

UNDERTAKING

TRADE PRACTICES ACT 1974

Undertaking to the Australian Competition & Consumer Commission given for the purposes of section 87B of the *Trade Practices Act 1974* (Cwlth)

By

GRAINCORP LIMITED (ABN 60 057 186 035)

July 2003

1 Interpretation and definitions

In these undertakings, the singular includes the plural and vice versa.

A reference to “these undertakings” is a reference to all of the provisions of this document and Annexure A.

“**Act**” means the *Trade Practices Act 1974* (Cwlth).

“**ABA**” means Australian Bulk Alliance Pty Limited (ABN 39 087 280 260), a joint venture (held in equal shares) between Ausfarmers and Ausbulk.

“**ABA Business**” means the business conducted by ABA and its subsidiaries, including:

- (a) various storage and handling facilities in New South Wales and Victoria; and
- (b) a 50% interest (through a wholly-owned subsidiary) in the MGT.

“**ABA Share**” means the share in ABA held by Ausfarmers.

“**ABA Grain Receiving Facilities**” means the grain receiving and storage facilities owned by ABA (through a wholly-owned subsidiary) and operated by Ausbulk.

“**Ausbulk**” means Ausbulk Limited (ABN 88 007 556 256).

“**Ausfarmers**” means Ausfarmers Pty Limited (ABN 19 052 348 973), a wholly-owned subsidiary of Grainco Australia.

“**AWB**” means AWB Limited (ABN 99 081 890 459).

“**Business Day**” means a day on which banks are generally open in New South Wales.

“**Commission**” means the Australian Competition & Consumer Commission.

“**Divestment Date**” means the date on which GrainCorp procures the sale of the ABA Share in accordance with these undertakings.

“**Effective Date**” means the date that all the issued shares in Grainco Australia, other than the share issued to GrainCorp, are cancelled.

“**Grainco Australia**” means Grainco Australia Limited (ABN 50 070 878 241).

“**GrainCorp**” means GrainCorp Limited (ABN 60 057 186 035).

“**MGT**” means the Melbourne Grain Terminal, a joint venture (held in equal shares) between Melbourne Terminal Operations Pty Limited (a wholly owned subsidiary of ABA) and AWB.

“**Parties**” means GrainCorp and Grainco Australia.

“**Proposed Acquisition**” means the proposed acquisition of Grainco Australia by GrainCorp which will be implemented by cancelling all the issued shares in Grainco Australia, other than the share issued to GrainCorp.

“**Qualified Purchaser**” means a purchaser of the ABA Share who is not objected to by the Commission in accordance with clause 4.12.

“**Related Body Corporate**” has the meaning given to it by section 4A of the Act.

2 Background

- 2.1 GrainCorp is an Australian agribusiness company which is listed on the Australian Stock Exchange. GrainCorp’s core business is the provision of bulk grain storage and handling services in New South Wales and Victoria.
- 2.2 Grainco Australia is an unlisted Australian public company. Grainco Australia’s core business is the storage and handling of grains, oilseeds and pulses in Queensland. Grainco Australia also engages in certain grain trading activities.
- 2.3 In March 2003, the Parties sought informal clearance from the Commission in relation to a possible merger of their respective businesses.
- 2.4 After considering the Parties’ submissions and conducting extensive market enquiries in relation to the Parties’ merger proposal, the Commission advised GrainCorp that it does not intend to intervene in the proposed merger pursuant to section 50 of the Act. As requested by the Parties, the Commission’s decision was expressly based on the fact that GrainCorp would not acquire Grainco Australia’s interest in ABA and the Commission requested that the Parties provide it with confirmation that Grainco Australia’s interest in ABA had been divested prior to completion of the proposed merger.
- 2.5 ABA is a joint venture between Ausfarmers, a wholly-owned subsidiary of Grainco Australia, and Ausbulk. Ausfarmers and Ausbulk each own one share in ABA.
- 2.6 As subsequently discussed with the Commission, GrainCorp has submitted a bid to acquire a 100% interest in Grainco Australia, which includes Grainco Australia’s interest in ABA.
- 2.7 The Commission has expressed concerns that the Proposed Acquisition may contravene section 50 of the Act if it were to include Grainco Australia’s interest in ABA.
- 2.8 GrainCorp offers the following Undertakings (including those described in Annexure A) to overcome the Commission’s concerns in relation to the Proposed Acquisition.
- 2.9 The Commission agrees that, taking into account, and subject to the implementation of these Undertakings, its concerns in relation to the Proposed Acquisition will be overcome.

3 Commencement of Undertaking

- 3.1 These Undertakings (including those described in Annexure A) come into effect when all of the following conditions are satisfied:
- (a) the Undertakings are executed by GrainCorp;
 - (b) the Commission accepts the Undertakings so executed; and
 - (c) all the issued shares in Grainco Australia, other than the share issued to GrainCorp, are cancelled.

4 Undertakings

Divestiture of the ABA Share

- 4.1 GrainCorp must divest or cause the divestiture of the ABA Share. The divestiture must be only to a Qualified Purchaser.
- 4.2 From the Effective Date until the Divestment Date, GrainCorp must not:
- (a) sell or transfer the ownership of the ABA Share, or agree to the sale or transfer of, any part of the ABA Business; or
 - (b) to the extent that it is within its reasonable control having regard to the operation of the joint venture arrangements, make any material change to the attributes or extent of the ABA Business,
- except in accordance with these Undertakings.
- 4.3 The Commission acknowledges and agrees that, in accordance with Ausbulk's interest in ABA, Ausbulk has certain rights to acquire the ABA Share. Accordingly:
- (a) Grainco Australia may sell the ABA Share to Ausbulk at any time prior to the Effective Date; and
 - (b) GrainCorp may sell the ABA Share to Ausbulk at any time during the Initial Sale Period,
- in which case:
- (c) Ausbulk will be deemed to be a Qualified Purchaser;
 - (d) clauses 4.8 to 4.13 of this Undertaking will not apply; and
 - (e) GrainCorp must notify the Commission in writing of any sale to Ausbulk within five Business Days of that sale.

Hold separate terms - ABA Grain Receival Facilities

- 4.4 Subject to clause 4.5, GrainCorp agrees that from the Effective Date until the Divestment Date it will:
- (a) to the extent possible take all reasonable steps to ensure that the ABA Grain Receival Facilities are maintained by ABA in good working order and as fully operational on the Divestment Date as they were on the Effective Date;
 - (b) to the extent possible take all reasonable steps to ensure that the ABA Grain Receival Facilities, under the management arrangements with Ausbulk, are maintained and continue to be operated as independent grain receival facilities from those operated by GrainCorp; and
 - (c) to the extent possible take all reasonable steps to ensure that all contracts or arrangements with suppliers and customers are performed by ABA in accordance with their terms and, if required, are renewed on commercial terms which are, in all the circumstances, no less favourable to ABA.
- 4.5 For the purposes of section 4.4, the Commission acknowledges that, following the Effective Date, GrainCorp will not have day-to-day control or management of any of the country grain receival facilities operated by ABA. Those facilities are currently managed by Ausbulk and GrainCorp agrees that it will continue with that management arrangement until the Divestment Date.

Hold separate terms - Melbourne Grain Terminal

- 4.6 For the purposes of clause 4.7, the Commission acknowledges that, as part of the Proposed Acquisition, GrainCorp will indirectly acquire Grainco Australia's rights and obligations (held by a wholly-owned subsidiary under a labour contract) to operate the MGT on behalf of ABA and AWB. GrainCorp agrees that it will use all reasonable endeavours to obtain the consent of Ausbulk and AWB to assign or novate the labour contract to operate the MGT to Ausbulk or any other party effective from the Divestment Date.
- 4.7 GrainCorp agrees that from the Effective Date until the Divestment Date it will, to the extent possible:
- (a) take all reasonable steps to ensure that the MGT is maintained by ABA in good working order and as fully operational on the Divestment Date as it was on the Effective Date; and
 - (b) take all reasonable steps to ensure that all contracts or arrangements involving the MGT and its suppliers and customers are performed in accordance with their terms and, if required, are renewed on commercial terms which are, in all the circumstances, no less favourable to the MGT.

Divestiture terms

- 4.8 Subject to clause 4.3, GrainCorp must, within 60 days of the Effective Date, invite expressions of interest to purchase the ABA Share by sending a notice ("**Offer Notice**") to prospective purchasers identified by GrainCorp as advised by GrainCorp to the Commission.

- 4.9 The Offer Notice must inform the prospective purchasers that the ABA Share will be offered for sale and request registration of expressions of interest in the purchase of the ABA Share.
- 4.10 GrainCorp must give, within five Business Days of its receipt of an expression of interest, confidential written notice to the Commission of the names and addresses of all persons who register expressions of interest in response to the Offer Notice.
- 4.11 Upon or prior to GrainCorp reaching “in principle” agreement with a prospective purchaser as to the sale of the ABA Share, GrainCorp must give the Commission written notice (“**Proposed Purchaser Notice**”) that:
- (a) sets out the name, address and contact details of the proposed purchaser;
 - (b) attaches a copy of the proposed sale and purchase agreement with the proposed purchaser; and
 - (c) includes a description of the business carried on by the proposed purchaser.
- 4.12 The Commission may object to a proposed purchaser having regard to:
- (a) the adequacy of the proposed purchaser’s financial resources to purchase and conduct the ABA Business;
 - (b) the likelihood of the proposed purchaser being a vigorous and effective competitor; or
 - (c) the independence of the proposed purchaser in relation to GrainCorp, its Related Bodies Corporate, directors and managers,

by giving GrainCorp written notice of its objection (“**Objection Notice**”) within ten Business Days of receipt by the Commission of the Proposed Purchaser Notice, or such further period as reasonably required by the Commission and notified to GrainCorp prior to the expiry of the ten Business Day period referred to in this clause (in which case, the Initial Sale Period may, by agreement with the Commission, be extended by such further period). In circumstances where the Commission, within the specified period, does not give an Objection Notice, the proposed purchaser will be a Qualified Purchaser.

- 4.13 Subject to:
- (a) GrainCorp’s contractual obligations (including any obligations of confidence under the ABA joint venture arrangements); and
 - (b) any confidentiality assurances which, in the opinion of the Commission, are reasonable,

GrainCorp must permit any prospective purchasers to have reasonable access to any business records in relation to the ABA Business held by GrainCorp and to inspect the assets and operations of the ABA Business.

5 Obligations to procure and notify

- 5.1 When the performance by GrainCorp of an obligation under these Undertakings requires a Related Body Corporate of GrainCorp to take some action or refrain from taking some action, GrainCorp will procure that Related Body Corporate to take that action or to refrain from taking that action.
- 5.2 Where GrainCorp becomes aware that it, or a Related Body Corporate of GrainCorp, by any action or omission, has breached or is likely to have breached, any term of this Undertaking, GrainCorp or the Related Body Corporate, must provide to the Commission full details of the breach or likely breach within five Business Days of GrainCorp or the Related Body Corporate, becoming aware of the breach or likely breach.
- 5.3 GrainCorp must promptly provide to the Commission (in confidence where appropriate) all information reasonably requested by the Commission which is relevant to the performance of these Undertakings. GrainCorp will comply with any such request within ten Business Days unless specific provision is made elsewhere within these Undertakings for a different time period to apply.
- 5.4 GrainCorp must, within three Business Days of the Effective Date, advise the Commission in writing of the date of the Effective Date.

6 Confidentially

Public inspection

- 6.1 Subject to clause 6.2, GrainCorp acknowledges that the Commission will make this Undertaking available for public inspection.
- 6.2 Annexure A to this Undertaking will remain confidential until the sale of the ABA Share in accordance with this Undertaking.

Reference to Undertaking

- 6.3 GrainCorp acknowledges that the Commission may from time to time publicly refer to this Undertaking subject to clause 6.2.

7 No derogation

- 7.1 GrainCorp acknowledges that these Undertakings in no way derogate from the rights and remedies available to any other person arising from the Proposed Acquisition and conduct to which these Undertakings relate.

8 Provision of information

- 8.1 The Commission may, at any time until the Divestment Date request information from GrainCorp that the Commission reasonably requires for the purpose of monitoring such undertakings. GrainCorp will comply within ten Business Days of receipt or such other period of time as may be agreed by the Commission.

9 Enforcement action

- 9.1 For the avoidance of doubt, the Commission may take enforcement action at any time during any relevant limitation period whether before or after the sale of the ABA Share in respect of any breach by GrainCorp of a term of these Undertakings or the Act.

10 Notices

- 10.1 Any notice or other communication to the Commission pursuant to these Undertakings must be sent to:

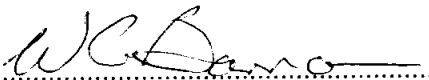
General Manager, Mergers & Asset Sales
Australian Competition & Consumer Commission
470 Northbourne Avenue
Dickson ACT 2602

or in whatever manner the Commission subsequently notifies GrainCorp.

- 10.2 Any notice or other communication to GrainCorp pursuant to these undertakings must be sent to:

Business Development Manager
GrainCorp Operations Limited
Level 10, 51 Druitt Street
Sydney NSW 2000

EXECUTED by **GRAINCORP**)
LIMITED in accordance with section)
127(1) of the *Corporations Act 2001*)
(Cwlth) by authority of its directors:)


.....)
Signature of director)

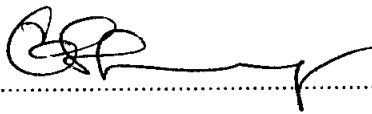
.....)
Name of director (block letters))

.....)
Name of director (block letters))

N.A.M.T
.....)
Signature of ~~director~~/company)
secretary*)
*delete whichever is not applicable)

.....)
Name of ~~director~~/company secretary*)
(block letters))
*delete whichever is not applicable)

ACCEPTED BY THE AUSTRALIAN COMPETITION & CONSUMER COMMISSION


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Graeme Julian Samuel
Acting Chairman
Australian Competition & Consumer Commission

Date: *14th July* 2003