**SUMMARY: LEGAL OPINION ON JOINT RESEARCH AND SETTING INDUSTRY STANDARDS**

**Question: Does the competition Act allow industry bodies to do joint research and to set industry standards and criteria?**

**Background**

The grain storage industry, specifically in relation to malting barley, wishes to enter into discussions as an industry with AB InBev regarding certain aspects pertaining to the storage and off-take of malting barley. Agbiz Grain, wishes to enter into discussions with
AB InBev pertaining to national grading regulations and the AB InBev quality requirements applied to all parties supplying malting barley, including the storage system. The discussions are aimed at the development of a storage protocol and in order to limit storage related risk and financial losses, to both storage operators and AB InBev. The ultimate aim is for Agbiz Grain members to conduct joint market research, with the co-operation of AB InBev in view of setting a fair industry standard for the parties to adopt in respect of the storage of malting barley and processes incidental thereto.

**Legal position**

Information sharing arrangements are regulated in terms of section 4 of the Competition Act, i.e. the section that deals with restrictive horizontal practices between
competitors. Section 4(1 )(a) of the Competition Act provides that, should an agreement between parties in a horizontal relationship have the effect of substantially preventing or lessening competition in a market, such agreement will be prohibited unless a party to the agreement can prove that any technological, efficiency or other pro-competitive gains resulting from that agreement outweighs that effect.

General rules regarding the exchange of information, are:

* The exchange of information with direct or potential competitors constitutes a higher risk
than the exchange of information with non-competitors;
* Where the information exchanged consists of price, costs, investment, general business
strategy, rebates, discounts or invoice information (as opposed to process-type
information), the risk is higher;
* The exchange of confidential information presents a much higher risk than information in the public domain;
* Where current or recent information is exchanged, this presents a higher risk than historic
information; and
* Frequent and regular exchanges of information present a higher risk than infrequent
exchanges.

The mere exchange of information between competitors is not automatically prohibited unless it has the effect of price fixing, market allocation or collusive tendering.

Arrangements that will result in the restriction or distortion of competition on price, output, product quality, product variety or innovation, will be problematic.

**Conclusion**

The contemplated standardisation agreement and criteria R&D is not likely to raise any competition concerns. The parties are free to discuss and agree on what should be accepted as a product standard across the relevant industry, provided that said
discussions and agreement do not have the object, purpose or effect, either actual or potential, of substantially lessening competition.

The intended conduct herein will also not constitute cartel conduct. There would not be a purpose or effect of price fixing arising out of the discussions and furthermore, there
will be no purpose of market division, restricting outputs or bid rigging.

**Caveat**

It should be noted that the Competition Commission has published regulations specifically focussing on buyer power. The Regulations on Buyer Power applies, amongst others, to the agro- processing sector specifically. These Regulations could very well be applicable to the current situation and this ought to be investigated in detail.