supported the commercial rationale and objective of the joint venture on condition that "the domestic milling industry does not incur unreasonable cost penalty or restriction in access to continuity of supply of its raw material needs."[103]

The applicants' view

7.234 The applicants responded to concerns about access to and use of information relating to other traders' grains stocks, the use of stock swaps in response to freight

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98 Brooks Grain and Elders submission, 21 February 2005, p. 13.
99 Barrett Burston Malting submission, p. 8.
100 Australian Bulk Alliance submission, 4 February 2005, p. 2.
101 Brooks Grain and Elders submission, 21 February 2005, p. 13.
102 Ibid, p. 11.
103 Flour Millers Council of Australia submission, p. 1.

advantages and arbitrage opportunities and the regional impact of the allocation of grain to export.

Access to information

7.235 The applicants stated that the key information the joint venture will have is export grain inventory information and the export program for AWB and GrainCorp. This information will be used by the joint venture to co-ordinate export logistics in an efficient manner.

7.236 GrainCorp is firmly of the view that information it holds on grain at its sites would not deliver any competitive advantage because:

- The amount of grain held by a grain owner in a particular storage facility is unlikely to reflect its full grain trading position.

- Stock information does not reflect a trader or owner's position or reveal their marketing strategy and other relevant information continues to be confidential. A grain owner can hold all or part of its stocks in another grain owner's name.

- GrainCorp already has knowledge of AWB and other party's stock information but does not derive an advantage from this information.

- Information held by a bulk-handler as to grain quality and market prices and shipping stem is also generally available.

7.237 Export Grain Logistics will not negotiate with grain storage and handlers as to their arrangements for grain. Accordingly, AWB as the largest user of ABA's terminals will continue to have details on grain storage and handling at ABA sites.

7.238 Further, as a separate legal entity, the Joint Venture will have in place obligations to ensure that it does not breach the confidence as between GrainCorp and AWB in respect of information provided to it or in relation to information that it obtains relating to third parties. Where that information is actually confidential or commercially sensitive such information is ring-fenced from the Parties.

7.239 The applicants state that they intend to honour the confidentiality obligations as a matter of contract and general / statute law. In respect of confidential information obtained from third parties, legally enforceable contractual obligations will be negotiated as between the third parties and Export Grain Logistics to protect such confidential information. These contractual restrictions on Export Grain Logistics will operate in addition to the ring-fencing arrangements outlined in the Joint Venture Agreement.

7.240 The creation of a separate legal entity also gives rise to corresponding legal duties on the officers of the Joint Venture (both in general law and under the Corporations Act 2001 (Cth)) which reinforce the protection of confidential information and the preservation of the competitive independence of GrainCorp and AWB. For example, at general law, directors of a company must not disclose or improperly use confidential information of the company.

> Further, the Parties refute Brooks/Edlers' suggestion that a "culture of non-compliance" in respect of confidentiality obligations exists within the Parties' operations. The examples listed by Brooks/Elders are irrelevant to the operations of Export Grain Logistics and in respect of the maintenance of stock records, inaccurate.[104]

Stock swaps

7.241 The applicants submitted that differences in rail rates between silos to alternative domestic and export destinations create arbitrage opportunities for stock swaps between owners of grain. While Export Grain Logistics may create new relativities for rail rates between silos that take into account efficient supply chain costs for export grain, it is not involved in stock swaps or marketing decisions for grain stored in GrainCorp, AWB Grainflow or other silos. Decisions in relation to stock swaps are made by the grain owners where the arbitrage benefit is contractually shared between the two counterparties.

7.242 It was submitted by one party that formal processes should be created for conducting and reporting stock swaps between AWBI and other parties. AWBI already have formal processes for stock swaps which are made readily available to the trade. Stock swaps are closely monitored by the WEA. As they are commercial transactions between AWBI and other parties, they should not be made public.

7.243 Where clients initiate stock swaps, GrainCorp cannot outload, title transfer or stock swap that grain without the permission of the client owning that grain. GrainCorp is not aware of the stock swap instruction until after a deal is struck between the parties and is never privy to the contractual details.

7.244 Where GrainCorp initiates a stock swap, it is for a limited range of operational reasons i.e. delays or grain unavailability due to weather problems, grain infestation or fumigation, grain quality problems, inaccessible grain, mechanical failure, rail delays and last of grain in storage being outloaded.

7.245 Customers can reserve grain (at a fee) so their grain will not be swapped. If it is swapped GrainCorp must pay any affected client compensation for the freight and quality differential.

Allocation of grain

7.246 The applicants responded to concerns regarding any vertical issues associated with GrainCorp's interest in Allied Mills and whether there are any incentives for the joint venture to advantage Allied Mills over other domestic participants in allocation of grain stock and domestic transport. The applicants argue that:

- The joint venture will have no negative impact on the domestic grain market nor create a supply risk for domestic grain consumers. It will not make decisions in relation to grain acquisition, storage and its movement; as these will be made by the grain owner.

- It will initially choose the allocation of specific sites for export in accordance with each party's nominated export requirements subject to final AWB and GrainCorp approval. Stock swaps are only able to be executed with the agreement of the parties that physically own the grain.

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[104] GrainCorp and AWB submission 24 March 2005, p. 51.

- GrainCorp cannot now, nor can the joint venture in the future, ‘empty out an area’ of grain to disadvantage or advantage a domestic customer. The formation of the joint venture will involve the transfer of GrainCorp’s activities in terms of site selection to the joint venture. This will enable site selection for export grain to take into account both silo operations and rail operation issues.

- Since AWB has no interest in Allied Mills, AWB’s 50% interest in the joint venture should in fact provide greater comfort to industry participants that there will not be any disadvantaging other industry participants.

7.247 Moving wheat from specific silos in accordance with AWBI (and other customer’s) shipping requirements involves the following arrangements:

- AWB provides its shipping program to GrainCorp. GrainCorp already has information on AWB exports, which is of little value in itself as:
  - GrainCorp is not permitted to export wheat
  - GrainCorp is not privy to the contractual details behind the shipments and program
  - much of this information, eg the shipping stem, is available publicly.

- GrainCorp normally selects the specific silos for a customer’s export order against its nominated quality specification. GrainCorp chooses a range of silos, within a port zone, based on GrainCorp’s knowledge of stock inventory to meet GrainCorp’s silo operational requirements – e.g. grain is not blocked or under fumigation or outloading configuration; and

- The owner of the grain has to provide final approval by issuing an order number before movements can occur. The owner of grain will generally not allow their grain to be moved to export if there is an arbitrage opportunity with a domestic client for stock swaps.

7.248 Finally the applicants submit that, even if the ACCC believes ‘emptying out’ a region by GrainCorp were possible, then GrainCorp could do it now. Accordingly, even accepting that argument, the establishment of the joint venture does not adversely affect competition in this way.

ACCC view

7.249 The ACCC recognises the joint venture creates a structure and process whereby there is a greater sharing of the applicants’ information which potentially enables them to operate collectively in the provision of storage and handling or trading services or in the acquisition of grain or freight services.

7.250 The joint venture may allow the parties greater access to information held on behalf of third party users of the storage and handling system which could be used to discriminate against those users as competitors. Examples of concern in submissions were the management of stock swaps and grain reserves.

7.251 The applicants argue this will be limited or prevented by the structure and designated export task of the joint venture and the use of ring-fencing measures as a safeguard. Also AWB and GrainCorp have incentives as competitors to protect their own trading and stock information from each other by limiting its use within the joint venture in accordance with the ring-fencing arrangements. In addition, the applicants advise that third party information will be handled subject to bilateral commercial arrangements, not under the ring-fencing protocols.

7.252 The ACCC has considered the issues of storage and handling information and stock movement issues previously and has decided that:

- There are strong constraints on GrainCorp's ability to discriminate against particular users of its storage and handling facilities.

- The main constraint was that the ownership of grain is not fixed and traders could buy and sell large amounts of grain within the storage system. This means that GrainCorp would not be able to target grain within its system because the owner of that grain could change.

- In terms of access to storage, a large amount of grain entered its system in the name of growers or traders and was then purchased by millers. Therefore GrainCorp would not know who the grain was destined for when it entered GrainCorp's storage facilities.

- In terms of raising rivals' storage costs, the ACCC considered that the ability to contract for traders to hold grain on their behalf, thereby defeating the price rise, would deter GrainCorp from attempting to raise charges.

- In terms of GrainCorp using knowledge of where millers' might be short of particular types of wheat and bidding up the prices of those stocks, the ACCC found that GrainCorp did not have complete information of millers' stocks either because millers used some storage other than GrainCorp's, or because wheat was held for millers by traders in the traders' names, effectively disguising the wheat. This was, to some extent, part of millers' current commercial practice.

- In terms of GrainCorp blending differing qualities of grain, within a defined band, known as "co-mingling", to disadvantage millers, the ACCC found that this was a current practice in the industry and would be unlikely to be used to any greater extent against rival millers in the future.

7.253 This shows the issue and potential conflict of incentives has existed prior to the joint venture. As storage and handling operators, both AWB and GrainCorp could behave in this way already but are restricted by how the system presently operates. The parties argue strongly that the joint venture has been designed to further restrict the inappropriate exchange and use of confidential information.

7.254 In essence, the integrity and confidentiality of the applicants' and third party information in the joint venture will depend on the efficacy of the ring-fencing arrangements. Significant concerns have been raised by interested parties regarding information flows through the joint venture back to the shareholders – AWB and GrainCorp.

7.255 The ACCC notes the ring fencing arrangements contained in the Joint Venture Shareholders Agreement are focussed on restricting the flow of confidential information provided by GrainCorp to the joint venture to AWB and vice versa. The applicants propose that any third party that contracts with the joint venture can address any confidentiality concerns it has as part of the negotiation of those contracts.

7.256 Nevertheless, the ACCC considers that there is the potential for significant anti-competitive detriment if confidential information provided to the Joint Venture were to be passed back to the shareholding companies and taken advantage of. The Joint Venture is likely to interact with entities that provide storage and handling services in direct competition with AWB and GrainCorp.

7.257 As a result, the ACCC is of the view that the applicants should develop measures designed to ensure that confidential information provided to the Joint Venture by third parties is not passed back to or used inappropriately by the shareholders.

Balance of public benefit and detriment

7.258 The ACCC may only grant authorisation if it is satisfied that, in all the circumstances, the joint venture is likely to result in a public benefit that will outweigh any public detriment.

7.259 The ACCC considers the joint venture arrangements are likely to result in public benefit from:

- improvements in economic efficiency from reducing export grain supply chain costs by better coordination
- increasing the returns to grain exporters
- avoidance of some additional costs such as demurrage
- greater transparency in pricing, which will provide more appropriate signals for investment.

7.260 The ACCC considers the applicant's proposed range of $10 to $30 million remains a reasonable estimate of the potential efficiency savings, but notes that some of these benefits may not be achievable until after current rail freight contracts expire. Any ongoing reluctance by rail freight providers to seek to achieve potential efficiencies is likely to result in benefits being towards the lower end of this range.

7.261 The experience of the joint venture operating under interim authorisation has confirmed that there are additional potential benefits to be achieved through related cost savings. The quantum of benefits is likely to vary from year to year, depending on the size of the harvest and the distribution of harvest volumes across the various regions.

7.262 Broadly, the ACCC considers the joint venture is likely to result in public detriment due to:

- reduced incentives for AWB and GrainCorp to compete in grain storage and handling
- the joint venture may allow the parties greater access to information held on behalf of third parties which could be used to discriminate against those parties as competitors.

7.263 The ACCC believes there are a number of factors in the proposed arrangements that mitigate against these detriments. The restricted focus of the joint venture on export grain limits the potential anticompetitive detriments in the domestic market. The ring fencing arrangements provide some protection against the inappropriate sharing and use of information. The ongoing competition between AWB and GrainCorp in storage and handling of grain also creates a strong incentive for the applicants to protect their own trading and stock information from each other.

7.264 The ACCC places significant weight on its assessment that the applicants will continue to compete in storage and handling. The applicants independently provided board documents in support of this position.

7.265 While the ACCC considers that the likely public benefits flowing from the conduct for which authorisation is sought outweigh the likely detriments, significant detriments may arise as a result of misuse of confidential third party information provided to the Joint Venture. These detriments could significantly erode the net benefits identified.

7.266 It is difficult to quantify the level of anti-competitive detriment that may arise as a result of ineffective ring fencing of confidential third party information by the Joint Venture from its shareholders. While the likelihood and extent of detriment is likely to be low to moderate, it is conceivable that, in some circumstances, the anticompetitive detriment could be sufficiently high to exceed the identified net public benefit. As a result, in order for the ACCC to be satisfied that the identified net benefits are not eroded in this manner, the ACCC considers it appropriate to impose a condition that effective ring fencing measures be developed and implemented.

7.267 The ACCC notes that the joint venture has been structured to minimise competition concerns which may also have the effect of limiting the potential efficiency gains that a more interventionist model could have provided. It could be argued that for the joint venture to be fully effective in achieving the desired savings and benefits there would need to be greater intervention and integration, on the one hand, between AWB and GrainCorp operations as storage and handlers and traders and, on the other hand, between the joint venture, the storage and handling system and the rail providers.

7.268 The ACCC notes calls by some companies for ‘open access’ to the services of Export Grain Logistics to enable better planning and co-ordination of the entire export grain freight task – with some calling for all domestic grain freight to be included as well.

7.269 While there may be greater efficiencies achievable by co-ordinated planning of the entire grain freight task, and potentially by the involvement of other participants in the grain industry, this is not relevant to the assessment the ACCC is required to make when considering this application for authorisation. The ACCC must consider whether the public benefits likely to flow from the conduct proposed by the applicants exceed the detriments likely to result from that conduct.

Duration of authorisation

7.270 The applicants originally sought authorisation for the period where AWB has power for export wheat under the *Wheat Marketing Act 1989* (Cth) or for a period of not less than 5 years. The applicants have recently requested that the Commission grant authorisation for a full five harvest periods – which would be until November/December 2010. The applicants claim this would provide sufficient time for the joint venture to enter into contracts to achieve the proposed efficiencies. 2010 is also the year the the Wheat Marketing Act is next scheduled for review.

Deregulation of wheat marketing

7.271 The applicants recognise the potential competitive impact of the joint venture arrangements may be materially different if wheat marketing is deregulated.

7.272 The domestic market for wheat was deregulated in 1989. The right to monopoly or 'single desk' selling of export wheat is held by AWB (International) Ltd, the AWB subsidiary responsible for the national wheat pool. The Wheat Export Authority (WEA) regulates and monitors the single desk arrangements and may issue export consents to others wishing to export wheat. The WEA is required to consult on such consents with AWBI which has a veto right over bulk export requests.

7.273 The wheat export single desk was reviewed in 2000 for the purposes of national competition policy requirements. In its response the Commonwealth Government opted to retain the single desk arrangements. A review of the administration and operation of the single desk (including supply chain arrangements) and the performance of the WEA was conducted in 2004. However the next review of the single desk policy is not expected by industry to occur until 2010.

Proposed Undertaking

7.274 As described at para 4.26, the applicants have offered an undertaking to the effect that should wheat marketing be deregulated, the ACCC could review the authorisation, while providing the applicants with the opportunity to demonstrate that the joint venture arrangements have had no anti-competitive effect based on actual performance and conduct.

7.275 The ACCC considers that the proposed undertaking is unnecessary in the context of an authorisation, since s 91B(3)(c) of the TPA provides that if at any time after granting an authorisation, it appears to the ACCC there has been a material change in circumstances, it may consider revoking the authorisation.

7.276 The ACCC has undertaken its assessment of the likely benefits and detriments of the joint venture arrangements in the context of the current circumstances – namely the existence of AWB's statutory wheat export monopoly.

7.277 The ACCC considers that any deregulation of wheat marketing that occurs within the period of authorisation which is likely to have a significant impact on the magnitude of the benefits or detriments would constitute a material change in circumstances.

Views of interested parties

7.278 The NSW Farmers Association proposed authorisation only be granted until such time as the 2004/05 national pool returns are finalised and reported to growers. This would enable an assessment of the benefits that have flowed through to growers.

7.279 Pacific National submitted that the period of authorisation should only extend to November 2007, when a material change in circumstances in grain haulage in NSW will occur, and therefore when a reasonable assessment of the detriments and benefits of the joint venture should be conducted if the proponents wish to extend the joint venture.[105]

7.280 The applicants responded to Pacific National's proposal, stating:

> … the expiry of [AWB's] contract [with Pacific National] actually provides an opportunity for the Joint Venture to negotiate new arrangements and increase the public benefits. Therefore it is important that the authorisation of the Joint Venture continue for a significant period after that time in order to provide commercial and contractual certainty to allow these benefits to be obtained.[106]

ACCC view

7.281 The ACCC generally considers it appropriate to grant authorisation for a limited period of time, so as to allow an authorisation to be reviewed in the light of any market developments.

7.282 The 5 year period (until 31 December 2009) originally sought by the applicants appears to be a reasonable period. The ACCC believes this provides sufficient time and certainty for the joint venture to achieve the proposed efficiencies. The longer the period of authorisation, the greater the potential for significant detriments to occur.

7.283 The applicants recently requested authorisation be granted until end 2010. This would allow the joint venture to operate for a full five harvests and would avoid uncertainty for the 2010 season while a review of the Wheat Marketing Act is undertaken.

7.284 The ACCC considers that if a review of the WMA is undertaken in 2010, it is by no means certain that the review would be completed and any outcomes flowing from such a review would take effect in that year. For this reason the ACCC does not see merit in extending the period of authorisation from 2009 (as proposed in the Draft Determination) until 2010.

7.285 The ACCC considers that the expiry of Pacific National's contract with AWB towards the end of 2006 provides an opportunity for negotiation by the Joint Venture of new grain rail freight rates that can more comprehensively take account of efficiencies able to be achieved.

7.286 The ACCC understands Pacific National's reference to changes at the end of 2007 to relate to the expiry of an agreement between Pacific National and the NSW Government. Under this agreement, Pacific National has community service obligations with respect to the haulage of grain on the one hand and guaranteed minimum grain haulage percentages on the other. It is not clear to the ACCC that the expiry of this agreement is likely to alter the balance of benefits and detriments of the joint venture arrangements. To the extent that such a change does constitute a material change in circumstances (as suggested by Pacific National), then the ACCC would have scope under s.91B(3)(c) of the TPA to review the authorisation.

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105 Pacific National submission, 9 February 2005, p. 1.

106 GrainCorp and AWB submission, 24 March 2005, p. 35.

Interim authorisation

7.287 The ACCC granted interim authorisation on 7 October 2004. The ACCC considers interim authorisation should remain in place until such time as its Final Determination comes into effect (or should circumstances warrant revocation or amendment of the interim authorisation at some earlier time).

8. DETERMINATION

The Applications

8.1 On 27 September 2004, GrainCorp Operations Limited (GrainCorp), AWB Limited (AWB) and Export Grain Logistics Pty Ltd lodged applications for authorisation A30233, A30234 and A30235 with the Australian Competition and Consumer Commission (the ACCC).

8.2 Application A30233 was made under subsection 88(1) of the TPA, and sought authorisation to make and give effect to a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of the TPA.

8.3 Application A30234 was made under subsection 88(8) of the TPA, and sought authorisation to engage in conduct that constitutes or may constitute the practice of exclusive dealing within the meaning of section 47 of the TPA.

8.4 Application A30235 was made under subsection 88(9) of the TPA, and sought authorisation to acquire shares in the capital of the body corporate, or to acquire assets of the person (including a body corporate) named in the application as Export Grain Logistics Pty Ltd (ACN 109 812 197).

8.5 The applicants describe Export Grain Logistics as being a special purpose company with a share capital of $2.00 with each of AWB and GrainCorp having a 50% shareholding. Its task will be to implement the export collaborative arrangements between GrainCorp and AWB pursuant to a Joint Venture Shareholders Agreement between GrainCorp, AWB and Export Grain Logistics.

The Statutory Tests

8.6 Subject to paras 8.7 and 8.8 below, for the reasons outlined in Chapter 7 of this determination, the ACCC is satisfied that:

- in all the circumstances, the arrangements for which authorisation is sought are likely to result in a public benefit that would outweigh the detriment to the public constituted by any lessening of competition arising from the arrangements

- the arrangements for which authorisation is sought are likely to result in such a benefit to the public that the arrangements and the acquisition should be allowed to take place.

8.7 The ACCC considers that significant detriments may arise as a result of misuse of confidential third party information provided to the Joint Venture. These detriments could significantly erode the net benefits identified.

8.8 It is difficult to quantify the level of anti-competitive detriment that may arise as a result of ineffective ring fencing of confidential third party information by the Joint Venture from its shareholders. While the likelihood and extent of detriment is likely to be low to moderate, it is conceivable that, in some circumstances, the anticompetitive detriment could be sufficiently high to exceed the identified net public benefit. As a result, in order for the ACCC to be satisfied that the identified net benefits are not eroded in this manner, the ACCC considers it appropriate to impose a condition that effective ring fencing measures be developed and implemented.

Conduct for which the ACCC grants authorisation

8.9 The ACCC grants authorisation until 31 December 2009 for:

- the acquisition of the ordinary shares of Export Grain Logistics, 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 the Joint Venture Shareholders Agreement between GrainCorp, AWB and Export Grain Logistics

on condition that within three months, the applicants develop and implement measures designed to ensure that confidential information provided to Export Grain Logistics by third parties will not be provided to or used inappropriately by its shareholders. These measures must be developed in conjunction with and to the satisfaction of an independent person with expertise in ring fencing arrangements.

8.10 This determination is made on 15 April 2005.

Interim authorisation

8.11 At the time of lodging the application, the applicants requested interim authorisation. On 7 October 2004, the ACCC granted interim authorisation in respect of the joint venture arrangements. Interim authorisation will continue to protect the joint venture from action under the TPA until the earlier of the ACCC's final determination coming into effect or the ACCC or the Tribunal (should the determination be reviewed) deciding to revoke or amend the interim authorisation.

Date authorisation comes into effect

8.12 This determination is made on 15 April 2005. If no application for review is made to the Australian Competition Tribunal, it will come into force on 7 May 2005. If an application is made to the Tribunal, the determination will come into force:

- where the application is not withdrawn – on the day on which the Tribunal makes a determination on the review; or

- where the application is withdrawn – on the day on which the application is withdrawn.