

## **Chapter 2**

### **Archer Daniels Midland's bid for GrainCorp and formal reviews of the bid**

#### **Introduction**

2.1 A key matter for this committee to consider in conducting this inquiry is the proposed takeover of GrainCorp Limited (GrainCorp) by the US-based company, Archer Daniels Midland (ADM).

2.2 This chapter discusses:

- the terms of ADM's takeover bid;
- ownership arrangements in the Australian grain handling market; and
- regulatory reviews of ADM's bid.

#### **GrainCorp background**

2.3 GrainCorp operates a grain storage, handling and logistics network that covers the breadth of Australia's eastern states. GrainCorp has a combined grain storage capacity of more than 21 million tonnes at over 280 country sites, and, in addition to other port terminal services, operates seven of the eight bulk export grain elevators in eastern Australia and two speciality terminals.

2.4 In 1992, the New South Wales government privatised the Grain Handling Authority, which then became GrainCorp. Two years later, GrainCorp listed on the Australian Stock Exchange.

2.5 GrainCorp is Australia's largest listed agribusiness. ADM's bid valued GrainCorp at \$3.4 billion (based on the proposed \$13.20 per share offer to shareholders).

2.6 ADM owned 19.8 per cent of GrainCorp's issued shares.<sup>1</sup> On 20 August 2013, after failing to achieve the 50.1 per cent minimum acceptance from Graincorp shareholders required for its bid to be successful, ADM increased its shareholding in

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1 GrainCorp, 'Conditional agreement with Archer Daniels Midland Company that may lead to a takeover offer resulting in total value to shareholders of \$13.20 per share (inclusive of dividends totalling \$1.00)', News release, 26 April 2013, [http://www.graincorp.com.au/literature\\_131246/GrainCorp\\_conditional\\_agreement\\_with\\_ADM](http://www.graincorp.com.au/literature_131246/GrainCorp_conditional_agreement_with_ADM) (accessed 27 August 2013).

GrainCorp to 25.8 per cent.<sup>2</sup> In a statement to the Australian Securities Exchange ADM also extended its offer closing date to 16 November 2013.<sup>3</sup>

### **Background to ADM's takeover bid**

2.7 On 22 October 2012, GrainCorp announced that it had received an indicative, non-binding proposal from ADM to acquire the outstanding shares in GrainCorp at a price of \$11.75 per share. The GrainCorp Board rejected the offer on 15 November 2012, stating that it believed the proposal 'materially undervalued' GrainCorp.<sup>4</sup>

2.8 On 4 December 2013, GrainCorp advised that it had received a revised, non-binding proposal from ADM to acquire the outstanding shares in GrainCorp at \$12.20 per share. On 13 December 2013, the GrainCorp Board announced that the revised offer had not altered its view that ADM's proposal materially undervalued GrainCorp.<sup>5</sup>

2.9 Following another revised offer from ADM, GrainCorp announced on 26 April 2013 that it had entered into a takeover bid implementation deed with ADM, under which ADM would make an off-market takeover offer, subject to satisfactory completion of confirmatory due diligence.<sup>6</sup>

2.10 Under the revised offer, shareholders would receive \$13.20 per share, comprising a cash payment of \$12.20 per share and dividends totalling \$1.00 per share, which are expected to be fully franked. If regulatory approvals are not secured by 1 October 2013, an additional fully franked dividend of 35 cents per share would be payable for each full month for the period between 1 October 2013 and the date the

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2 'ADM extends GrainCorp takeover deadline', *Business Spectator*, 23 August 2013, <https://www.businessspectator.com.au/news/2013/8/23/agribusiness/adm-extends-graincorp-takeover-deadline> (accessed 26 August 2013).

3 'ADM extends GrainCorp takeover deadline', *Business Spectator*, 23 August 2013, <https://www.businessspectator.com.au/news/2013/8/23/agribusiness/adm-extends-graincorp-takeover-deadline> (accessed 26 August 2013).

4 GrainCorp, 'GrainCorp has advised Archer Daniels Midland Company that its revised indicative, non-binding proposal materially undervalues the company', News release, 13 December 2013, [http://www.graincorp.com.au/literature\\_117453/Revised\\_non\\_binding\\_ADM\\_proposal\\_materially\\_undervalues\\_GrainCorp](http://www.graincorp.com.au/literature_117453/Revised_non_binding_ADM_proposal_materially_undervalues_GrainCorp) (accessed 27 August 2013).

5 GrainCorp, 'GrainCorp has advised Archer Daniels Midland Company that its revised indicative, non-binding proposal materially undervalues the company', News release, 13 December 2013, [http://www.graincorp.com.au/literature\\_117453/Revised\\_non\\_binding\\_ADM\\_proposal\\_materially\\_undervalues\\_GrainCorp](http://www.graincorp.com.au/literature_117453/Revised_non_binding_ADM_proposal_materially_undervalues_GrainCorp) (accessed 27 August 2013).

6 GrainCorp, 'Conditional agreement with Archer Daniels Midland Company that may lead to a takeover offer resulting in total value to shareholders of \$13.20 per share (inclusive of dividends totalling \$1.00)', News release, 26 April 2013, [http://www.graincorp.com.au/literature\\_131246/GrainCorp\\_conditional\\_agreement\\_with\\_ADM](http://www.graincorp.com.au/literature_131246/GrainCorp_conditional_agreement_with_ADM) (accessed 27 August 2013).

regulatory conditions have been satisfied or waived, subject to GrainCorp being profitable over that relevant period.<sup>7</sup>

2.11 The dividend component of the \$13.20 per share would be paid by GrainCorp, prior to the completion of the transaction.<sup>8</sup>

2.12 As GrainCorp noted in its news release on 26 April 2013 and in a letter to shareholders dated 2 May 2013, the ADM offer represented a 15 per cent increase over ADM's initial approach on 19 October 2012, and a 49 per cent premium to the \$8.85 trading price of GrainCorp's shares on the last day prior to ADM's October 2012 proposal.<sup>9</sup>

2.13 As ADM explains on its website, ADM's offer implies an aggregate transaction value of \$3.4 billion:

The transaction value reflects the weighted average cost of acquiring the initial 19.8 percent stake in GrainCorp at an average of A\$11.24 per share, and the remaining shares of GrainCorp at A\$12.20 per share.<sup>10</sup>

2.14 ADM has indicated that it will fund the acquisition through a combination of operating cash flows and debt.<sup>11</sup>

2.15 ADM announced on 2 May 2013 that it had completed its due diligence on GrainCorp, and intended to make a cash offer to acquire the company under the terms of the implementation deed.<sup>12</sup>

2.16 Key conditions to the ADM offer include:

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7 GrainCorp, 'Conditional agreement with Archer Daniels Midland Company that may lead to a takeover offer resulting in total value to shareholders of \$13.20 per share (inclusive of dividends totalling \$1.00)', News release, 26 April 2013, [http://www.graincorp.com.au/literature\\_131246/GrainCorp\\_conditional\\_agreement\\_with\\_ADM](http://www.graincorp.com.au/literature_131246/GrainCorp_conditional_agreement_with_ADM) (accessed 27 August 2013).

8 ADM, 'ADM and GrainCorp', <http://www.adm.com/en-US/company/ADMandGrainCorp/Pages/default.aspx> (accessed 27 August 2013).

9 GrainCorp, 'Conditional agreement with Archer Daniels Midland Company that may lead to a takeover offer resulting in total value to shareholders of \$13.20 per share (inclusive of dividends totalling \$1.00)', News release, 26 April 2013, [http://www.graincorp.com.au/literature\\_131246/GrainCorp\\_conditional\\_agreement\\_with\\_ADM](http://www.graincorp.com.au/literature_131246/GrainCorp_conditional_agreement_with_ADM) (accessed 27 August 2013); GrainCorp, letter to shareholders, 2 May 2013, [http://www.graincorp.com.au/literature\\_117184/Shareholder\\_Letter\\_-\\_Recommended\\_Takeover\\_Offer](http://www.graincorp.com.au/literature_117184/Shareholder_Letter_-_Recommended_Takeover_Offer) (accessed 27 August 2013).

10 ADM, 'ADM and GrainCorp', <http://www.adm.com/en-US/company/ADMandGrainCorp/Pages/default.aspx> (accessed 27 August 2013).

11 ADM, 'ADM and GrainCorp', <http://www.adm.com/en-US/company/ADMandGrainCorp/Pages/default.aspx> (accessed 27 August 2013).

12 GrainCorp, 'Completion of confirmatory due diligence', News release, 2 May 2013, [http://www.graincorp.com.au/literature\\_131808/Completion\\_of\\_confirmatory\\_due\\_diligence\\_by\\_ADM](http://www.graincorp.com.au/literature_131808/Completion_of_confirmatory_due_diligence_by_ADM) (accessed 27 August 2013); ADM, 'ADM and GrainCorp', <http://www.adm.com/en-US/company/ADMandGrainCorp/Pages/default.aspx> (accessed 27 August 2013).

- (a) 50.1 per cent minimum acceptance;
- (b) regulatory approvals; and
- (c) no prescribed occurrences.

2.17 Each GrainCorp Director indicated that they would recommend the ADM offer, should it proceed, subject to it continuing to be in the best interests of shareholders and:

- (a) there being no superior proposal;
- (b) an independent expert determining that the ADM offer is fair and reasonable; and
- (c) the regulatory conditions being satisfied or waived by 31 December 2013.<sup>13</sup>

2.18 Consistent with Part 6.5 of the *Corporations Act 2001*, ADM will lodge a bidder's statement and GrainCorp will lodge a target's statement and independent expert report with the Australian Securities and Investment Commission (ASIC).

2.19 A GrainCorp news release dated 2 May 2013 indicated that shareholders would be provided with further information on the bid, including the bidder's and target's statements and the independent expert report, and it expected this information would be despatched in June 2013.<sup>14</sup>

2.20 ADM's arguments for its bid are discussed in Chapter 3.

### **Ownership arrangements in the Australian grain handling market**

2.21 Diagram 2.1 sets out the ownership and supply relationships of relevant corporate entities in the grains business in Australia. This demonstrates the existing concentration of interests in the Australian market. In the committee's view, further consolidation by corporate giants in this sector raises serious competition concerns.

2.22 For instance, ADM holds a 16 per cent major shareholding in Singapore-based Wilmar International (Wilmar). The companies have 'significant supplier relationships with each other'.<sup>15</sup> Wilmar is the largest shareholder in food

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13 GrainCorp, 'Conditional agreement with Archer Daniels Midland Company that may lead to a takeover offer resulting in total value to shareholders of \$13.20 per share (inclusive of dividends totalling \$1.00)', News release, 26 April 2013, [http://www.graincorp.com.au/literature\\_131246/GrainCorp\\_conditional\\_agreement\\_with\\_ADM](http://www.graincorp.com.au/literature_131246/GrainCorp_conditional_agreement_with_ADM) (accessed 27 August 2013).

14 GrainCorp, 'Completion of confirmatory due diligence', News release, 2 May 2013, [http://www.graincorp.com.au/literature\\_131808/Completion\\_of\\_confirmatory\\_due\\_diligence\\_by\\_ADM](http://www.graincorp.com.au/literature_131808/Completion_of_confirmatory_due_diligence_by_ADM) (accessed 27 August 2013); ADM, 'ADM and GrainCorp', <http://www.adm.com/en-US/company/ADMandGrainCorp/Pages/default.aspx> (accessed 27 August 2013).

15 Archer Daniels Midland, 'ADM and Wilmar Receive Approval for Partnerships in Fertilizer, Ocean Freight and Vegetable Oil', News release, 18 October 2012, <http://www.adm.com/news/layouts/PressReleaseDetail.aspx?ID=446> (accessed 27 August 2013).

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manufacturer Goodman Fielder (Goodman). Goodman makes Coles' home brand and Smart Buy bread.<sup>16</sup>

2.23 The exclusive supplier of the bulk flour that Goodman uses for its bread, biscuits and pastry is Allied Mills (Allied). Allied is supplied and 60 per cent owned by Graincorp. United States-based Cargill holds the remaining 40 per cent in the company.

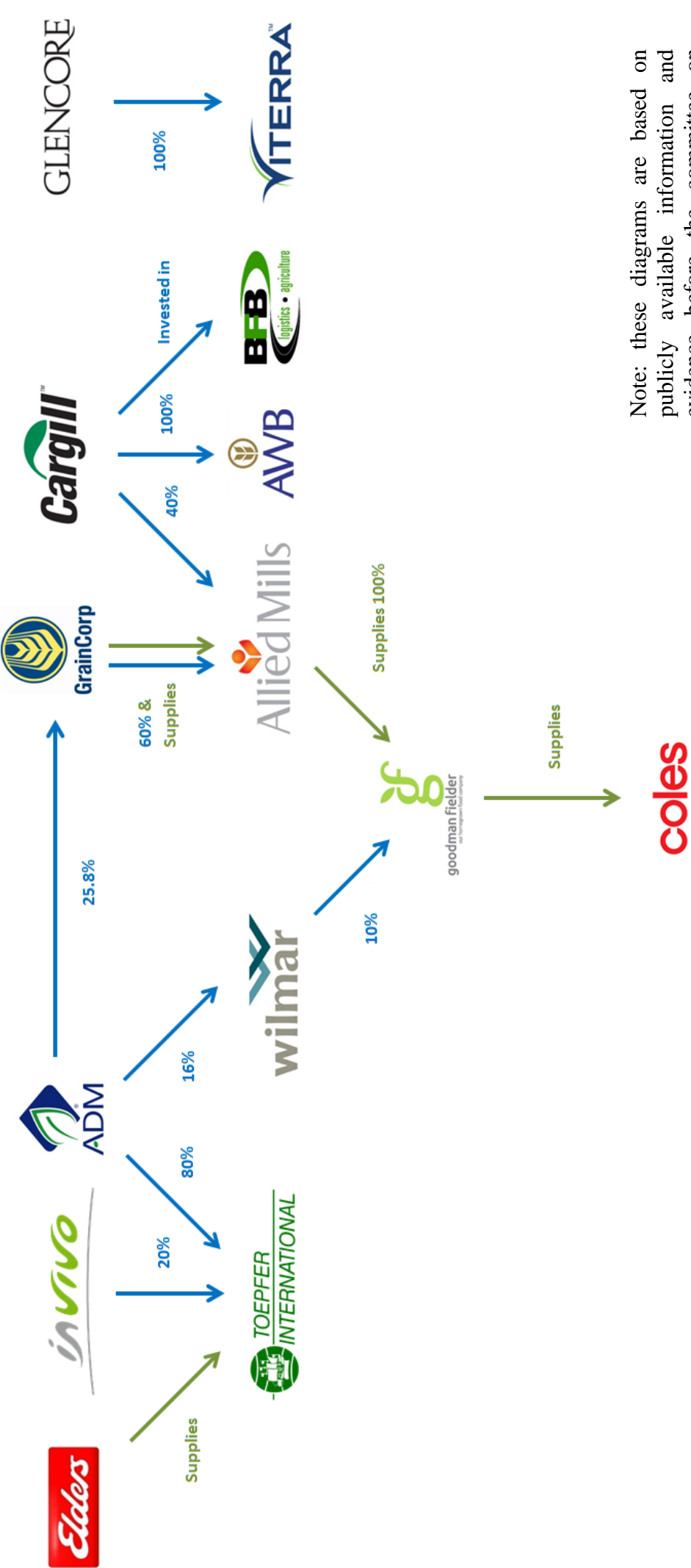
2.24 ADM also has an 80 per cent share in grain trader Toepfer International (Toepfer). The remaining interests in Toepfer are held by French agricultural cooperative Invivo Group.

2.25 Diagram 2.2 presents the ownership and supply relationships in the Australian grains market following a successful acquisition of GrainCorp by ADM.

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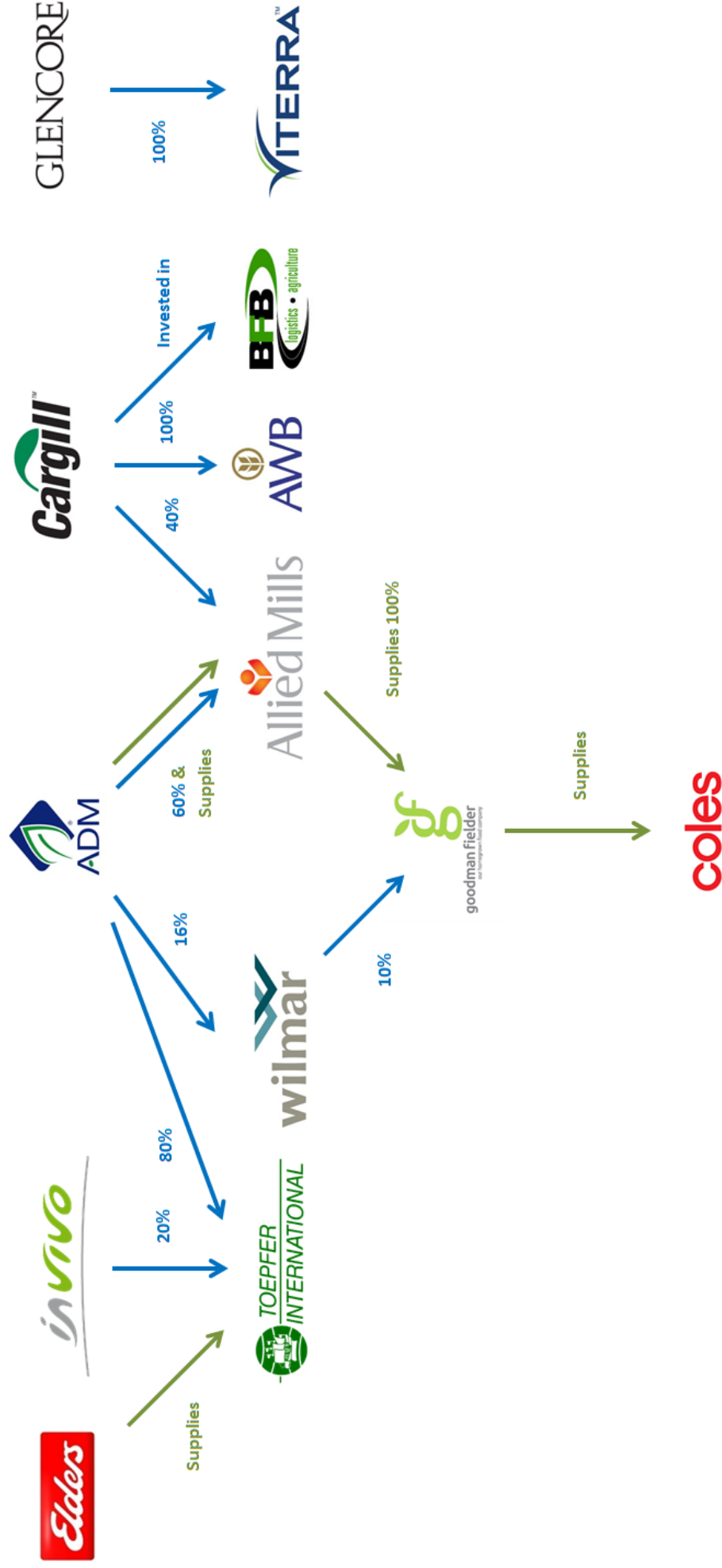
16 Jeff Whalley, 'Goodman Fielder uses its loaf in home-brand bread deal with Coles', *Herald Sun*, 26 June 2013, <http://www.heraldsun.com.au/business/goodman-fielder-uses-its-loaf-in-home-brand-bread-deal-witrh-coles/story-fni0dcne-1226669756511> (accessed 27 August 2013).

Diagram 2.1—Ownership and supply relationships in the Australian grains market



Note: these diagrams are based on publicly available information and evidence before the committee on relevant entities. Further relationships may exist between these entities.

Diagram 2.2—Ownership and supply relationships in the Australian grains market following a successful acquisition of GrainCorp by ADM





## **Regulatory reviews of ADM's bid**

2.26 ADM's offer is subject to regulatory conditions in Australia under the *Foreign Acquisitions and Takeovers Act 1975* and the *Competition and Consumer Act 2010* (CCA), and is currently being reviewed by the Foreign Investment Review Board (FIRB). As noted below, the offer was also subject to a review by the Australian Competition and Consumer Commission (ACCC), which was completed on 27 June 2013.

## **Review by the Australian Competition and Consumer Commission**

2.27 The ACCC's informal review considered the proposed acquisition under section 50 of the CCA, which prohibits mergers and acquisitions that substantially lessen competition in a market, or are likely to do so. The review process provides parties with the ACCC's informal view on whether the acquisition is likely to breach section 50. An informal view by the ACCC not to oppose a merger does not provide the parties with protection from legal action by the ACCC or other parties.<sup>17</sup> The informal review commenced on 3 May 2013.

2.28 As part of its informal review, the ACCC invited written submissions from 70 interested parties, including grain and animal feed traders and marketers, farmers and industry associations, millers and other associated agribusinesses. ACCC staff also met with those interested parties who requested meetings, and maintained contact with ADM and GrainCorp.<sup>18</sup>

2.29 On 27 June 2013, the ACCC announced its intention not to oppose the takeover. ACCC Chairman Mr Rod Sims said:

The ACCC concluded that the proposed acquisition would be unlikely to substantially lessen competition as the merged entity would continue to face competition from a number of sources.<sup>19</sup>

2.30 The ACCC's review process was conducted by a team of four investigators over an eight week period.<sup>20</sup> The review looked at two issues:

- (a) whether the proposed transaction would substantially lessen competition in any market by removing the existing competition between ADM and GrainCorp; and
- (b) whether ADM would have different incentives to GrainCorp such that it would be likely to foreclose third party access to the storage and

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17 For more information, see <http://www.accc.gov.au/business/mergers/merger-reviews>.

18 Correspondence from the Australian Competition and Consumer Commission to the Committee, 17 June 2013.

19 Australian Competition and Consumer Commission, 'ACCC to not oppose Archer Daniels Midland acquisition of Graincorp', Media release, 27 June 2013, <http://www.accc.gov.au/media-release/accc-to-not-oppose-archer-daniels-midland-acquisition-of-graincorp> (accessed 27 August 2013).

20 Ms Rose Webb, Executive General Manager, Mergers and Adjudication Group, Australian Competition and Consumer Commission, *Proof Committee Hansard*, 16 July 2013, p. 12.



transport supply chain following the merger, which may in turn reduce competition between traders to acquire grain.

2.31 Mr Sims stated that 'it is unlikely that the incentives faced by ADM in regard to the storage and transport supply chain would be materially altered by the acquisition'. He stressed the continuing importance of access to critical bottleneck infrastructure.<sup>21</sup>

2.32 Unlike the FIRB review, the ACCC review did not apply a national interest test.

***The committee's concerns with the ACCC's review***

2.33 The committee is concerned that the ACCC did not have the necessary expertise to undertake a full and proper review of ADM's bid. The evidence of ACCC officers at the public hearing on 16 July 2013 indicated that staff at the competition regulator did not have knowledge of key concepts relevant to grain handling, including warehousing charges and what a 'sub-terminal' is.<sup>22</sup> The ACCC also did not obtain independent expert advice or assistance.<sup>23</sup>

2.34 In particular, due to existing cross-ownership in the grains market—including ADM's 80 per cent shareholding in Toepfer—the committee has serious concerns about the implications for competition if ADM's bid is successful.

2.35 At the public hearing Ms Rose Webb, Executive General Manager, Mergers and Adjudication Group at the ACCC, was unsure whether the ACCC had considered Wilmar's relationship with Goodman and in turn, ADM's interest in Goodman through its holding in Wilmar.<sup>24</sup>

2.36 In response to a question on notice of what consideration was given to Wilmar's shareholding in Goodman, the ACCC advised the committee that:

...the ACCC did not specifically consider Wilmar's interest in Goodman Fielder as part of its assessment of the Proposed Acquisition. However, the ACCC did have regard to ADM's 16.37% shareholding in [Wilmar] as part of its review, particularly in the context of Wilmar's 50% joint venture interest in the Queensland Bulk Terminal.

Based on the information available, the ACCC does not consider that ADM's shareholding in Wilmar would put ADM in a position to influence

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21 Australian Competition and Consumer Commission, 'ACCC to not oppose Archer Daniels Midland acquisition of Graincorp', Media release, 27 June 2013, <http://www.accc.gov.au/media-release/accc-to-not-oppose-archer-daniels-midland-acquisition-of-graincorp> (accessed 27 August 2013).

22 Mr Michael Eady, Director, Fuel, Transport and Prices Oversight Branch, Australian Competition and Consumer Commission, *Proof Committee Hansard*, 16 July 2013, p. 10.

23 Ms Rose Webb, Executive General Manager, Mergers and Adjudication Group, Australian Competition and Consumer Commission, *Proof Committee Hansard*, 16 July 2013, p. 13.

24 Ms Rose Webb, Executive General Manager, Mergers and Adjudication Group, Australian Competition and Consumer Commission, *Proof Committee Hansard*, 16 July 2013, p. 2.

the commercial decisions of Goodman Fielder, nor would this shareholding provide any clear incentive for ADM to favour Goodman Fielder in its dealings. Wilmar may be the largest substantial shareholder in Goodman Fielder but its holding is only approximately 10%, and in turn ADM owns only 16.37% of Wilmar. The ACCC notes that according to Wilmar's 2012 annual report, as at 5 March 2013, there were two larger shareholders in Wilmar: Kuok Brothers Shd Berhad with an 18.36% interest and PPB Group Berhad with an 18.33% interest.

At the Committee's request, the ACCC has considered whether the customer / supplier relationships of Goodman Fielder with Allied Mills and Coles impact on the ACCC's assessment under section 50 of the [CCA] in respect of the Proposed Acquisition. Having done so, and having regard to the relevant percentage shareholdings and the other competitors at each level of the supply chain, the ACCC remains of the view that the Proposed Acquisition would not be likely to have the effect of substantially lessening competition in a relevant market.<sup>25</sup>

2.37 The committee views ADM's investment in Wilmar, and Wilmar's holding in Goodman, as significant and highly relevant to the consideration of the impact on competition represented by ADM's bid. The committee questions why the ACCC had not considered these shareholdings until they were brought to the competition regulator's attention by the committee.

2.38 Ms Webb told the committee that the ACCC also did not consider whether Cargill would seek to take over the 60 per cent share in Allied currently held by GrainCorp if ADM's acquisition of GrainCorp is successful, or the implications for competition in the market if this occurs. ADM and Cargill have both settled class-action lawsuits in the US accusing the food giants of price fixing.<sup>26</sup> In the case of ADM, the company agreed to a US\$400 million settlement. The committee's strong view is that the likelihood of Cargill acquiring ADM's potential future interest in GrainCorp, and the resulting implications for the market if this occurs, are of great concern.

2.39 Based on the ACCC's evidence at the public hearing on 16 July 2013 and its responses to questions on notice, the committee has significant doubts about the competition regulator's understanding of the grain sector or the implications of ADM's bid.

2.40 The committee appreciates that the ACCC considers competition issues across a broad range of industries and that it would not be possible for the ACCC to have on

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25 Australian Competition and Consumer Commission, answer to question on notice, 30 July 2013 (received 30 July 2013).

26 In 2004, the two companies settled class-action lawsuits accusing the two companies of fixing the price of high-fructose corn syrup. See: 'Cargill settles price-fixing lawsuit', *Food Navigator*, 21 May 2004, <http://www.foodnavigator.com/Legislation/Cargill-settles-price-fixing-lawsuit>; (accessed 12 August 2013); 'USA: ADM reaches settlement in high fructose corn syrup suit', *Just-Food*, 18 June 2004, [http://www.just-food.com/news/adm-reaches-settlement-in-high-fructose-corn-syrup-suit\\_id81770.aspx](http://www.just-food.com/news/adm-reaches-settlement-in-high-fructose-corn-syrup-suit_id81770.aspx) (accessed 12 August 2013).

its staff experts in all areas. Nonetheless, the committee is rightly concerned that the ACCC did not consider fundamental aspects of the grains market in Australia or delve with any significant detail into cross-ownership arrangements in the sector. Further, the ACCC did not engage independent experts to aid in its assessment of ADM's bid.

2.41 The committee is concerned by evidence that the ACCC presented at the public hearing on 16 July 2013, which revealed that the ACCC had not investigated the implications of ADM's 80 per cent share in Toepfer for competition in the market:

CHAIR: If there were a farmer standing down the back of the room just listening to all this, I am sure he would think it should be. I absolutely think it should. There is a possibility that someone who has 100 per cent of the flour production to Goodman Fielder—you can look on their site: they produce everything from scones to God knows what—in turn have this cute deal with Coles, who cannot even make up their minds on what a half-baked or fully baked loaf of bread baked on the premises is. Between them and Woolies, they have 82 per cent of the pre-packaged market in Australia, which the ACCC in their great wisdom did not think was a worry as a monopoly. The top five in the United States have 40 per cent of the market and the top five in Canada have only 60 per cent of the market, but you let the top two here have 82 per cent of the market. Don't you think that there is a possibility for market manipulation in that cosy arrangement? If this deal goes ahead, Toepfer will be taken out of the market in Australia. Do you agree with that? They are not going to be buying against ADM when they are 80 per cent owned by ADM. Would that be a reasonable assumption?

Ms Webb: I cannot predict what a commercial company is going to do.

CHAIR: Let us go to one other thing. You did not give consideration to whether Cargill would impose themselves on GrainCorp in an ADM takeover situation to apply all of Allied?

Ms Webb: Not that I am aware of.

Senator BACK: In the event that, as indicated, you could not predict the likelihood of the scenario that Senator Heffernan just put to you, what is the ACCC's role then if indeed it is not to predict the likely or possible outcomes contingent on decisions being made about, for example, mergers? What is it the ACCC does if it would not actually make that prediction as a possibility?

Ms Webb: It is correct that in our merger analysis we are making a prediction about the likely outcomes of the new arrangement or the acquisition. I just meant that in relation to the future of Toepfer we did not make any prediction. That was a matter for them, and I do not think we have—<sup>27</sup>

2.42 In the committee's view, the importance of the grains industry to Australian farmers and to the national economy warranted a closer and more informed inspection by the ACCC. The committee intends to invite the chairman of the ACCC to give evidence at a public hearing to explain why the ACCC's review was so restricted in its scope and analysis.

2.43 In addition, the committee is concerned that the ACCC did not give due consideration to the issues raised by stakeholders, which are discussed in the next chapter.

### **Review by the Foreign Investment Review Board**

2.44 There is no publicly available timeframe for the FIRB review. Ultimately, FIRB's role is to provide advice to the Treasurer on the takeover bid, and it falls to the Treasurer to make the final decision on whether to permit the takeover to go ahead.

2.45 The committee has followed the FIRB process closely. Mr Brian Wilson, Chairman and Mr Jonathan Rollings, General Manager of FIRB were invited to, and attended, the public hearing on 16 July 2013.

2.46 The committee wrote to FIRB on 7 August 2013. The committee noted that it:

...appreciates the time you have given to date in assisting with its inquiry, and was grateful for your comment at its Sydney hearing acknowledging the usefulness to FIRB of evidence that has been elicited by the committee thus far. It hopes that FIRB will take into account all the evidence before it in order to make a fully informed decision that recognises the potential harm of ADM's proposed takeover to the interests of Australian grain growers, and the national interest more broadly. The committee further hopes that in making its recommendation to the Treasurer, FIRB will also take into account the findings of the committee's forthcoming interim report, as well as evidence that may come to light at the committee's planned future hearing.

2.47 Further, the committee wrote:

Any further information you could provide on the current status of FIRB's review of ADM's takeover bid would be greatly appreciated, and would help to inform the committee's ongoing deliberations. The committee would treat this information as confidential.

The letter is reproduced at Appendix 4.

2.48 At the time of writing, the committee has not received a response from FIRB or any information on the current status of FIRB's review.

### ***Examination of the Foreign Investment Review Board National Interest Test***

2.49 In June 2013, the committee completed its inquiry into FIRB's National Interest Test. In its report, the committee noted that:

Foreign investment has long been an important feature of Australian agriculture. It has provided a key source of capital for Australian farmers and has promoted the growth of the Australian agricultural sector. Foreign investment has improved agricultural productivity, has generated many

opportunities for Australian agricultural businesses, and assisted job creation and economic sustainability for many rural communities.

Foreign investment will also be essential to further development of Australian agriculture and will greatly assist Australian businesses to make the most of opportunities in the Asia Pacific region in the coming century.<sup>28</sup>

2.50 However, the report also noted that 'future foreign investment in Australia also presents challenges for the agricultural industry and Australia's national interest'.<sup>29</sup> In particular, foreign investment has the potential:

- to distort the capital market and trade to the detriment of Australian farmers and Australia's economy due to food security concerns; and
- for tax minimisation strategies to be used to erode Australia's revenue base.<sup>30</sup>

2.51 The committee found that Australia's current framework for foreign investment was 'significantly deficient in effectively managing a number of key challenges facing Australian agriculture' and recommended that the government make a comprehensive update of the *Foreign Acquisitions and Takeovers Act 1975* and related policies.<sup>31</sup>

2.52 FIRB Chairman Mr Brian Wilson told the committee at the public hearing on 16 July 2013 that the impact of investment on tax revenue is now part of its consideration of the national interest. Mr Wilson said that:

I think almost invariably, depending upon the ownership structure, foreign ownership probably results in the potential for less tax paid in Australia than the same business entirely domestically owned—in exactly the same way, of course, that Australian ownership of foreign businesses results in the payment of less tax in those foreign countries than if those businesses were entirely domestically owned.<sup>32</sup>

2.53 Mr Wilson noted further:

...it is reasonably difficult for us to say that a transaction entirely in line with Australian law and in line with international tax treaties is, of itself, contrary to the national interest simply because the tax characteristics change ... But I can certainly conceive of a situation where the issues around tax in a particular transaction may be so large that, notwithstanding

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28 Senate Rural and Regional Affairs and Transport References Committee, *Foreign Investment and the National Interest*, June 2013, p. xxi.

29 Senate Rural and Regional Affairs and Transport References Committee, *Foreign Investment and the National Interest*, June 2013, p. xxi.

30 Senate Rural and Regional Affairs and Transport References Committee, *Foreign Investment and the National Interest*, June 2013, p. xxi.

31 Senate Rural and Regional Affairs and Transport References Committee, *Foreign Investment and the National Interest*, June 2013, p. xxi-xxii.

32 Mr Brian Wilson, Chairman, Foreign Investment Review Board, *Proof Committee Hansard*, 16 July 2013, p. 16.

that the transaction and the tax arrangements are entirely in accordance with the law, there may be a national interest issue.<sup>33</sup>

2.54 The committee notes that ADM and Cargill have been accused of tax evasion overseas<sup>34</sup> and believes that the potential impact on Australia's revenue base from ADM's bid should be given close attention by FIRB.

### **Other reviews**

2.55 The committee notes that, at the time of writing, six overseas regulators have approved ADM's bid:

- Korea Fair Trade Commission (August 2013);
- European Commission (July 2013);
- Japan Fair Trade Commission (July 2013);
- Competition Commission of South Africa (July 2013);
- Canada's Competition Bureau (July 2013); and
- United States Federal Trade Commission (November 2012).<sup>35</sup>

2.56 These approvals were required due to GrainCorp's global presence and international relationships.

2.57 The bid is also subject to approval from the Ministry of Commerce (MOFCOM) of the Government of the People's Republic of China, as GrainCorp has a small oils business in China.

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33 Mr Brian Wilson, Chairman, Foreign Investment Review Board, *Proof Committee Hansard*, 16 July 2013, p. 16.

34 See for example, Rodrigo Orihuela, 'Cargill, ADM Accused of Tax Evasion in Probe Targeting Argentine Exporters', *Bloomberg*, 4 March 2011.

35 ADM, 'ADM and GrainCorp', <http://www.adm.com/en-US/company/ADMandGrainCorp/Pages/default.aspx> (accessed 27 August 2013).