

The Senate

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Rural and Regional Affairs  
and Transport  
References Committee

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Ownership arrangements of grain handling

August 2013

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## Acronyms and Abbreviations

ADM	Archer Daniels Midland
AGEA	Australian Grain Exporters Association
AgForce	AgForce Queensland
Allied	Allied Mills
CCA	<i>Competition and Consumer Act 2010</i>
FIRB	Foreign Investment Review Board
Goodman	Goodman Fielder
GrainCorp	GrainCorp Limited
MOFCOM	Ministry of Commerce of the Government of the People's Republic of China
PGA	Pastoralists and Graziers Association
Toepfer	Toepfer International
VFF	Victorian Farmers Federation
Wilmar	Wilmar International



# List of Recommendations

## Recommendation 1

4.4 The committee recommends that the Australian Competition and Consumer Commission reopen its informal review of Archer Daniels Midland's proposed acquisition of GrainCorp. The review should consult independent expert advice to determine whether there will be a substantial lessening of competition under the new cross-ownership arrangements in the Australian grain handling market if the ADM takeover proceeds.

## Recommendation 2

4.6 The committee recommends that in making its recommendation on the proposed takeover of GrainCorp to the Treasurer, the Foreign Investment Review Board consider the following matters:

- the evidence from the committee's public hearing hearings in June and July 2013, as well as the evidence from its proposed public hearing later this year;
- the potential loss of revenue to the taxpayer from ADM's tax minimisation strategies should the takeover proceed;
- the potential for the takeover to distort the capital market to the detriment of Australian farmers and Australia's economy due to food security concerns; and
- the need to protect the public interest and the interests of grain growers.



# Chapter 1

## Introduction

### About this inquiry

1.1 This inquiry into the ownership arrangements of grain handling in Australia comes at a critical juncture in the development of Australia's grain handling market. The Australian grain handling market was established in the 1920s and 1930s with the creation of various wheat, grain, barley and oats boards. It has consolidated significantly over the past 30 years. GrainCorp, created in 1992, evolved from the New South Wales Grain Board. It was listed on the Australian Stock Exchange in 1994. In 2000, GrainCorp bought VicGrain and in 2003, it bought the Queensland based GrainCo.

1.2 On 26 April 2013, GrainCorp announced that it had entered into a takeover bid implementation deed with the United States-based multinational Archer Daniels Midland (ADM). If the takeover is successful, a foreign company stands to own and control seven-eighths of Australia's east coast grain handling infrastructure.

1.3 This inquiry responds to the issues and concerns raised by ADM's proposed takeover of GrainCorp. The benefits of direct foreign investment come with a particular set of challenges. This is particularly the case in a critical market such as grains, where there is already significant cross-ownership of assets, and where the bidding company has a decidedly chequered record of corporate governance.

### Conduct of inquiry

1.4 On 16 May 2013 the Senate referred the matter of ownership arrangements of grain handling to the Rural and Regional Affairs and Transport References Committee for inquiry and report on 31 July 2013, on which date the committee tabled a brief interim report and requested an extension of its due date to 30 August 2013. The terms of reference are available in Appendix 1.

1.5 The committee advertised the inquiry in *The Australian*, on the committee's website, and invited submissions from peak bodies, government departments and relevant agricultural companies. To date, the committee has received 14 submissions (see Appendix 2).

1.6 The committee held a public hearing in Canberra on 18 June 2013, in which representatives of ADM answered questions that related primarily to ADM's takeover bid for GrainCorp. The committee held a second public hearing in Sydney on 16 July 2013.

1.7 To date, the committee has taken evidence from a wide variety of industry bodies, government departments, businesses and interested individuals (a list of

witnesses who attended these hearings is provided at Appendix 3). The committee intends to hold a further public hearing later this year, and table its final report on the reference soon thereafter.

## **Acknowledgements**

1.8 The committee acknowledges the contribution of several individuals and organisations that made submissions and gave verbal evidence to the committee.

## **Note on references**

1.9 References to Committee Hansard are to the proof versions. Page numbers may vary between the proof and official version of the Hansard.

## **Previous Senate inquiries**

1.10 The Rural and Regional Affairs and Transport Legislation and References Committees have conducted three previous inquiries that are relevant to the current inquiry:

- the legislation committee inquiry into the Wheat Export Marketing Amendment Bill 2012 [Provisions], tabled June 2012;
- the references committee inquiry into the operational issues in export grain networks, tabled April 2012; and
- the references committee inquiry into the Foreign Investment Review Board (FIRB) national interest test, tabled on 26 June 2013.

## **Structure of the report**

1.11 This interim report has four chapters:

- chapter two provides an overview of ADM's takeover bid for GrainCorp and the regulatory reviews conducted by the Australian Competition and Consumer Commission (ACCC) and FIRB;
- chapter three explores various perspectives on the merits of ADM's bid, including concerns expressed to the committee about the impact the bid might have on the interests of Australia's farmers and, more broadly, the Australian grain industry and Australia's long-term food security interests; and
- chapter four presents the committee's interim conclusions and recommendations.

## 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).

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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.

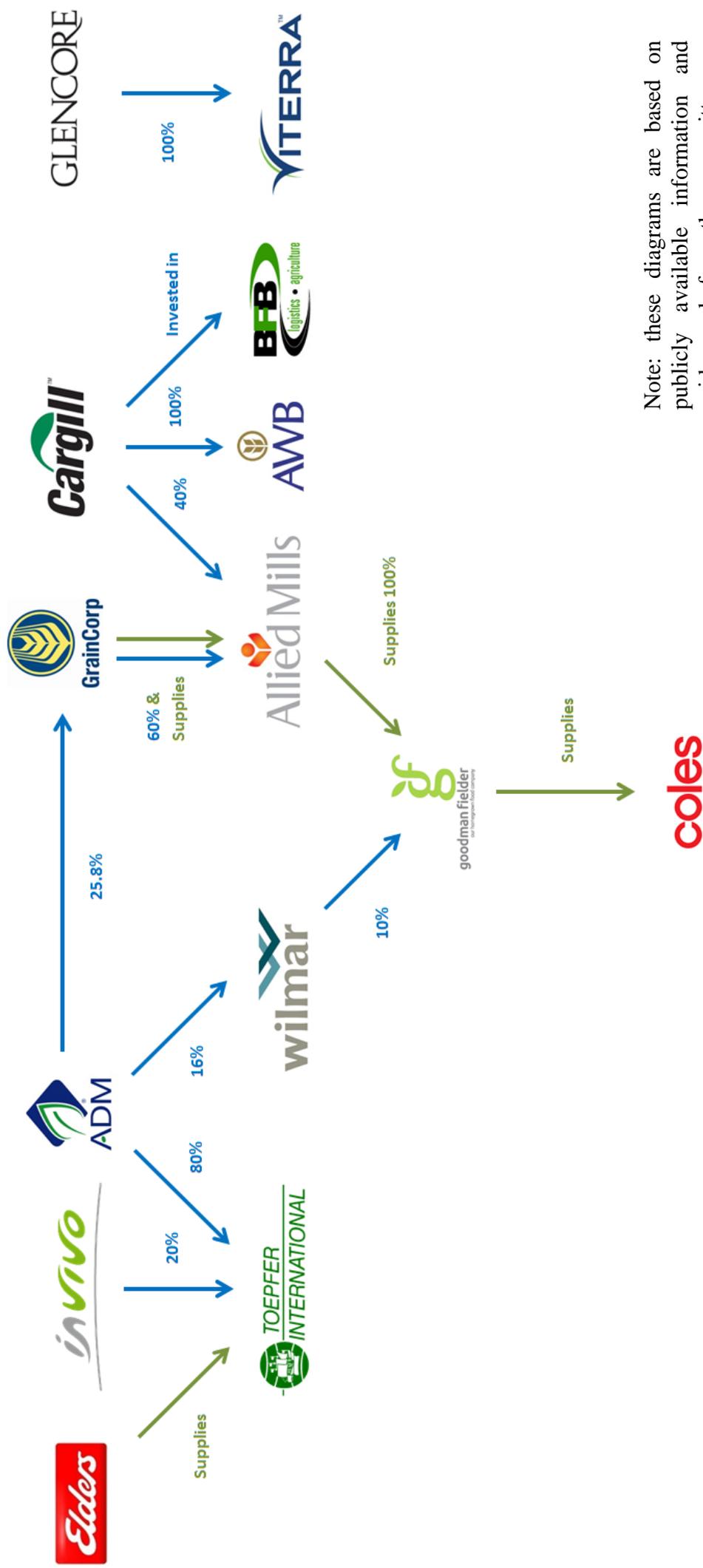
2.24 ADM also has an 80 per cent share in grain trader Toepfer International (Toepfer). The remaining interests in Toepfer are held by French agricultural cooperative Invivo Group.

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.



## 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.

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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).

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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).

## **Chapter 3**

### **Stakeholder views on Archer Daniel Midland's bid for GrainCorp**

3.1 A broad range of views were expressed over the course of the inquiry on Archer Daniel Midland's (ADM) proposed takeover of GrainCorp, both in written submissions and in public hearings held in Canberra on 18 June 2013 and Sydney on 16 July 2013.

3.2 A number of witnesses argued that ADM would provide much-needed capital investment in Australian grain storage and handling networks, while offering Australian growers access to new markets and an expanded knowledge base.

3.3 However, the majority of witnesses appearing before this committee who commented on the proposed takeover expressed either reservations about, or outright opposition to, GrainCorp's sale to ADM.

3.4 Concerns about the proposed takeover included:

- the potential for ADM to use its market power to the detriment of Australian growers, including through restricting or increasing the costs of third party access to its newly-acquired grain handling network. This is of serious concern to many of the contributors to this inquiry;
- that ADM might implement certain efficiencies to improve returns, that may well result in increased costs to growers, and which could include shutting down existing up-country storage sites; and
- that ADM's corporate culture and, in particular, historical record of unethical and illegal behaviour, introduced reputational and other risks for Australian growers.

3.5 For some witnesses, the apparent downsides of ADM's acquisition of GrainCorp meant that they advocated nothing less than the government blocking the takeover. Others, however, proposed making the sale subject to certain conditions, such as the divestment of particular assets currently owned by GrainCorp.

#### **Implications for access to the grain handling network**

3.6 A key point of concern for a number of witnesses was the market power ADM would have in the event of a takeover, and in particular ADM's capacity to exercise this market power in a way that restricted third party access to its newly-acquired grain handling and storage network.

3.7 Although not addressing ADM's bid for GrainCorp specifically, Southern Agventure argued that the capacity of vertically integrated bulk handlers to restrict third party access to the grain handling network ultimately meant that growers received less money for their grain:

It is clear that control of grain storage and related infrastructure including rail transport capability and port facilities places those organisations with

such control with a significant comparative advantage. It has the potential to impact on competing grain traders' access to grain handling facilities, ports, silos and transport infrastructure. Like many experiences with industry regulation, access to infrastructure is a major limitation to effective competition. [In] these circumstances, it is the grain grower who has the least influence and is forced to accept lower prices as a result particularly where regional infrastructure arrangements including stem through ports, mean effective monopoly positions for those with vertically integrated control.<sup>1</sup>

3.8 The committee is concerned by evidence that ADM officials presented at the public hearing on 18 June 2013, in which ADM officials expressed a lack of knowledge of GrainCorp's virtual monopoly ownership of storage and receival site operations on the eastern seaboard:

Senator NASH: I think it is a more important point for ADM than the grower because you will do it in the best interests of ADM. You mentioned that you would like to expand the market for Australian grains. Putting that against the fact that you operate in 140 countries, why should there be any comfort at all for Australian grain growers that they would be a priority? If you are looking to go into a market, be it Asia or wherever, and you are operating in 140 countries, why on earth would grain growers in Australia think that they are going to be a priority for you?

Mr Pinner: Two things: we have sales in 140 countries so we have a global network and access to the consumer and we can bring that back to the Australian grower; the other thing to remember is that Australian wheat is not the same as wheat around the world. It is hard, white wheat, quality wheat. It has certain functionality and uses. We have customers around the world that ask for it. And today we do not have a market share and an asset base in Australia. We think that by bringing the GrainCorp assets, that global market place, working with our end customer, the farmer on one end and at the other end the flour miller and processor, we can bring more value to the grain farmers in Australia.

Mr Bethell: The phrase 'virtual monopoly' was used. We do not see the evidence that up-country there is a virtual monopoly in terms of storage facilities.

Senator NASH: Seriously? You really believe that?

Mr Bethell: There have been no findings as far as we are aware that there is any kind of natural monopoly in the up-country storage system.

Senator NASH: I give up.<sup>2</sup>

3.9 Referring specifically to ADM's takeover bid, the Victorian Farmers Federation (VFF) told the committee that the combined assets of ADM and GrainCorp would create a vertically and horizontally integrated entity that dominated the grain

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1 Southern Agventure, *Submission 12*, pp 1–2.

2 *Proof Committee Hansard*, 18 June 2013, p. 8.

handling, storage and transportation network in eastern Australia. Indeed, according to the VFF, in the event of a takeover, ADM would possess an effective monopoly power which it might use to deny:

...fair and transparent access to ports, upcountry storage and/or market information. This would be at the expense of other third-party providers, such as domestic users, exporters, Australian producers and consumers.<sup>3</sup>

3.10 However, both GrainCorp and ADM rejected suggestions that GrainCorp operated a monopoly, and pointed to competition in Australian grain handling, storage and transportation systems. For instance, while ADM acknowledged that GrainCorp owns significant up-country and port infrastructure, it also stressed that 'all of its supply chain infrastructure faces significant competitive pressure'.<sup>4</sup>

3.11 In its submission, GrainCorp also emphasised that there was significant excess capacity in its storage and handling network. GrainCorp suggested that it was therefore in its commercial interest to maximise throughput, and any attempt to restrict third party access to its network would be contrary to that interest.<sup>5</sup>

3.12 ADM also indicated in its submission that it took as its starting point the view that:

...existing port and receival site access arrangements have served Australian growers well and that GrainCorp will continue to have strong incentives to continue to compete in the supply of grain storage and handling services. ADM is confident that there will be no adverse impact [from its takeover] for grain traders' access to grain handling facilities, ports, silos or transport infrastructure arising from the acquisition.<sup>6</sup>

3.13 A number of witnesses participating in the inquiry indicated that they were not comforted by these assurances, nor did they agree with GrainCorp's and ADM's characterisation of a competitive and transparent grain handling, storage and transportation services in eastern Australia. The different views on these matters, as they relate to port access and up-country storage facilities specifically, are addressed below.

### ***Port access***

3.14 Both GrainCorp and ADM suggested that GrainCorp's port infrastructure faced, as GrainCorp put it, 'Substantial (and growing) competition from alternate export pathways from eastern Australia'. This competition, GrainCorp suggested, was itself a natural disincentive to uncommercial behaviour, including any attempt to restrict third party or other exporter access.<sup>7</sup>

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3 Mr Brett Hosking, President, VFF Grains Group, Victorian Farmers Federation, *Proof Committee Hansard*, 16 July 2013, p. 38.

4 Archer Daniels Midland, *Submission 1*, p. 7.

5 GrainCorp, *Submission 7*, p. 3.

6 Archer Daniels Midland, *Submission 1*, p. 8.

7 GrainCorp, *Submission 9*, p. 12.

3.15 Similarly, ADM argued that GrainCorp's port terminals were:

...subject to a number of competitive pressures - from other competing bulk terminals (eg. Melbourne, Newcastle and Brisbane), containerised exports and the threat of customers bypassing GrainCorp facilities.<sup>8</sup>

3.16 Like GrainCorp, ADM suggested it would make no commercial sense for it to restrict third party access to the port infrastructure it would acquire should the takeover proceed. This was particularly the case because GrainCorp's ports were currently operating well below capacity – indeed, GrainCorp's ports had operated at approximately 35 per cent capacity over the past decade. Just as it was in GrainCorp's commercial interest to maximise throughput, so too would be in ADM's interest:

For this reason alone, ADM has a strong commercial motivation not to exclude any participant access—rather ADM intends to encourage more use so as to increase utilisation of the ports.<sup>9</sup>

3.17 GrainCorp and ADM also pointed out that, in addition to the commercial imperatives to maximise throughput, GrainCorp's ports were subject to access undertakings required by the government. If an exporter of grain or an associated entity is the provider of one or more port terminal services, that exporter must have port access undertakings in place with the Australian Competition and Consumer Commission (ACCC).<sup>10</sup>

3.18 In its submission, ADM stated that it was committed to operating GrainCorp's port services in accordance with existing 'open access' arrangements.<sup>11</sup> This commitment was also expressed in an 'open letter to Australian growers' published on ADM's website:

ADM will continue to provide access to GrainCorp's bulk grain export terminals in accordance with GrainCorp's access undertakings with the Australian Competition & Consumer Commission, and ADM will honour all long-term and short-term port access agreements with GrainCorp customers.<sup>12</sup>

3.19 During the inquiry, it was noted that the requirement to have access undertakings in place with the ACCC will be removed on 1 October 2014, provided that a mandatory industry code of conduct is prescribed under the *Competition and*

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8 Archer Daniels Midland, *Submission 1*, p. 7.

9 Archer Daniels Midland, *Submission 1*, pp 8–9; GrainCorp, *Submission 9*, p. 11.

10 Information on access undertakings is available at Grain Trade Australia, 'Prescribed Mandatory Code of Conduct for Port Access', <http://www.graintrade.org.au/node/499> (accessed 27 August 2013).

11 Archer Daniels Midland, *Submission 1*, p. 8.

12 Archer Daniels Midland, 'An Open Letter to Australian Growers', <http://www.adm.com/en-US/company/ADMandGrainCorp/OpenLetter/Pages/default.aspx> (accessed 27 August 2013).

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*Consumer Act 2010*. From that point forward, access to port services will be governed by the code and general competition law.<sup>13</sup>

3.20 Some witnesses expressed confidence that the shift from access undertakings with the ACCC to a mandatory code of conduct would provide clear and enforceable rules regarding port access. For instance, Australian Grain Exporters Association (AGEA) told the committee:

The mandatory code of conduct will have a lot more teeth than previously what we had with the access undertakings. So whenever that gets put in place we will have a new set of rules and, hopefully, we can move forward with better access.<sup>14</sup>

3.21 Under questioning AGEA was unable to tell the committee what the exact sanctions would be for breaches of the mandatory code of conduct. However, AGEA emphasised that the penalties were referred to in the Competition and Consumer Act, and could be quite substantial, depending on the level of the breach.<sup>15</sup>

3.22 Despite the existing arrangements relating to access undertakings, and the plan to move to a mandatory code of conduct, a number of witnesses questioned whether ADM would provide fair access to the port infrastructure it would acquire from GrainCorp.

3.23 Grain Growers told the committee that it had conducted a survey of its membership on the ADM takeover, and 89 per cent of respondents had indicated that they believed a foreign takeover of GrainCorp's ports would have an impact on port access.<sup>16</sup> As Grain Growers explained to the committee, this result was a:

...very strong indication ... that [growers] were concerned about the impact that a foreign company would have in potentially having control of the ports. It was very clear from our membership that there were concerns out there about the potential change.<sup>17</sup>

3.24 NSW Farmers, meanwhile, suggested that:

...it is appropriate to consider the current development of the mandatory code of conduct by the Australian Government, as required by the Wheat Export Marketing Amendment Act 2012, in any approval process for the sale. NSW Farmers has made submissions to the ACCC that if the

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13 Information on access undertakings is available at Grain Trade Australia, 'Prescribed Mandatory Code of Conduct for Port Access', <http://www.graintrade.org.au/node/499> (accessed 27 August 2013).

14 Ms Rosemary Richards, Executive Officer, Australian Grain Exporters Association, *Proof Committee Hansard*, 16 July 2013, p. 65.

15 Ms Rosemary Richards, Executive Officer, Australian Grain Exporters Association, *Proof Committee Hansard*, 16 July 2013, p. 68.

16 Dr Michael Southan, General Manager, Grower Engagement, Grain Growers Limited, *Proof Committee Hansard*, 16 July 2013, p. 69.

17 Dr Michael Southan, General Manager, Grower Engagement, Grain Growers Limited, *Proof Committee Hansard*, 16 July 2013, p. 69.

provisions within the proposed code are not considered adequate, or alternatively not in a form at which the ACCC is able to make such a determination, that the ACCC should reserve any findings it makes within this review. In such a case it would also be appropriate for the ACCC to publicly state what the appropriate conditions within the code would be.<sup>18</sup>

### ***Access to up-country storage sites***

3.25 Both ADM and GrainCorp argued that there is significant competition in terms of up-country storage facilities and services in eastern Australia, and that it would remain in the commercial interest of whoever owned GrainCorp's storage infrastructure to maximise throughput.

3.26 In its submission, ADM argued that while GrainCorp accounted for about half of the up-country storage capacity in eastern Australia, significant capacity was also owned by growers (on farm), merchants and other bulk handlers. ADM further noted that:

...some 80% of the grain that passes through the GrainCorp up-country storage network is owned by entities other than GrainCorp. In relation to grain trading, it is widely accepted that the Australian market is now highly competitive, with a range of international and Australian players active in the market.<sup>19</sup>

3.27 Similarly, GrainCorp characterised the market for up-country storage providers as a competitive one, and noted that its country storage and receival network 'competes in an environment where there is substantial excess capacity – enough to hold the average winter harvest (17 million tonnes) approximately 2.3 times over'.<sup>20</sup>

3.28 GrainCorp argued that if they failed to provide competitive terms and conditions to growers for the use of GrainCorp's storage facilities, then growers would respond by storing their grain elsewhere or bypassing the GrainCorp network and taking their grain direct to a customer.<sup>21</sup>

3.29 ADM, meanwhile, told the committee that, like GrainCorp, it would be in its commercial interest to maximise the amount of grain in its storage and handling network, including at up-country storage and receival sites.<sup>22</sup> In its abovementioned 'open letter to Australian growers', ADM also made the following commitment:

In terms of country receival sites, ADM's intention is to ensure its network remains relevant and responsive to grower needs. It is in ADM's interest to

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18 New South Wales Famers, *Submission 11*, p. 10.

19 Archer Daniels Midland, *Submission 1*, p. 7.

20 GrainCorp, *Submission 7*, p. 3.

21 Ms Alison Watkins, Managing Director and Chief Executive Officer, GrainCorp, *Proof Committee Hansard*, 16 July 2013, pp 23, 29–31.

22 Archer Daniels Midland, *Submission 1*, p. 8.

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ensure that its origination networks and up-country storage facilities are efficiently utilised by providing open access to all owners of grain.<sup>23</sup>

3.30 NSW Farmers challenged suggestions from GrainCorp and ADM that if growers were not provided with access to GrainCorp storage facilities on terms they felt fair, then they could deliver to an alternative site or install their own on-farm storage. According to NSW Farmers, ADM's assertion that, if growers were dissatisfied with the fees and charges imposed by GrainCorp for use of its up-country storage facilities, they could simply:

...tip down the road shows little understanding of the dominance that GrainCorp holds in the marketplace. Farmers are rational business men and women, and to deliver to the site further away [or] to invest in long-term storages requires grain prices for these market options to include enough margin to cover these additional costs.<sup>24</sup>

3.31 NSW Farmers also emphasised that operational costs and pressures during harvest meant that, contrary to what ADM and GrainCorp appeared to be suggesting, growers were not in a position to 'vote with their trucks' when deciding where to deliver their grain:

We have seen increases where we are now paying exorbitant fees and charges for delivering our grain, and the last thing we want to be doing is putting our grain on our trucks and heading off another 40 or 50 km down the road at an additional cost to us. The time and the expense it costs us to turn our trucks around at a site—we are competing with other people as well—means the more we are forced to centralise our receivals. The more competition we are receiving there for our truck receivals during harvest, when we have big headers roaming around there stripping 60 or 70 tonnes of wheat an hour, then the last thing we want to do is send off a B-double [a type of road train] an extra hour down the track to sit in a queue where we can only get two loads of wheat off in a day and competing with all the other cockies that are there.<sup>25</sup>

3.32 AgForce Queensland (AgForce), meanwhile, suggested the lack of competition in terms of up-country storage facilities had resulted in inefficient practices on GrainCorp's part, and producers and other agribusinesses were bearing the costs of this inefficiency. Specifically, AgForce argued that traders and marketers in Queensland sometimes faced difficulties in accessing grain in a timely and efficient fashion once it was in GrainCorp's handling system:

The biggest problem currently facing traders and marketers in Queensland is their ability to access and accumulate grain when required. Due to

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23 Archer Daniels Midland, 'An Open Letter to Australian Growers', <http://www.adm.com/en-US/company/ADMandGrainCorp/OpenLetter/Pages/default.aspx> (accessed 27 August 2013).

24 Mr Mark Hoskinson, Chairman, Grains Committee, New South Wales Farmers Association, *Proof Committee Hansard*, 16 July 2013, p. 37.

25 Mr Mark Hoskinson, Chairman, Grains Committee, New South Wales Farmers Association, *Proof Committee Hansard*, 16 July 2013, p. 39.

GrainCorp currently having a basic monopoly on up-country storage, traders, marketers and producers are only able to access their grain when it is suitable for GrainCorp. This has proven to be a significant issue and is costing competitors time and money.<sup>26</sup>

3.33 In its appearance before the committee, AgForce did not suggest the situation would necessarily be worse as a result of ADM's takeover, but it did question the strength of the current competition regulatory system:

Even though they have told us they are going to allow other people access to up-country storage, access to ports, there is still really no teeth anywhere in the system whereby we can guarantee that. Certainly, we do not have any confidence in the ACCC being of any value at all.<sup>27</sup>

3.34 As such, AgForce argued that should the takeover proceed, ADM should be required to provide assurances that it will be efficient and accountable in providing access to grain held in its storage network.<sup>28</sup>

3.35 Other witnesses also argued that, in light of GrainCorp's ownership of such a significant part of eastern Australia's up-country storage capacity, it would be appropriate to place conditions on ADM's takeover to ensure growers' interests were protected. These potential conditions are discussed further below.

3.36 The committee notes that since making submissions to this inquiry, NSW Farmers, VFF and Agforce have publicly expressed concerns about the potential impact of ADM's bid on competition.<sup>29</sup> NSW Farmers and VFF have both passed resolutions opposing the sale of Graincorp,<sup>30</sup> while Agforce has sought assurances from the Government and ADM that they would allow access to ports and would not hinder trading or handling competition in the market.<sup>31</sup>

### **Recommendations that ADM's takeover be subject to access conditions**

3.37 To protect the interests of growers and promote a competitive market for storage and handling services, several witnesses participating in this inquiry argued that ADM's takeover should be subject to certain conditions.

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26 AgForce Queensland, *Submission 4*, attachment, p. 3.

27 Mr Wayne Newton, AgForce Grains President, AgForce Grains Limited, *Proof Committee Hansard*, 16 July 2013, p. 62.

28 AgForce Queensland, *Submission 4*, attachment, pp. 4–5.

29 Grace Ryan, 'East coast farmers join forces against ADM takeover', *Western Advocate*, 21 August 2013, <http://www.westernadvocate.com.au/story/1720904/east-coast-farmers-join-forces-against-adm-takeover/?cs=114> (accessed 28 August 2013).

30 Grace Ryan, 'East coast farmers join forces against ADM takeover', *Western Advocate*, 21 August 2013, <http://www.westernadvocate.com.au/story/1720904/east-coast-farmers-join-forces-against-adm-takeover/?cs=114> (accessed 28 August 2013).

31 Agforce, 'Agriculture - 30 Issues, 30 Days Issue 28: Graincorp and ADM', 19 August 2013, <http://www.agforceqld.org.au/index.php?tgtPage=news&id=view,366> (accessed 28 August 2013).

3.38 With respect to ADM's assurances to growers that it would maintain existing access arrangements for up-country storage facilities and abide by any regulations at port, NSW Farmers suggested these assurances would carry more weight if ADM agreed to make them mandatory conditions of its proposed takeover:

In our initial meeting we proposed to ADM that if they are genuine in delivering those outcomes for growers they should offer them up as a mandatory condition as part of the foreign investment review process. It is disappointing that, as yet, ADM do not appear to have done so. Until this [happens], growers will not have any real choice but [to] be sceptical about their intentions.<sup>32</sup>

3.39 Appearing before the committee the VFF also suggested that:

...guaranteeing access to upcountry infrastructure and upcountry market stocks information through the ACCC and/or a mandatory code of conduct should be relatively achievable conditions of a sale that could be recommended by the Treasurer.<sup>33</sup>

3.40 The VFF subsequently added that:

...if we can have some sort of undertaking—I should be careful of what words I use—to ports, to up-country silos and to marketing information, so that there is a transparent and competitive market, that will go a long way to addressing a lot of the concerns we have around the way the market is operating at the moment and potentially if ADM do take over GrainCorp.<sup>34</sup>

3.41 Several witnesses, including NSW Farmers and Link Agriculture, also argued that should the takeover proceed, ADM should be required to divest certain assets in order to encourage a more competitive marketplace.

3.42 For its part, Link Agriculture noted that GrainCorp currently owns up-country storage sites that are unused and unmaintained. Link Agriculture therefore recommended that ADM 'ought to be forced to divest themselves of the hundreds of currently unused vertical storage facilities'.<sup>35</sup>

3.43 Asked about its suggestion that divestments should be part of any takeover, NSW Farmers provided a chart to the committee showing GrainCorp sites in NSW, and stated that it:

...shows that there is a certain amount of grain in the north of the state that goes out through Newcastle. In the southern part of the state it is bottlenecked through Port Kembla. There is leakage through some ports

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32 Mr Mark Hoskinson, Chairman, Grains Committee, New South Wales Farmers Association, *Proof Committee Hansard*, 16 July 2013, p. 38.

33 Mr Brett Hosking, President, VFF Grains Group, Victorian Farmers Federation, *Proof Committee Hansard*, 16 July 2013, p. 38.

34 Mr Stephen Sheridan, Manager, VFF Grains Group, Victorian Farmers Federation, *Proof Committee Hansard*, 16 July 2013, p. 45.

35 Link Agriculture, *Submission 13*, p. 1.

down in Victoria. We are saying that, to break that monopoly up, the Port Kembla port should be divested in the equation.<sup>36</sup>

3.44 Asked how NSW Farmers envisaged such a divestment might take place, the committee was told:

Our position on it is that we ask the ACCC to consider that, noting our concerns about different incentives for behaviour, but it could fit quite clearly within either FIRB's remit or the Treasury's remit through the Acquisitions Act. The ACCC could also use its powers of divestment under the competition and consumer law. So the reality is that, as growers, our members need to see improvements in competition. We cannot be locked into the suboptimal bottleneck infrastructure that we have. Even the ANZ's 'Greener Pastures: The Global Soft Commodity Opportunity for Australia and New Zealand' report talked a lot about how we have not gone far enough with regard to ensuring contestability on port infrastructure and other bottleneck infrastructure.<sup>37</sup>

### **Risk of sites being closed in search for new efficiencies**

3.45 In addition to hearing evidence from various witnesses on the potential impact of the proposed takeover on third party access to up-country storage facilities, several witnesses also raised concerns that such facilities might be closed by ADM in a search for new efficiencies.

3.46 ADM wrote that it recognised the importance of up-country silos 'to growers as a key part of the value chain, and to local communities as a seasonal source of employment'. ADM added that it will continue GrainCorp's current practice of assessing which facilities will be opened on a year-by-year basis, with that assessment based on the level of the harvest.<sup>38</sup>

3.47 Despite these assurances, several witnesses remained concerned that ADM would close storage sites and supporting infrastructure as it sought to improve profitability, and this would be to the detriment of both growers and local communities.

3.48 NSW Farmers told the committee that it had been unable to secure any details from ADM regarding how it would identify and develop new operational efficiencies. As such, NSW Farmers expressed concerns that ADM's search for 'operational efficiencies' would mean closing down storage facilities.<sup>39</sup>

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36 Mr Mark Hoskinson, Chairman, Grains Committee, New South Wales Farmers Association, *Proof Committee Hansard*, 16 July 2013, p. 43.

37 Mr Justin Crosby, Policy Director, New South Wales Farmers Association, *Proof Committee Hansard*, 16 July 2013, p. 43. The ANZ report, released on 19 October 2012, is available at <http://www.media.anz.com/phoenix.zhtml?c=248677&p=irol-insight> (accessed 27 August 2013).

38 Archer Daniels Midland, *Submission 1*, p. 8.

39 Mr Mark Hoskinson, Chairman, Grains Committee, New South Wales Farmers Association, *Proof Committee Hansard*, 16 July 2013, p. 37.

3.49 Expanding on this point, NSW Farmers told the committee that such closures would not only affect growers, but would also damage local communities:

If they are talking about efficiencies and if we see supply chain closures, we are also talking about rural and regional Australia and the effect that is going to have on jobs. We have got a lot of people out there in full-time jobs working in communities. We have people—farmers' wives and daughters and sons—who get part-time work at silos. That is going to have a detrimental effect on those people especially if we see rationalisation of the upcountry storages on the branch lines, and we as New South Wales farmers—and I am sure that VFF are doing the same thing—are fighting tooth and nail to keep these branch lines open. Any rationalisation of sites along those lines will jeopardise those lines and we will be forced by lack of investment to put our grain on the road competing with the school buses and everything else—<sup>40</sup>

3.50 AgForce suggested that if ADM intends to close any GrainCorp storage sites without selling them to another user, it should provide assurances that the sites will not become eyesores, and that any such closures are undertaken in consultation with local communities.<sup>41</sup>

### **ADM's record as a corporate citizen**

3.51 In its submission, ADM emphasised its 'strong grower-focused culture'.<sup>42</sup> It also suggested that, like GrainCorp, ADM was 'built on a foundation of strong values that include integrity, respect, responsibility and a firm commitment to good stewardship of the land'.<sup>43</sup>

3.52 While ADM emphasised its positive corporate culture and strong guiding values to the committee, this inquiry has also focused on past instances of ADM's involvement in illegal or unethical behaviour.

3.53 NSW Farmers suggested that ADM's record of illegal activities could potentially damage the reputation of Australian growers:

Recent scrutiny by this committee and the Australian Broadcasting Corporation's *Background Briefing* program has brought the incidences of the illegality in ADM's operations to light. It is the New South Wales Farmers' concern that this history may bring the reputation of Australian growers into disrepute, a matter for consideration in determining whether the sale is in the national interest. This was one of the reasons former wheat

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40 Mr Mark Hoskinson, Chairman, Grains Committee, New South Wales Farmers Association, *Proof Committee Hansard*, 16 July 2013, p. 40.

41 AgForce Queensland, *Submission 4*, attachment, pp. 10–11.

42 Archer Daniels Midland, *Submission 1*, p. 7.

43 Archer Daniels Midland, *Submission 1*, p. 12.

export licence arrangements required Wheat Exports Australia to consider the previous history of an exporter.<sup>44</sup>

3.54 Given the publicity surrounding ADM's corporate record, NSW Farmers told the committee that any government decision on ADM's proposed takeover should have regard to ADM's corporate record:

In particular, any decision should specify how ADM has addressed concerns that arise from previous illegalities that it was associated with and, if necessary, the assurance measures that the Australian government will require to ensure that it will not impact on the reputation of Australian grain and its markets.<sup>45</sup>

### **Concerns regarding wheat blending**

3.55 Although not a major focus of the inquiry, NSW Farmers raised concerns that ADM's takeover might lead to a reduction in the standard of Australian wheat being exported, and in turn damage the reputation of the product that east coast Australian growers had built over a long period of time.

3.56 Specifically, NSW Farmers told the committee that:

...since deregulation, we have been battling with the ideas of producing clean green wheat of high quality and continuing that quality, and we now face sending our grain into these markets where American wheat could be sold alongside our grain, bringing our wheat quality into question. It really concerns me that we will be forced to grow wheat of fair-average quality, down from where we used to grow some of the best in the world, and supplying the markets. The east coast of Australia—and I am not putting any rubbish on Western Australia—is the only place in Australia where we produce the highest quality grain, the prime hard varieties of the milling quality, and we supply genuine customers who are already showing concerns that the quality seems to be dropping off since deregulation. So we are trying to hold onto those markets and the last thing we want to do is lose them through quality issues, and quality cannot be guaranteed because we now have an American company which can totally control our supply chain.<sup>46</sup>

### **The balance between the interests of shareholders and growers**

3.57 Witnesses participating in this inquiry expressed a range of views on the whether ADM's takeover would be in the interests of GrainCorp's shareholders, and if these interests were potentially in conflict with the interests of growers.

3.58 In its submission, GrainCorp rejected the notion that:

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44 Mr Mark Hoskinson, Chairman, Grains Committee, New South Wales Farmers Association, *Proof Committee Hansard*, 16 July 2013, p. 38.

45 Mr Mark Hoskinson, Chairman, Grains Committee, New South Wales Farmers Association, *Proof Committee Hansard*, 16 July 2013, p. 38.

46 Mr Mark Hoskinson, Chairman, Grains Committee, New South Wales Farmers Association, *Proof Committee Hansard*, 16 July 2013, p. 39.

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...the interests of its shareholders and those of Australian growers or consumers are somehow mutually exclusive. Regardless of ownership structure, without Australian growers and the grain they produce, and without consumer demand for the products the company handles and processes, GrainCorp's business would not be able to generate a return for its owners.<sup>47</sup>

3.59 Similarly, ADM maintained that 'everything we do begins with the grower'. To this end, it committed to establishing a GrainCorp Grower and Community Advisory Group, which would:

...provide a conduit between GrainCorp management and the views of growers and their communities. To be chaired by a distinguished person with a strong affiliation with regional and rural Australia and the grower community, it will also include four growers – one from each of New South Wales, Victoria and Queensland and an additional grower representative. Other Advisory Group members will include senior GrainCorp management representatives, as well as a person with a strong connection to regional and rural community organisations.<sup>48</sup>

3.60 In its appearance before the committee, Pastoralists and Graziers Association (PGA) Western Graingrowers underlined the value of ADM's takeover offer for GrainCorp shareholders, stating that:

...there is a very good offer before the GrainCorp shareholders that will greatly advantage the GrainCorp company and enable Australia to serve its overseas customers, and the GrainCorp shareholders will benefit substantially from it.<sup>49</sup>

3.61 NSW Farmers, however, questioned whether the takeover would, in fact, be in the best interests of GrainCorp shareholders. As Mr Hoskinson told the committee:

A number of [GrainCorp's] shareholders have brought to my attention section 2.7 of the bidder's statement [provided to them by ADM]. This section outlines that, in the instance that ADM achieves acceptance of the bid—that is, over 50 per cent of the voters' shares—it will, as far as possible, exert its control over GrainCorp including the timing ... and the quantum of any future dividends. These shareholders have outlined their concerns that they have felt intimidated by the way ADM has approached this obligation and that, to them, that indicates a low level of willingness from ADM to act in the best interests of GrainCorp, the company as a whole, let alone in the interests of the farmers or in the national interest.<sup>50</sup>

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47 GrainCorp, *Submission 7*, p. 3.

48 Archer Daniels Midland, *Submission 1*, p. 12.

49 Mr Leon Bradley, Committee Member, PGA Western Graingrowers, The Pastoralists and Graziers Association of Western Australia, *Proof Committee Hansard*, 16 July 2013, p. 59.

50 Mr Mark Hoskinson, Chairman, Grains Committee, New South Wales Farmers Association, *Proof Committee Hansard*, 16 July 2013, p. 38.

3.62 Similarly, Mrs Gillian and Mr Don Haling contended that ADM's proposed takeover was neither in the interest of growers or GrainCorp shareholders. They suggested that given GrainCorp was already growing and providing strong returns to shareholders and a 'very efficient service to grain growers', it made little sense to sell the company to ADM.<sup>51</sup>

3.63 The VFF, meanwhile, drew a clear distinction between the interests of shareholders and the interests of growers and the nation more broadly, particularly given what it regarded as ADM's uneven record as a good corporate citizen:

[F]rom the shareholders' point of view, that probably is a good deal. From our nation's point of view and from our community's point of view and from the growers' point of view, there is a lot of threat potentially coming our way with the deal. It is that unknown. And, as has been pointed out, we do not know how ADM are going to behave if they come to Australia. I am not Tom Waterhouse, but I would give pretty good odds as to how they are going to behave.<sup>52</sup>

3.64 AgForce wrote in its submission that because GrainCorp is already a publicly listed company, a change in ownership would produce little change in the balance between shareholder and grower interests. Nonetheless, AgForce also suggested that in:

...recent years in Queensland producers believe that the service and benefits to producers did come second to shareholders. The majority of sites in Queensland have not had adequate maintenance carried out for some time, equipment does not work properly and traders and producers alike have difficulty accessing their grain in storage. However, the profits announced by GrainCorp in the last two years have been amongst the largest, if not the largest ever posted by GrainCorp.

AgForce believe GrainCorp's quest for profit has been at the expense of producers. While this is a difficult problem to address with a non-government entity, AgForce believe that some of the problems currently being experience can be resolved by ensuring open and free access to up-country storage sites and that any anti-competitive behaviour is met with swift and appropriate action.<sup>53</sup>

3.65 AgForce noted that, historically speaking, GrainCorp's infrastructure had been built to serve growers interests. It would therefore be inappropriate for this infrastructure to now be used simply to maximise profit for its owner.<sup>54</sup>

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51 Mrs and Mr Gillian and Don Haling, *Submission 2*, pp. 1–2.

52 Mr Brett Hosking, President, VFF Grains Group, Victorian Farmers Federation, *Proof Committee Hansard*, 16 July 2013, p. 39.

53 AgForce Queensland, *Submission 4*, p. 2,

54 Mr Wayne Newton, AgForce Grains President, AgForce Grains Limited, *Proof Committee Hansard*, 16 July 2013, p. 57.

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## ADM's takeover bid and foreign investment in Australian agribusiness

3.66 In its submission to this inquiry, ADM highlighted its international record of investing to grow its agricultural value chain:

In building those networks, ADM has created growth and opportunity up and down the agricultural value chain, from the grower to the truck driver to the plant operator to the food manufacturer. As ADM grows its value chain, it benefits people, communities and businesses at every link.

That is the future we see in Australia as well. As Australian agriculture looks to grow its ability to serve expanding global markets, a strong global partner, helping to create a more robust industry up and down the value chain, can only strengthen those efforts.<sup>55</sup>

3.67 ADM also pointed to its history of investment in infrastructure and research and development, and its commitment to working with GrainCorp's management to identify areas where further investment can deliver improved operational efficiencies. ADM suggested such investments might be made, for example, in 'new stackers and intake capacity increases to allow faster truck discharge, improved communications technology, and increased storage capacity'.<sup>56</sup>

3.68 More specifically, ADM has committed to supporting or investing \$300 million in capital expenditure in the GrainCorp business from the execution of the implementation deed on 25 April 2013. This figure would include the \$250 million in expenditure announced by GrainCorp in 2012, plus an additional \$50 million 'on strategic expenditure for the GrainCorp business'. This amount would be in addition to the annual expenditure required to maintain and improve GrainCorp's existing assets, which will average between \$40 million and \$60 million in coming years.<sup>57</sup>

3.69 Several written submissions and witnesses appearing before the committee argued that ADM's takeover bid represented an opportunity to provide much-needed capital investment in Australian agribusiness.

3.70 In both its submission and appearance before the committee, PGA Western Graingrowers argued that greater foreign investment in Australian agriculture was a welcome development. In particular, PGA highlighted the access international corporations have to global financial markets, and the liquidity they can bring to the Australian grains marketplace. Addressing concerns expressed by AgForce about a lack of competition and the unfair advantage the marketing arms of bulk handling companies had over other non-bulk handling companies in terms of access to grain and stocks information, PGA Western Graingrowers told the committee:

We believe that foreign investment in infrastructure will encourage competition, and a lot of the problems that were raised by the previous

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55 Archer Daniels Midland, *Submission 1*, p. 4.

56 Archer Daniels Midland, *Submission 1*, p. 10.

57 Archer Daniels Midland, *Submission 1*, p. 10.

speaker are better resolved by competition and investment rather than a return to a heavy-handed regulation that completely ignores the requirements of customers overseas.<sup>58</sup>

3.71 Farmer and former chairman of GrainCorp, Mr Ron Greentree, argued that GrainCorp, under its current ownership arrangements, was not in a position to provide the capital investment in the grain storage and handling network that Australian growers needed:

The capital requirements are ginormous to be able to keep our business farm going and even more so outside the farm gate. The farmers have spent their capital on trying to get their crop off and get it under store very quickly—the size of our headers, our augers. We have all spent it, but unfortunately outside the farm gate the amount of capital has not kept pace. Elevator capacities at GrainCorp silos on average have not changed over the last 20 or 30 years. If they have not kept up with us, we can see that our cost of storing and transport has doubled in the last seven years on the east coast of Australia. My worry is that I do not believe that GrainCorp under its present structure and ownership will have the means to be able to keep up with that investment in storage and handling going into the future.<sup>59</sup>

3.72 Mr Greentree added:

[E]very farmer has had frustration with GrainCorp about not spending and how slow they are and how long the silo lines are. That has not gone away. That is going to stay until they start putting more capital into the storage system.<sup>60</sup>

3.73 Mr Greentree told the committee that without greater capital investment in the storage and handling network, Australian growers would continue to face rising costs, undermining their competitiveness.<sup>61</sup>

3.74 Mr Greentree suggested that ADM was more likely than GrainCorp 'to spend the money on the infrastructure that affects farmers'.<sup>62</sup>

3.75 Mr Greentree contended that GrainCorp had been running at a loss in drought years, so in those years at least it lacked the capital required to invest in the grain storage and handling network. He also took the view that what money GrainCorp had been able to raise was largely being spent overseas on GrainCorp's malt business, which it had diversified into:

So there is no capital that can be spent. They have had to go and do rights issues. They have had to go and raise more capital to keep the show going.

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58 Mr Leon Bradley, Committee Member, PGA Western Graingrowers, The Pastoralists and Graziers Association of Western Australia, *Proof Committee Hansard*, 16 July 2013, p. 58; PGA, *Submission 6*, p. 3.

59 Mr Ron Greentree, farmer, *Proof Committee Hansard*, 16 July 2013, p. 51.

60 Mr Ron Greentree, farmer, *Proof Committee Hansard*, 16 July 2013, p. 55.

61 Mr Ron Greentree, farmer, *Proof Committee Hansard*, 16 July 2013, p. 52.

62 Mr Ron Greentree, farmer, *Proof Committee Hansard*, 16 July 2013, p. 51.

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And what have they done with that? They have gone and spent that money overseas. I cannot see how that is going to stop happening, because they freely admit they want to takeover-proof themselves. If they stay like they are now, they may continue to do that. That money might never come home. They seem to think that storage and handling is not trendy, but that is what is affecting us as growers and I am very concerned.<sup>63</sup>

3.76 Mr Greentree argued that ADM's larger capital base and more diverse sources of income compared to GrainCorp provided it with greater ongoing capacity to finance investments in the Australian grain storage and handling network:

What I am saying is that GrainCorp in their present structure will not be able to do that because the majority of the income will come from the east coast of Australia and there could be a drought here. I am saying that there is potential for a company like ADM, if they wanted to, to still have other places of income where they could put into Australia where GrainCorp could not. What I am on about is more about what GrainCorp are not doing for Australian east coast farmers at the moment and trying to get that better.<sup>64</sup>

3.77 While not questioning GrainCorp's capacity to invest in the grain storage and handling network, ADM made a similar point in its submission about its own capacity to maintain stable investment levels, including through periods of drought:

With one of the strongest balance sheets in the agricultural sector, ADM can support the accumulation of quality Australian grain to underpin long-term global demand, while at the same time supporting ongoing investment in grain handling infrastructure. Because of this financial strength and geographical diversity, ADM can also manage through drought conditions and supply shocks to ensure they are there for the grower year after year.<sup>65</sup>

3.78 Although not referring to ADM's proposed takeover of GrainCorp specifically, AGEA made the general point that the grains industry is a global business, and 'foreign investment is one mechanism for ensuring the industry can build economies of scale and can access and leverage global knowledge, technologies and innovations'. AGEA further suggested that Australian supply chains were high cost compared to Australia's competitors, 'and further investment is required to ensure supply chains are competitive and efficient'.<sup>66</sup>

3.79 In addition to underlining the need for foreign investment in Australian agribusiness, Mr Greentree told the committee that he believed that if the takeover was blocked, this could have a devastating impact on GrainCorp's value, and weaken what he believed to be its already limited capacity to fund capital investment:

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63 Mr Ron Greentree, farmer, *Proof Committee Hansard*, 16 July 2013, p. 51.

64 Mr Ron Greentree, farmer, *Proof Committee Hansard*, 16 July 2013, p. 55.

65 Archer Daniels Midland, *Submission 1*, p. 11.

66 AGEA, *Submission 5*, pp 12.

I suppose my other concern is that, hypothetically, if the deal did not go ahead, we would know what the share price was before the offer. I do not know the figure, but maybe 40 or 50 per cent of the shareholders' money could be held in overseas funds. I believe that those people could then, hypothetically, pull out—this is just my personal opinion—and the share price could crash. Then we would have less confidence in overseas capital investing in agribusiness in Australia. That really scares me. If they lose that confidence in GrainCorp then they will not have the backing. If they have to go out and raise more money then they are going to spend less money on capital, because they can only do it from profits and they might have to use that capital just to keep the show going.<sup>67</sup>

3.80 Several witnesses also focused on the impact a regulatory rejection of ADM's takeover bid, or a broader shift to a more restrictive policy setting with regard to foreign investment, might have on Australian agribusiness.

3.81 Mr Greentree argued that if, in response to regulatory delays, ADM withdrew its application for takeover approval:

...the message that would send to the world about investing in agribusiness in Australia would be a bad outcome and could potentially stop or very much slow down that stream of money.<sup>68</sup>

3.82 Similarly, PGA told the committee that it was:

...very concerned that the message being conveyed to the international markets, the signals that they are receiving, is that Australia is no longer a friendly place for investment, and the signals it sends to local investors—in what will be, I believe, a very considerable loss to GrainCorp shareholders if this proposal is not allowed to go ahead—are very discouraging for the prospects of the wheat industry in Australia.<sup>69</sup>

3.83 Although not addressing ADM's proposed takeover, AGEA made a broader point about the risks involved in a move to a more restrictive policy setting with regards to foreign investment, cautioning that:

...any policy shift to a more restrictive environment in relation to foreign investment and/or ownership of supply chain assets may give rise to concerns about sovereign risk amongst investors. This will influence future investment decisions that could impact on growth in the industry and may see capital allocated to other origins/enterprises.<sup>70</sup>

3.84 In contrast, Mr Jock Munro told the committee that it was inaccurate to characterise ADM's takeover as 'foreign investment'. According to Mr Munro:

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67 Mr Ron Greentree, farmer, *Proof Committee Hansard*, 16 July 2013, p. 52.

68 Mr Ron Greentree, farmer, *Proof Committee Hansard*, 16 July 2013, p. 53.

69 Mr Leon Bradley, Committee Member, PGA Western Graingrowers, The Pastoralists and Graziers Association of Western Australia, *Proof Committee Hansard*, 16 July 2013, p. 58.

70 AGEA, *Submission 5*, p. 3.

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...this is not an investment this is a clear sell out, and to say that Australia has not got the money, cannot create enough cash to invest in its own industries, is a complete fallacy. The money that built these assets came from the land. We created that money ourselves and built these assets. To say that we cannot go on updating those assets and continue to improve them is just a nonsense.<sup>71</sup>

3.85 While expressing in-principle support for foreign investment, NSW Farmers argued that ADM's proposed takeover would not bring with it new capital investments in the grain handling network:

New South Wales Farmers agree that direct foreign investment has played an important part in the development of the Australian agricultural industry. However, this has traditionally been where the investment has assisted in the development of new infrastructure or in the establishment of a production system necessary for producing new commodities. The proposed acquisition of GrainCorp by ADM fails to fit these established patterns. Growers more accurately view it as a purchase of existing assets that will place in it a dominant position in the east coast grains market.

In considering the proposed capital investments that ADM has indicated that it will support if it were to acquire GrainCorp, it must first be recognised that the lion's share had already been committed to GrainCorp by GrainCorp's Australian board. Secondly, public statements by ADM with regard to additional expenditure above that already allocated would appear to tie up the initial money that was to follow the operational efficiencies.<sup>72</sup>

3.86 NSW Farmers also argued that ADM appeared to lack a full understanding of GrainCorp's assets and operations, and as a result was not in a position to identify where or when its promised additional capital expenditure would be invested.<sup>73</sup>

3.87 According to NSW Farmers, it was not clear how the amount to be dedicated by ADM to annual repair maintenance could be differentiated from the amount already spent annually by GrainCorp.<sup>74</sup>

3.88 Grain Growers included questions in its membership survey about the potential benefits of an ADM takeover of GrainCorp for Australian agriculture. An overwhelming number of respondents indicated that they did not think the takeover would be to the industry's benefit. Asked if ADM's takeover of GrainCorp

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71 Mr Jock Munro, private capacity, *Proof Committee Hansard*, 16 July 2013, p. 80.

72 Mr Mark Hoskinson, Chairman, Grains Committee, New South Wales Farmers Association, *Proof Committee Hansard*, 16 July 2013, p. 37.

73 Mr Mark Hoskinson, Chairman, Grains Committee, New South Wales Farmers Association, *Proof Committee Hansard*, 16 July 2013, p. 37.

74 Mr Mark Hoskinson, Chairman, Grains Committee, New South Wales Farmers Association, *Proof Committee Hansard*, 16 July 2013, p. 37.

would 'benefit the Australian industry in any way', 85 per cent of respondents answered 'no'.<sup>75</sup>

### **Opportunities to access new markets and knowledge**

3.89 ADM argued that its economies of scale and global market reach would help Australian growers remain competitive and take advantage of growing world food demand:

ADM's network of global customers for food and agricultural commodities spans more than 140 countries. This reach – and the market insight it brings – will benefit Australian growers, driving greater and more consistent demand for Australian grains.

The combination of GrainCorp and ADM will provide Australian growers a unique opportunity to be part of a truly global network of markets and buyers including ADM's own global processing operation, itself a significant creator of demand for agricultural production.

Joining these two great businesses will generate opportunities for Australian growers in new markets, including those not economically viable for GrainCorp to access on its own, as well as expanding Asian and Middle Eastern markets. Through ADM, the combined group will provide customers around the world with access to a more diversified grain origination portfolio while providing Australian growers with greater access to world markets, enhanced logistics and leading market insights.<sup>76</sup>

3.90 ADM also suggested that Australian growers would benefit from its knowledge of market dynamics and best practice:

ADM's global footprint enables growers to trade profitably amid market volatility and offers growers greater insight into the detail of specific crops and qualities including global and regional wheat supply and demand, which helps with forward crop planning and marketing for wheat and other crops. ADM also offers valuable insights into best practice, research and risk management tools to help growers strengthen their businesses.<sup>77</sup>

3.91 Mr Greentree argued that large multinational agricultural commodity companies, such as Cargill and ADM, had strong and established relationships with the large global food manufacturers, such as MacDonal'd's and Nestle. According to Mr Greentree, ADM's relationships with major food companies would provide new opportunities for Australian growers:

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75 Dr Michael Southan, General Manager, Grower Engagement, Grain Growers Limited, *Proof Committee Hansard*, 16 July 2013, p. 69. Dr Southan explained that Grain Growers had sent out the survey to about 6000 of its members, and had received 473 responses. The survey was open from 6 May to 10 May. Mr Eastburn added that this was 'by far the highest response of all the [surveys] we have sent out', with the next-highest receiving about 300 responses.

76 Archer Daniels Midland, *Submission 1*, p. 6.

77 Archer Daniels Midland, *Submission 1*, p. 11.

[If] we are going to be set ourselves up around the world, we have to have all these multinational companies in Australia that are going to have the relationships with these mega food companies. And at the moment we do not have them here.<sup>78</sup>

3.92 In contrast, Grain Growers was sceptical about ADM's claims that its takeover would provide Australian growers with new market opportunities. Grain Growers told the committee that, rather than providing Australian growers with access to new markets, the takeover was more about improving ADM's trade opportunities and access to Southeast Asian markets.<sup>79</sup>

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78 Mr Ron Greentree, farmer, *Proof Committee Hansard*, 16 July 2013, p. 54.

79 Mr John Eastburn, Chairman, Grain Growers Limited, *Proof Committee Hansard*, 16 July 2013, p. 72.



# Chapter 4

## Conclusion and recommendations

4.1 The purpose of this interim report has been threefold:

- first, to publicise the extent of cross-ownership in the Australian grain handling market and the anti-competitive harm that Arthur Daniel Midland's (ADM's) proposed takeover of GrainCorp would have on the market;
- second, to raise concerns that this ownership structure, and these potential anti-competitive impacts, have not been adequately considered by Australia's regulators; and
- third, to draw attention to ADM's poor record as a corporate citizen and the low level of trust that Australian grain growers have in ADM.

4.2 The current cross-ownership arrangements in the Australian grain handling market were not properly considered in the Australian Competition and Consumer Commission's (ACCC) informal review of the takeover bid. The committee is concerned that the ACCC did not have the necessary expertise to undertake a full and proper review and did not obtain independent expert advice or assistance. It is troubled that ACCC officials could not advise the committee whether the ACCC review had examined:

- (a) Wilmar International's relationship with Goodman Fielder and ADM's interest in Goodman through its holding in Wilmar; and
- (b) whether Cargill would seek to take over the 60 per cent share in Allied Mills currently held by GrainCorp if ADM's acquisition of GrainCorp is successful, or the implications for competition in the market if this occurs.

4.3 The committee believes that the ACCC should revisit ADM's proposed bid in light of the evidence raised in chapters 2 and 3 of this report. The committee reiterates that it intends to invite the Chairman of the ACCC to give evidence at a public hearing later in 2013 to explain why the ACCC's review was so restricted in its scope and analysis.

### Recommendation 1

**4.4 The committee recommends that the Australian Competition and Consumer Commission reopen its informal review of Archer Daniels Midland's proposed acquisition of GrainCorp. The review should consult independent expert advice to determine whether there will be a substantial lessening of competition under the new cross-ownership arrangements in the Australian grain handling market if the ADM takeover proceeds.**

4.5 The committee is encouraged that the Foreign Investment Review Board (FIRB) has recognised the potential revenue implications from foreign takeovers. It is also confident that FIRB will take into account ADM's chequered record of corporate governance.

## **Recommendation 2**

**4.6 The committee recommends that in making its recommendation on the proposed takeover of GrainCorp to the Treasurer, the Foreign Investment Review Board consider the following matters:**

- **the evidence from the committee's public hearing hearings in June and July 2013, as well as the evidence from its proposed public hearing later this year;**
- **the potential loss of revenue to the taxpayer from ADM's tax minimisation strategies should the takeover proceed;**
- **the potential for the takeover to distort the capital market to the detriment of Australian farmers and Australia's economy due to food security concerns; and**
- **the need to protect the public interest and the interests of grain growers.**

### **Further inquiries**

**4.7 The committee flags the likelihood that it will recommend to the Senate that the inquiry be re-adopted in the new parliament. Assuming that occurs, the committee intends to take further evidence at a public hearing from Cargill, Glencore, Toepfer International and the relevant financial representatives from ADM.**

**Senator the Hon. Bill Heffernan**

**Chair**

# **APPENDIX 1**

## **Terms of Reference**

On 16 May 2013, the Senate moved that the following matters be referred to the Rural and Regional Affairs and Transport References Committee for inquiry and report by 31 July 2013.

The ownership arrangements of grain handling, with particular reference to whether:

- (a) such arrangements are in the interests of:
  - (i) Australia's farmers; and
  - (ii) Australia's long term food security interests;
- (b) there are potential impacts on competing grain traders' access to grain handling facilities, ports, silos and transport infrastructure;
- (c) there are potential impacts for grain traders, and a competitive marketplace, of access to warehoused grain stock information;
- (d) there is potential for conflict between the responsibility to shareholders and the best interest of Australian producers and consumers; and
- (e) any other related matters.



## **APPENDIX 2**

### **Submissions Received**

<b>Submission Number</b>	<b>Submitter</b>
<b>1</b>	Archer Daniels Midland
<b>2</b>	Mrs and Mr Gillian and Don Haling
<b>3</b>	Grain Trade Australia Ltd
<b>4</b>	AgForce Queensland
<b>5</b>	Australian Grain Exporters Association
<b>6</b>	Pastoralists and Graziers Association of WA (Inc)
<b>7</b>	Grain Producers SA
<b>8</b>	Grain Producers Australia
<b>9</b>	GrainCorp Limited
<b>10</b>	Victorian Farmers Federation
<b>11</b>	NSW Farmers
<b>12</b>	Southern Agventure Ltd
<b>13</b>	Link Agricultural
<b>14</b>	Mr Jock Munro

## **Additional Information Received**

- 1** Documents tabled at public hearing in Canberra, ACT, on Tuesday, 18 June 2013
- 2** Documents tabled at public hearing in Sydney, NSW, on Tuesday, 16 June 2013
- 3** Correspondence received from Archer Daniels Midland, 31 July 2013

# APPENDIX 3

## Public Hearings and Witnesses

### Tuesday, 18 June 2013, Canberra

- BETHELL, Mr Kit, Senior Director,  
Government Relations, Europe, Archer Daniels Midland Company
- PINNER, Mr Ian, President,  
ADM Grain Group, Archer Daniels Midland Company

### Tuesday, 16 July 2013, Sydney

- ARNEY, Mr Darren, Chief Executive Officer,  
Grain Producers South Australia
- AUCOTE, Mr Chris, President,  
Australian Grain Exporters Association; General Manager, Bunge Australia
- BRADLEY, Mr Leon, Committee Member,  
PGA Western Graingrowers, The Pastoralists and Graziers Association of  
Western Australia
- CROSBY, Mr Justin, Policy Director,  
New South Wales Farmers Association
- EADY, Mr Michael, Director,  
Fuel, Transport and Prices Oversight Branch, Australian Competition and  
Consumer Commission
- EASTBURN, Mr John, Chairman,  
Grain Growers Limited
- GREENTREE, Mr Ron, farmer
- HONEY, Mr Geoff, Chief Executive Officer,  
Grain Trade Australia
- HOSKING, Mr Brett, President,  
VFF Grains Group, Victorian Farmers Federation
- HOSKINSON, Mr Mark, Chairman,  
Grains Committee, New South Wales Farmers Association
- MUNRO, Mr Jock, Private capacity
- MURRAY, Miss Nina, Grains Policy Director,  
AgForce Grains Limited
- NEWTON, Mr Wayne, AgForce Grains President,  
AgForce Grains Limited
- RICHARDS, Ms Rosemary, Executive Officer,  
Australian Grain Exporters Association

- ROLLINGS, Mr Jonathan, General Manager,  
Foreign Investment and Trade Policy Division, Treasury
- SHERIDAN, Mr Stephen, Manager,  
VFF Grains Group, Victorian Farmers Federation
- SOUTHAN, Dr Michael, General Manager,  
Grower Engagement, Grain Growers Limited
- TRIGG, Mr Angus, Director,  
Government and Media Relations, GrainCorp
- WATKINS, Ms Alison, Managing Director and Chief Executive Officer,  
GrainCorp
- WEBB, Ms Rose, Executive General Manager,  
Mergers and Adjudication Group, Australian Competition and Consumer  
Commission
- WEIDEMANN, Mr Andrew, Chairman,  
Grain Producers Australia
- WILSON, Mr Brian, Chairman,  
Foreign Investment Review Board
- WOODS, Mr Peter, Project Manager,  
Grain Producers Australia

## **APPENDIX 4**

**Letter to Mr Brian Wilson, Chair,  
Foreign Investment Review Board**





**SENATE RURAL AND REGIONAL AFFAIRS AND TRANSPORT REFERENCES COMMITTEE**  
**PO BOX 6100, PARLIAMENT HOUSE, CANBERRA, ACT, 2600**

Mr Brian Wilson  
Chair  
Foreign Investment Review Board

7 August 2013

Dear Mr Wilson

I am writing on behalf of the committee to update you and other members of the Foreign Investment Review Board (FIRB) on developments regarding the committee's inquiry into the ownership arrangements of grain handling in Australia.

As you may be aware, the committee has extended its reporting date for the inquiry from 31 July 2013 to 30 August 2013. The committee intends to table an interim report based on the evidence received to date by 30 August 2013. After the election, it is the committee's intention to recommend to the Senate that it re-refer the inquiry to the committee and, contingent upon that taking place, the committee will hold a further public hearing with witnesses including representatives of Glencore, Cargill, Archer Daniels Midland (ADM), Emerald Grain, Toepfer and the Australian Competition and Consumer Commission. It is also likely that FIRB will be invited to participate.

The committee greatly 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.

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.

Please feel free to contact the Inquiry Secretary on (02) 6277 3543 if you have any questions about the committee inquiry process.

Yours sincerely,

Senator the Hon. Bill Heffernan  
Chair