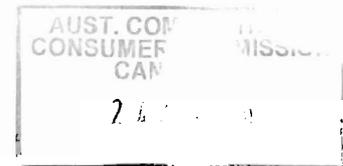




27 July 2010

BY REGISTERED POST

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



Dear Sir/Madam

Notification – Third Line Forcing

The Australian Grain Growers Cooperative Limited (ABN 33 719 186 591) ("**AGG**") is a body incorporated under the Cooperatives Act 1997 (SA). The primary objective of AGG is to facilitate the marketing of grain for AGG members.

Please find **enclosed** the following:

- a notification under section 93(1) of the Act in relation to third line forcing conduct proposed to be engaged in by AGG ("**Notification**"); and
- a cheque in the amount of \$100.00, being in payment of the fee for lodging the Notification for AGG.

AGG is being established for the purpose of establishing and operating a grain harvest pool and offering joint marketing to its members. As AGG is a new cooperative and has limited resources, it intends to appoint a service provider to provide the grain marketing services to its members. The service provider is intended to be Plum Grove Pty Ltd. The proposed arrangements between AGG, Plum Grove and its members raises the question of whether the conduct comprises third line forcing under the Trade Practices Act 1974 (Cth).

In our view, the proposed conduct is unlikely to comprise third line forcing for the following reasons:

AGG is a cooperative established under the Co-operatives Act 1997 (SA), and therefore is a democratic organisation controlled by their members;

decisions regarding the implementation of the Rebate Condition and Membership Condition (as defined in the Notification) will be made by resolution of the AGG members; and

this distinguishes the proposed conduct from the circumstances ordinarily present in a "third line forcing" scenario, as the AGG members will ultimately control the actions of AGG.

Notwithstanding the above, AGG wish to obtain immunity in the event that the proposed conduct is considered to be third line forcing, noting that such conduct would be strictly prohibited.

Please do not hesitate to contact the writer should you have any queries in relation to the enclosed notification.

Yours faithfully
KELLY & CO

per:

A handwritten signature in black ink, appearing to read 'JAMIE RESTAS', written over a light grey rectangular background.

JAMIE RESTAS

Partner

Direct Telephone: 08 8205 0581

Direct Facsimile: 08 8205 0807

Email: jrestas@kellyco.com.au

Enclosure(s): Form G Notification
Cheque

Form G

Commonwealth of Australia
Trade Practices Act 1974 — subsection 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.

PLEASE FOLLOW DIRECTIONS ON BACK OF THIS FORM

1. **Applicant**

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

N94895
AUSTRALIAN GRAIN GROWERS CO-OPERATIVE LIMITED
(ABN 33 719 186 591) ("AGG"). AGG is a trading co-operative which has only recently been formed by South Australian grain growers pursuant to the Cooperatives Act 1997 (SA).

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

The primary objective of AGG is to facilitate the marketing of grain for AGG members. AGG will offer, or facilitate the offer, to grain growers of grain marketing pools and other marketing options during each grain marketing season.

The secondary objectives of AGG include:

- to represent the interests of members on issues affecting the marketing of grain in Australia and overseas;
- to facilitate forums, events and tours that raise the understanding within the membership about grain marketing and build relationships with end-users; and
- to facilitate opportunities that add value for members as grain growers.

(c) ***Address in Australia for service of documents on that person:***

Jamie Restas, Partner, Kelly & Co. Lawyers, GPO Box 286, Adelaide SA 5001

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 the supply of grain marketing, membership and associated services to grain growers.

(b) Description of the conduct or proposed conduct:

Section 47 of the *Trade Practices Act 1974* (Cth) (Act) prohibits anti-competitive dealing, and outlines a number of proscribed practices which amount to exclusive dealing.

Sections 47(6) and (7) of the Act, in conjunction with section 47(1), prohibit third line forcing, which arises when a product or service is offered to a purchaser on the condition that the purchaser also acquires goods or services from a specified third person or class of third persons, or when a party refuses to supply a product or services to a purchaser for the reason that the purchaser does not agree to also acquire goods or services from a specified third person or class of third persons.

The proposed conduct outlined below may fall within these provisions of the Act as it is a condition of active membership of AGG that its members acquire certain grain marketing products and services from AGG's nominated service provider in the event that AGG does not provide those products or services in its own capacity.

Proposed Conduct

Grain growers who wish to become members of AGG must pay an upfront fee to AGG, in return for which they are granted membership of AGG and access to grain marketing services and associated services from AGG.

The conduct to which this notification specifically relates is the following:

1. It is a condition of active membership of AGG that AGG members must supply a minimum of 150 tonnes of grain for marketing through AGG or its service provider in any three (3) year period ("**Membership Condition**"). This Membership Condition is reduced in writing in the AGG Disclosure Statement under the Cooperatives Act 1997, in the form set out in Annexure A attached to this Form G, or provisions of similar wording and effect.
2. AGG proposes to offer a rebate to AGG members, arising from the sale of their grain. The provision of the rebate is conditional on the AGG member maintaining active membership, by meeting the Membership Condition, rather than supply to Plum Grove ("**Rebate Condition**"). AGG may sell grain outside of the agreement with Plum Grove which covers only wheat and barley and is for a 3 year period.) The Rebate Condition will be reduced to writing in the contractual arrangements between AGG's service provider and the AGG member.
 - . The Rebate Condition is intended to operate as follows:

- the AGG member will sell the grain to the service provider, who will in turn establish the grain pools and sell the grain in the international and domestic markets;
- the service provider will retain a fee from the price received for the grain;
- the service provider will in turn pay a fee to AGG; and
- a portion of the AGG fee is intended to be returned to the AGG member as a rebate.

The rebate will be paid upon resolution of AGG members on recommendation of the AGG Board.

As at the date of this notification, AGG's nominated service provider is Plum Grove Pty Ltd (ACN 104 516 305) ("**Plum Grove**").

Notwithstanding the above, we confirm that provided AGG members satisfy the Membership Condition in any three (3) year period, AGG members may sell additional grain to any grain marketer without restriction. This right may be exercised in any year, provided that the aggregate minimum requirement is met by the expiry of the relevant three (3) year period. In addition, AGG members are not forced to sell any grain to AGG or its service provider – in the event that they do not and cease to satisfy the Membership Condition, they will simply cease to be members of the co-operative.

The Rebate Condition will apply where a payment is made by AGG's service provider to AGG. Payments received from AGG's service provider will initially be used to fund AGG's operating expenses and expansion. Any surplus, subject to approval by members at the AGM, may be distributed to members as a rebate.

Accordingly, AGG is not in a position to offer a rebate to AGG members in relation to grain sales, other than grain sold by its members to AGG's nominated service provider(s).

We confirm that AGG may enter into agreements with other service providers for marketing and sale of other commodities or commence to market and sell AGG member's products in its own name. Any profits generated may be rebated to AGG members after funding costs and requirements for expansion as stated above.

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:

AGG members, being growers of grain

(b) Number of those persons:

(i) At present time:

Nil – Membership application forms anticipated to be approved August 2010.

(ii) Estimated within the next year:

200 members

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

N/A

4. Public benefit claims

(a) Arguments in support of notification:

The purpose of the Proposed Conduct is to provide assistance to grain growers with the marketing and sale of their grain.

The Proposed Conduct has the following public benefits:

Reducing growers' costs and increased return to grain growers

- AGG is trading co-operative which has only recently formed by grain growers and acts in the best interests of grain growers. The Proposed Conduct sets out to provide a cheaper export mechanism for grain growers, who will in turn receive a higher return for sale of their grain inclusive of the rebate associated with the Rebate Condition.
- Grain growers would be likely to experience higher business costs if they were required to negotiate for the sale of their grain independently, due to the lower volumes of stock and associated supply chain costs borne by each grower, or if they sold their grain to other grain marketers.

Increased business efficiency

- The Proposed Conduct will provide grain growers with access to a grain marketing pool that is under the joint control of the co-operative and its service provider. The grain supplied by AGG members will be aggregated into a grain marketing pool and sold into the Australian domestic grain market and the international grain market on a bulk or containerised basis. Grain growers acting independently would not have access to the bulk market.
- The Proposed Conduct will provide grain growers with the ability to sell their grain at competitive prices, due to the established supply relationships that AGG and AGG members have within the relevant

markets, and supply relationships that Plum Grove will implement within the Australian domestic market and international market.

- Grain growers would be likely to experience lower prices for their grain if they were required to negotiate for the sale of their grain independently.
- The Proposed Conduct is likely to foster business efficiency by ensuring that grain growers have access to a range of services, allowing these parties more time to focus on running their businesses. This may provide a competitive advantage.

Reducing growers' risk

- The Proposed Conduct offers grain growers a mechanism to reduce the risk associated with the sale of their grain during each grain season.
- Grain growers acting independently are unlikely to have access to bulk grain markets without the provision of a grain marketing pool.
- An additional marketing opportunity will be available to all grain growers who choose to join AGG and continue to meet the membership conditions which are required to be set under the active membership provisions of the Co-operatives Act 1997.

Quality standards

- By requiring AGG members to acquire services from Plum Grove, the Proposed Conduct allows AGG to ensure that all members maintain consistently high standards, and allows promotion of the "AGG" brand to be maximised. This allows AGG to compete more effectively with its competitors in the highly competitive grain industry, which in turn benefits consumers.

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

Cooperatives Act 1997 (SA)

AGG Disclosure Statement

Please also refer to the facts and evidence set out above.

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 markets which may be affected by the Proposed Conduct can be reasonably identified as:

- the Australian domestic bulk and/or containerised market for grain; and
- the international bulk and/or containerised market for grain.

Each of the identified markets is characterized by a large number of participants and is highly competitive. Significant suppliers in these markets include:

- AWB Limited;
- Graincorp Limited;
- Viterro Ltd, formerly ABB Grain Ltd; and
- Elders Toepfer Grain Pty Ltd.

We note that previously there were exclusive grain marketers for the wheat and barley export markets. These export markets have now been deregulated and various grain marketers must now compete for market share. Accordingly, grain growers have a broad range of alternative service providers to whom they can sell their grain, similar to those covered by this notification.

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 may have an effect on grain growers who are AGG members and other grain distributors as described below:

Grain Growers

The general market for grain growers is not likely to be affected by the Proposed Conduct, as each grain grower has the choice of whether or not to become a member of AGG. The total volume of grain grown and available for sale in Australia will not be materially affected by this proposal.

AGG Members

The Proposed Conduct contemplated by AGG denies grain growers who are AGG members (and who choose to maintain active membership by satisfying the Membership Condition) the opportunity to choose on the normal commercial basis whether or not to sell their grain to grain distributors other than Plum Grove.

However, we note that:

- Grain growers more generally do not have any obligation to obtain membership of AGG. The Proposed Conduct will have an insignificant anti-competitive effect on grain growers, given that they are free to acquire services from any supplier they choose.
- Grain growers who wish to become active members of AGG and retain that membership must sell the minimum requirement to Plum Grove or other service provider selected by AGG, but may sell any grain in excess of that minimum requirement to any other grain distributor or service provider that they see fit. Also, AGG members are not forced to sell any grain to AGG or its service provider – in the event that they do not and cease to satisfy the Membership Condition, they will simply cease to be members of the co-operative and share capital will be refunded.
- We submit that the structure and objectives of a cooperative are relevant to the Proposed Conduct. Under the Co-operatives Act 1997 (SA), cooperatives are democratic organisations controlled by their members. Therefore AGG members will contribute to the decision-making process of AGG. This distinguishes the Proposed Conduct from the circumstances ordinarily present in a "third line forcing" scenario, as the AGG members will ultimately control the actions of AGG.

Grain Distributors

The Proposed Conduct contemplated by AGG denies grain distributors (other than Plum Grove for the term of the agreement) the opportunity to compete for the purchase of grain from AGG members to the extent that those members propose to deliver grain to AGG. As noted above, grain distributors may compete for the business of AGG members in excess of the minimum requirement set out in the Membership Condition or generally in relation to the grain that the members do not wish to deliver to AGG.

We submit that the anti-competitive effect on grain distributors will be insignificant, given the number of other grain growers operating around Australia to which grain marketers may provide their services. In this regard, we note that the Australian Bureau of Agricultural and Resources Economics'

("ABARE") estimate of wheat production in Australia as at 16 February 2010 is 21,656 ktonnes.¹ Further evidence and information about the extent of the wheat and barley markets in Australia can be provided if required.

For the reasons outlined above, AGG submits that the Proposed Conduct is not likely to cause a substantial lessening of competition in the relevant markets, and nor is it likely to cause any detriment to the public. In regard to South Australia where AGG operates, this proposal will offer a new market opportunity to grain producers who become members of AGG. To the extent that the Proposed Conduct does in fact contravene section 47 of the Act, AGG contends that it is entitled to statutory immunity provided by section 93 of the Act, as the public benefits resulting from the Proposed Conduct significantly outweigh any public detriments caused by it.

(b) Facts and evidence relevant to these detriments:

Australian Bureau of Agricultural and Resources Economics
(<http://www.abare.gov.au>).

Please refer to the facts and evidence set out above.

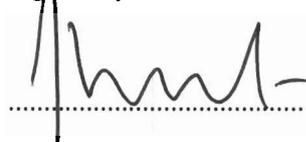
7. Further information

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

Jamie Restas
Kelly & Co. Lawyers
GPO Box 286
Adelaide SA 5001
Ph: (08) 8205 0581

Dated 27 July 2010

Signed by/on behalf of the applicant



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Jamie Restas

Partner

Kelly & Co. Lawyers

¹ ABS, Wheat use and stocks, Australia, cat no. 7307.0; ABS, Principal Agricultural Commodities, Australia, Preliminary, cat no. 7111.0 Canberra; ABARE crop report.