

12 August 2008

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Mr Richard Chadwick
General Manager
Adjudication Branch
Australian Competition and Consumer Commission
GPO Box 3131
CANBERRA ACT 2601

Dear Mr Chadwick

Notification of provisions which raise third line forcing concerns

We refer to the notification lodged on behalf of a number of applicants on 2 July 2008 with respect to the marketing of commercial wheat seed, N93486 – N93495.

Please find enclosed a further notification of possible third line forcing conduct with respect to a similar arrangement for the marketing of commercial wheat seed. The notification is lodged on behalf of Galleon Grains Pty Ltd ACN 102 914 769 and Maralong Pty Ltd (trading as Philp Brodie Grains) ACN 010 526 959.

Annexure B to Form G is an extract from Pacific Seeds Associate License Agreement. As this is a confidential document, the applicants request that Annexure B be excluded from the public register.

Enclosed is:

- (a) Form G: Notification of Exclusive Dealing;
- (b) a public register version of Form G with the confidential information in Annexure B masked; and
- (c) a cheque in the amount of \$200 payable to the Australian Competition and Consumer Commission.

If you have any questions in relation to this notification or require any further information, please contact Margaret Brown on (07) 3119 6388.

Yours faithfully

MINTER ELLISON



Contact: Margaret Brown Direct phone: +61 7 3119 6388 Direct fax: +61 7 3119 1380
Email: margaret.brown@minterellison.com
Our reference: KEXF MAB 40-5632909



MINTER ELLISON GROUP AND ASSOCIATED OFFICES
SYDNEY MELBOURNE BRISBANE CANBERRA ADELAIDE PERTH GOLD COAST DARWIN
AUCKLAND WELLINGTON HONG KONG SHANGHAI JAKARTA LONDON

Form G

Commonwealth of Australia

Trade Practices Act 1974 - sub-section 93(1)

NOTIFICATION OF EXCLUSIVE DEALING

To the Australian Competition and Consumer Commission:

Notice is hereby given, in accordance with subsection 93 (1) of the *Trade Practices Act 1974*, of particulars of conduct or of proposed conduct of a kind referred to subsections 47 (2), (3), (4), (5), (6), (7), (8) or (9) of that Act in which the person giving notice engages or proposes to engage.

1. Applicant

(a) Name of person(s) giving notice:

N93546

(i) Galleon Grains Pty Ltd ACN 102 914 769; and

N93547

(ii) Maralong Pty Ltd (trading as Philp Brodie Grains) ACN 010 526 959.

(b) Short description of business carried on by that person(s):

The Associates, Galleon Grains Pty Ltd ACN 102 914 769 and Maralong Pty Ltd (trading as Philp Brodie Grains) ACN 010 526 959, produce, process, distribute and sell Pacific Seeds licensed varieties of commercial wheat to authorised distributors and to licensed growers.

Pacific Seeds is involved in the wheat seed business throughout Australia and brings to the market a range of wheat seed varieties encompassing all major quality types and adapted to all major growing areas. Pacific Seeds, through two licence agreements with the Enterprise Grains Australia and LongReach Plant Breeders Management Pty Ltd is the licensee of eight varieties of licensed varieties of commercial wheat seed. Pacific Seeds is responsible for producing, processing, distributing and selling the licensed varieties of commercial wheat seed through a network of Associates.

The network ensures quality seeds are available to retailers and growers in a timely, convenient and economical manner.

(c) Address in Australia for service of documents on those persons:

Margaret Brown
Minter Ellison Lawyers
Waterfront Place
1 Eagle Street
BRISBANE QLD 4000

2. Notified arrangement

(a) Description of the goods or services in relation to the supply or acquisition of which this notice relates:

The notification relates to:

- (i) varieties of commercial wheat seed which are protected by Plant Breeders Rights under the *Plant Breeder's Rights Act 1994* and which are listed in the table attached as **Annexure A (licensed varieties of commercial wheat seed)**;
- (ii) rights granted to Associates under the Pacific Seeds Associate Licence Agreement between Pacific Seeds and each Associate (relevant extracts of which are attached at **Annexure B**);
- (iii) rights granted to Distributors under Distribution Agreements between Pacific Seeds and each distributor; and
- (iv) rights granted to Growers under the Variety Licence and Royalty Agreement between Pacific Seeds and each Grower.

(b) Description of the conduct or proposed conduct:

Supply of licensed varieties of commercial wheat seed

Pacific Seeds is the owner of, or has the right to commercialise, the licensed varieties of commercial wheat seed. Pacific Seeds has entered into a Pacific Seeds Associate Licence Agreement with each Associate.

Pacific Seeds Associate Licence Agreement

Under each Pacific Seeds Associate Licence Agreement, Pacific Seeds licences an Associate to produce, condition, supply, market and sell licenced varieties of commercial wheat seed. The terms and conditions on which this licence is granted includes a condition that Associates will only supply licensed varieties of commercial wheat seed:

- (i) to distributors who have a current Distribution Agreement with Pacific Seeds; and
- (ii) growers who have entered into a Variety Licence and Royalty Agreement with Pacific Seeds.

A copy of the relevant terms of the Pacific Seeds Associate Licence Agreement are attached as **Annexure B**.

The effect of these conditions is that Associates:

- (i) will only supply licensed varieties of commercial wheat seed to distributors who have a Distribution Agreement with Pacific Seeds; and
- (ii) will only supply licensed varieties of commercial wheat seed to growers who have a Variety Licence and Royalty Agreement with Pacific Seeds.

Distribution Agreement

Under each Distribution Agreement, Pacific Seeds licenses a distributor to supply licensed varieties of commercial wheat seed to growers. The terms and conditions on which this licence is granted include conditions that:

- (i) require licensed varieties of commercial wheat seed that have been provided to distributors by Associates to be sold only in Australia;
- (ii) restricts distributors from knowingly selling licensed varieties of commercial wheat seed that have been provided by Associates to any third party who will resell or has resold licensed varieties of commercial wheat seeds outside of Australia;
- (iii) requires distributors to maintain adequate records of all growers who purchase licensed varieties of commercial wheat seed from distributors so that end point royalties can ultimately be obtained from those growers; and
- (iv) requires distributors to provide a copy of the current version of the Pacific Seeds Variety Licence and Royalty Agreement to be provided prior to any sale transaction.

The effect of the fourth condition is that distributors may only supply licensed varieties of commercial wheat seed to growers who enter into the Pacific Seeds Variety Licence and Royalty Agreement. However, this notification does not relate to the supply of licensed varieties of commercial wheat seed to growers by distributors.

Variety Licence and Royalty Agreement

The Variety Licence and Royalty Agreement requires growers to pay end point royalties in accordance with a schedule of rates. The current schedule of rates is attached at **Annexure C**.

3. Persons, or classes of persons, affected or likely to be affected by the notified conduct

(a) Class or classes of persons to which the conduct relates:

Associates who are properly authorised by Pacific Seeds to sell licensed varieties of commercial wheat seed to distributors and growers pursuant to a

current Pacific Seeds Associate Licence Agreement (the applicants listed in paragraph 1(a)(i)-(ii)).

Distributors who are persons properly authorised by the Associate to distribute licensed varieties of commercial wheat seed pursuant to a current Distribution Agreement with Pacific Seeds.

Growers who are supplied with licensed varieties of commercial wheat seed from the Associate or its nominee for the primary purpose of producing harvested material.

(b) Number of those persons:

(i) At present time:

- (A) Associates – 15¹
- (B) Distributors – unknown
- (C) Growers - unknown

(ii) Estimated within the next year:

- (A) Associates – 15
- (B) Distributors – unknown, but believed to be in excess of 100
- (C) Growers - unknown

(c) Where number of persons stated in item 3(b)(i) is less than 50, their names and addresses:

Associates – see **Annexure D**

Distributors – not applicable

Growers – not applicable

4. Public benefit claims

(a) Arguments in support of notification:

- (i) *Enabling the applicants to take advantage of the Plant Breeder's Rights scheme*

The licensed varieties of commercial wheat seed are protected by the *Plant Breeder's Rights Act 1994* (Cth).

¹ Currently, Pacific Seeds has 15 Associates. Notifications were lodged on behalf of 10 of those Associates on 2 July 2008 (N93486 – N93495). This notification is lodged on behalf of a further 2 Associates.

The Act conforms with the 1978 Convention of the International Union for the Protection of New Varieties of Plants Convention (**UPOV Convention**). The second reading speech states that the purpose of the Bill is to encourage increased investment in plant breeding and technology transfer.

The scheme under the Act:

- (A) encourages plant breeding and innovation through the grant of a limited commercial monopoly to breeders of new varieties; and
- (B) gives innovators legal protection, without which anyone could commercialise the variety without recourse to the innovator.

Continued innovation maintains Australia's competitiveness in agricultural and horticultural industries. The stimulation of technology transfer is also crucial to maintaining Australia's access to new plant varieties for plant industries.

The *Plant Breeder's Rights Act* stimulates investment in breeding of principal plant crops, including wheat, which is an important element in maintaining Australia's international trading competitiveness. This is significant as Australia is one of the four largest wheat exporters in the world, along with the US, Canada and the EU.

The arrangement being notified is the 'closed loop' marketing arrangement which takes advantage of and gives effect to the Plant Breeder's rights scheme.

(ii) *Delivering benefits of innovation to stakeholders effectively*

The licensed varieties of commercial wheat seed are licensed to Pacific Seeds from a number of wheat breeders. Each licensed variety of commercial wheat seed has been developed to fill different quality classifications and is suited to specific geographical regions.

Wheat breeders focus on traits that will have maximum benefits for the Australian grains industry.²

Research by wheat breeders is also intended to produce more robust, high yielding and disease resistant varieties of wheat in each specific geographical wheat growing region of Australia.³

The proposed arrangement is the most effective way of delivering the benefits of innovations developed to key stakeholders by:

² Grains Research and Development Corporation, *GRDC helps facilitate sustainable wheat breeding* (7 March 2008) <http://www.grdc.com.au/director_research_breeding?item_id=36392122BCFC05D7EAAE822A4C6A925F&pageNumber=1&filter1=91&filter2=&filter3=&filter4=> at 7 April 2008.
LongReach Plant Breeders website <<http://www.longreachplantbreeders.com.au>> at 7 April 2008.

- compensating parties such as:
 - the Enterprise Grains Australia (EGA) joint venture (comprising of Grains Research and Development Corporation, the State of Queensland acting through the Department of Primary Industries and Fisheries, State of New South Wales acting through the Department of Primary Industries and the State of Western Australia acting through the Department of Agriculture); and
 - LongReach Plant Breeders Management Pty Ltd, (together **the licensors**) and Pacific Seeds for their investment in breeding, producing and commercialising the licensed varieties of commercial wheat seeds (as explained at paragraph (iii) below);
- taking the benefits and efficiencies which can be achieved by Pacific Seeds as the commercialising entity by making use of Pacific Seeds' established network of Associates to distribute the licensed varieties of commercial wheat seeds to distributors and growers;
- achieving efficiencies by allowing Associates to disseminate the licensed varieties of commercial wheat seeds to both distributors and growers thereby achieving maximum market penetration;
- providing the benefits of commercial competition and increased access to achieve better and faster results for growers;
- delivering the licensed varieties of commercial wheat seeds to growers and distributors in a timely manner and in accordance with each distributors' and growers' specifications; and
- ensuring that the community benefits from a greater supply of licensed varieties of commercial wheat seeds by reason of it growing in areas where other varieties of wheat seeds would otherwise be susceptible to disease, pests and other geographical limitations.

(iii) *Incentive for innovation*

The requirement for distributors to enter into a Distribution Agreement, and for growers to enter into the Variety Licence and Royalty Agreement provides an effective method of recovering the costs the licensors and Pacific Seeds have incurred in researching, developing and commercialising the licensed varieties of commercial wheat seeds, including an appropriate level of commercial return. A share of the end point royalties received by Pacific Seeds are remitted back to the licensors.

The use of an end point royalty system is an important reinvestment in the wheat industry and ensures the future breeding of superior varieties of wheat

seeds. Breeding new cultivars is expensive, taking from 8-12 years at an estimated cost of \$1 million per variety.⁴ Without ongoing support and reinvestment from growers, new varieties with better yield, disease, quality and agronomic characteristics would not be possible.⁵

Effective and continued cost recovery encourages further research and development of new varieties of seed which in turn helps growers increase the quality and quantity of output from land and assist them to meet the present and future demand for wheat production. End point royalties also drive breeders to focus on developing varieties of wheat that growers will adopt more quickly.⁶ This translates into the evolution of a system that delivers improved genetics to growers faster. Rapid breeding cycles are essential to enable growers to meet new pest and disease challenges and to enable breeders to meet market requirements.⁷

The end point royalty system also facilitates sustainable wheat breeding activity in Australia ensuring that improved wheat varieties are continually developed for growers.⁸

(iv) *Reducing growers' initial cost*

The purchase price of licensed varieties of commercial wheat seed would be greater if a seed based royalty system (the levying of a royalty on seed at the time of purchase of the seeds by growers) was used instead of the end point royalty system. The end point royalty system permits growers to defer the royalty fee part of the payment until after they have realised the profit of selling the grain.

A beneficial consequence of reducing the initial cost is that growers will be encouraged to try the new seed variety. This is important in the case of licensed varieties of commercial wheat seed as it has significant benefits to offer growers.

(v) *Reducing growers' risk*

Deferring the payment of royalties until the point at which the seed is sold transfers a portion of the risk of trying a new seed variety from the grower to the licensors and Pacific Seeds. The grower pays end point royalties on the amount of seed sold (not the amount of seed planted); if the seed does not grow well, the grower will pay less for it and the licensors and Pacific Seeds will receive less in the way of returns.

⁴ Department of Primary Industries and Fisheries, *Wheat Varieties for Queensland 2008* (2008) <<http://www.dpi.qld.gov.au/cps/rde/xbr/dpi/Wheat-variety-guide-2008.pdf>> at 7 April 2008.

⁵ Ibid.

⁶ Grains Research and Development Corporation, *GRDC helps facilitate sustainable wheat breeding* (7 March 2008) <http://www.grdc.com.au/director_research_breeding/?item_id=36392122BCFC05D7FA3E822A4C6A925E&pageNumber=1&filter1=91&filter2=&filter3=&filter4=> at 7 April 2008.

⁷ Ibid.

⁸ Ibid.

- (b) Facts and evidence relied upon in support of these claims:

Not applicable.

5. Market definition

Provide a description of the market(s) in which the goods or services described at 2(a) are supplied or acquired and other affected markets including: significant suppliers and acquirers; substitutes available for the relevant goods or services; any restriction on the supply or acquisition of the relevant goods or services (for example geographic or legal restrictions):

The applicants consider that the relevant market is the market for the supply and acquisition of agricultural seed.

6. Public detriments

- (a) Detriments to the public resulting or likely to result from the notification, in particular the likely effect of the notified conduct on the prices of the goods or services described at 2(a) above and the prices of goods or services in other affected markets:

The proposed conduct will not result in public detriment. It will not restrict Associates', distributors' or growers' abilities to purchase or plant licensed varieties of commercial wheat seed. There are no restrictions on the number of Variety Licence and Royalty Agreements which will be entered into by Pacific Seeds. Nor is it in Pacific Seeds' interest to impose such limitations.

Distributors and growers can purchase licensed varieties of commercial wheat seed from any one or more Associates. Pacific Seeds expects that the number of Associates and distributors will increase annually as growers become more aware of the benefits of the licensed varieties of commercial wheat seed and demand for licensed varieties of wheat seed increases. In addition, distributors and growers can also purchase other varieties of commercial wheat seed from sources other than Pacific Seeds or the Pacific Seeds network of Associates.

- (b) Facts and evidence relevant to these detriments:

Not applicable.

7. Further information

- (a) Name, postal address and contact telephone details of the person authorised to provide additional information in relation to this notification:

Margaret Brown
Minter Ellison Lawyers
Waterfront Place
1 Eagle Street
BRISBANE QLD 4000

Dated *12* August 2008

Signed on behalf of the applicant(s)

M. A. Brown
(Signature)

Margaret Alice Brown
(Full Name)

Minter Ellison Lawyers
(Organisation)

Consultant
(Position in Organisation)

DIRECTIONS

1. In lodging this form, applicants must include all information, including supporting evidence that they wish the Commission to take into account in assessing their notification.

Where there is insufficient space on this form to furnish the required information, the information is to be shown on separate sheets, numbered consecutively and signed by or on behalf of the applicant.

2. If the notice is given by or on behalf of a corporation, the name of the corporation is to be inserted in item 1(a), not the name of the person signing the notice, and the notice is to be signed by a person authorised by the corporation to do so.
3. Describe that part of the business of the person giving the notice in the course of the which the conduct is engaged in.
4. If particulars of a condition or of a reason of the type referred to in section 47 of the *Trade Practices Act 1974* have been reduced in whole or in part to writing, a copy of the writing is to be provided with the notice.
5. Describe the business or consumers likely to be affected by the conduct.
6. State an estimate of the highest number of persons with whom the entity giving the notice is likely to deal in the course of engaging in the conduct at any time during the next year.
7. Provide details of those public benefits claimed to result or to be likely to result from the proposed conduct including quantification of those benefits where possible.
8. Provide details of the market(s) likely to be affected by the notified conduct, in particular having regard to goods or services that may be substitutes for the good or service that is the subject matter of the notification.
9. Provide details of the detriments to the public which may result from the proposed conduct including quantification of those detriments where possible

ANNEXURE A – Licensed Varieties of Commercial Wheat Seed

Licensed Varieties	Licensor
EGA Gregory	The parties to the Enterprise Grains Australia (EGA) joint venture
EGA Wylie	As above
EGA Wentworth	As above
EGA Burke	As above
EGA Wills	As above
LongReach Crusader	LongReach Plant Breeders
LongReach Dakota	As Above
LongReach Lincoln	As Above

ANNEXURE B –Pacific Seeds Associate License Agreement extract

**EXCLUDED FROM
PUBLIC REGISTER**

**EXCLUDED FROM
PUBLIC REGISTER**

**EXCLUDED FROM
PUBLIC REGISTER**

**EXCLUDED FROM
PUBLIC REGISTER**

**EXCLUDED FROM
PUBLIC REGISTER**

**EXCLUDED FROM
PUBLIC REGISTER**

ANNEXURE C – End Point Royalty (EPR) Rates and Payment details

TABLE A: EPR

Licensed Variety	Grain EPR	
	Total Grain EPR Payable (incGST)	GST
	(\$/MT)	(\$/MT)
EGA Gregory	\$2.31	0.21
EGA Wylie	\$2.31	0.21
EGA Wentworth	\$2.31	0.21
EGA Burke	\$2.31	0.21
EGA Wills	\$2.31	0.21
LongReach ^(L) Crusader	\$2.97	0.27
LongReach ^(L) Lincoln	\$2.75	0.25
LongReach ^(L) Dakota	\$2.42	0.22

TABLE B: PAYMENT DETAILS

Grower deals with Product by:	EPR payable by Grower (including GST):	Mode of Payment:	Payment due (payments must include applicable GST):	Tax Invoice Issued by:
Selling as Commodity Grain to a third party which is an authorised EPR Collector.	The amount in Table A (Grain EPR) for the relevant Licensed Variety per metric tonne produced.	The EPR Collector will deduct the EPR from the purchase monies payable for the Grain.	Not Applicable (N/A)	EPR Collector after the EPR is deducted.
Selling as Commodity Grain to a third party which is not an authorised EPR Collector.	The amount in Table A (Grain EPR) for the relevant Licensed Variety per metric tonne produced.	Grower must pay EPR directly to an authorised EPR collector.	Within 30 days after the date of sale of the Commodity Grain.	EPR Collector after the EPR is paid.
Retaining as Stockfeed .	The amount in Table A (Grain EPR) for the relevant Licensed Variety per metric tonne produced.	Grower must pay EPR directly to an authorised EPR collector.	Within 30 days after the date of harvest of the Stockfeed.	EPR Collector after the EPR is paid.
Retaining as Retained Seed (note: Grower must not sell Seed).	No EPR payable for Retained Seed produced.	N/A	N/A	N/A
Product means Commodity Grain, Stockfeed, Fodder or Retained Seed.	Commodity Grain means grain produced from Seed or Retained Seed for sale as grain, and not as seed for replanting purposes, and does not include Stockfeed, Fodder or Retained Seed.	Stockfeed means grain produced from Seed or Retained Seed for the purpose of feeding livestock owned by the Grower, and does not include Commodity Grain, Fodder or Retained Seed.	Retained Seed means Product retained as seed for the purpose of subsequent planting by the Grower in order to produce further Commodity Grain, Stockfeed, Fodder or Retained Seed.	EPR Collector means a third party with whom Pacific Seeds has entered into an EPR collection arrangement or Pacific Seeds.

ANNEXURE D – Pacific Seeds' Associates details

Queensland

Galleon Grains Pty Ltd
Bambar Plains, Springsure, Qld 4722

Philp Brodie Grains
PO Box 7250, Toowoomba MC, Qld 4350
54 – 60 Industrial Avenue, Toowoomba, Qld
4350