

**COOPERATIVE BULK HANDLING LTD (CBH) – EXCLUSIVE DEALING
NOTIFICATION N93439**

FILE NOTE

27 August 2008

On 18 August 2008 Cooperative Bulk Handling Ltd (CBH) provided a revised version of its proposed Ring Fencing Policy to the Australian Competition and Consumer Commission (ACCC).

Following further inquiries from the ACCC, on 22 August 2008 CBH provided a further revised version of its proposed Ring Fencing Policy to the ACCC. In particular, CBH made amendments to clause 1 and 9 (see copy attached).

Appendix 2

CBH Ring-fencing Arrangements and Policy

1 Organizational structure

- 1.1 Under Grain Express, the storage and handling business operated by Cooperative Bulk Handling Limited (**CBH**) will remain operationally and legally distinct from the grain marketing businesses conducted by Grainpool Pty Ltd and its subsidiary, Agracorp Pty Ltd (together referred to in this document at **GPPL**).
- 1.2 The legal entity CBH relevantly comprises:
 - (i) Group CEO and Board;
 - (ii) Support Services, includes the finance, accounting and legal functions, which provide backup services to all of the entities in the CBH group; and
 - (iii) CBH Operations, which manages the operation of CBH storage and handling business.
- 1.3 GPPL is a distinct legal entity, with its own Board and management structure.
- 1.4 The General Manager of GPPL reports to the GPPL Board and the CEO of the CBH Group. The General Manager of CBH Operations reports to the CBH Board and the CEO of the CBH Group.
- 1.5 The functions and responsibilities of CBH Operations include:
 - (i) planning, maintenance and operations of upcountry receival and storage facilities;
 - (ii) management of road and rail freight contracts and arrangements;
 - (iii) gathering and managing information on grain quality, quantity and grade;
 - (iv) negotiation and management of storage and handling agreements with marketers;
 - (v) management and operation of the Metro Grain Centre;
 - (vi) management and operation of port storage and ship loading facilities; and
 - (vii) provision of crop forecasting and information services to growers.

2 Physical separation

- 2.1 As of June 2008, GPPL will be physically separated from CBH Operations and will occupy a different floor of the CBH building in Delhi Street, West Perth.

- 2.2 CBH plans to move GPPL to a separate building, which is under construction and due for completion in 2009.

3 Accounting separation

- 3.1 As a cooperative, CBH has the benefit of tax exempt status for the operation of its storage and handling business. That tax exempt status does not extend to GPPL.
- 3.2 Accordingly, CBH and GPPL maintain separate accounts.
- 3.3 Accounting separation is required to ensure that CBH and GPPL do not engage in transfers that would cause CBH to shift cost to GPPL in order to increase the proportion of its non-taxable revenue.
- 3.4 Both CBH's and GPPL's accounts are audited by the company auditor, Ernst and Young, to ensure that costs are appropriately apportioned between the taxable and non taxable business activities in the group.
- 3.5 For this reason, additional provision for auditing of accounting separation is unnecessary while CBH retains its tax exempt status.

4 Information flows

- 4.1 This aspect of ring-fencing arrangements provides for the management of flows of confidential information between CBH Operations, CBH Senior Management and GPPL.
- 4.2 Where appropriate, the principles stated in this document may be the subject of more detailed processes and procedures to promote and encourage compliance.

Confidential Information

- 4.3 **"Third Party"** means a person other than CBH, who enters into, or proposes to enter into an agreement for the supply of storage and handling services with CBH.
- 4.4 **"Confidential Information"** means information exchanged between CBH and a Third Party or their nominated representative, in relation to the business of that Third Party that:
- (i) is by its nature confidential;
 - (ii) relates to a Third Party's entitlement or interest in any grain delivered to, or held in the custody of CBH, unless authorised to be disclosed by a relevant person;
 - (iii) relates to the origin, grade, quality, quantity, location or attributes of grain owned by a particular Third Party;
 - (iv) relates to intellectual property rights owned by the Third Party or CBH;
 - (v) is specified to be confidential by the person who supplied it; or

- (vi) is known, or ought to be known, by a person using or supplying it to be confidential or commercially valuable,

but excludes information that:

- (vii) is comprised solely of the name, address and contact details of a person;
- (viii) was in the public domain at the time when it was supplied;
- (ix) subsequently becomes available other than through a breach of confidence or breach of this provision;
- (x) was in lawful possession of CBH prior to being provided by the Third Party; or
- (xi) ceases to be confidential in nature by any other lawful means.

Prohibited information flows

4.5 Subject to clause 4.6 of this document, CBH shall not:

- (i) disclose Confidential Information to other entities, including its own related bodies corporate, their agents or employees;
- (ii) access or use Confidential Information in violation of this policy for the purpose of damaging a competitor or conferring upon its related bodies corporate any competitive advantage over any Third Party in the marketing of grain; or
- (iii) allow other entities, including its own related bodies corporate, their agents or employees to have access to Confidential Information in CBH's possession.

Permitted information flows

4.6 CBH may disclose:

- (i) to a Third Party any Confidential Information that solely relates to the grain owned by that Third Party; and
- (ii) to any person, information concerning the grade, quality, quantity, location or attributes of grain received by CBH, provided that information is aggregated to such an extent that a recipient of that information would not be capable of identifying information specific to any particular Third Party.

Restricted information flows

4.7 CBH shall restrict or limit access to its databases (which contain Confidential Information) by:

- (i) only allowing full access to CBH officers and employees; and
- (ii) allowing access to persons other than CBH employees only to the extent that they may view non-confidential information.

CBH shall maintain a register of all persons who use its stock management database.

5 Operational decision making

- 5.1 **"Operational Decisions"** means decisions made in the course of providing storage, handling or supply chain coordination services and includes, but is not limited to, day to day decisions concerning freight scheduling, cargo accumulation decisions and ship loading. For the avoidance of doubt, Operational Decisions do not include decisions to offer or agree to any terms or conditions of an agreement to provide storage and handling services. Decisions regarding terms and conditions are addressed in clause 6.
- 5.2 CBH will comply with the following principles in making Operational Decisions in relation to the provision of storage and handling services:
- (i) CBH shall make Operational Decisions on an arm's length commercial basis with all supply chain participants;
 - (ii) CBH shall make Operational Decisions in a consistent manner that does not unfairly or unreasonably discriminate between the acquirers of those services;
 - (iii) CBH will not discriminate in favour of its related entities; and
 - (iv) CBH will make decisions with the primary objective of promoting efficiency in the supply chain.
- 5.3 CBH's obligations under clause 5.2 above, shall be read subject to the qualification that many Operational Decisions made in relation to the supply chain will necessarily involve conflicting interests of participants. Particularly when viewed in isolation, some decisions necessarily confer a relative disadvantage on one participant and an advantage on others. CBH will make such decisions based on objective commercial criteria and will adopt practices and policies to promote fair, reasonable and non-discriminatory Operational Decision making.
- 5.4 Any assessment or determination in relation to CBH's compliance with clause 5.2 shall, in appropriate cases, be considered with regard to the qualification in Clause 5.3 and where appropriate, individual decisions shall be assessed in the context of other decisions made in similar circumstances or involving the same party or parties.

6 Contracting

- 6.1 CBH shall negotiate on an arm's length commercial basis with GPPL with respect to the terms and conditions of storage and handling services.
- 6.2 To the extent that the contractual terms and conditions (including price) agreed between CBH and GPPL differ with the terms and conditions agreed between CBH and other marketers of grain, such differences must be reasonably justified by objectively verifiable commercial factors including, but not limited to:
- (i) differences in the cost of providing services;
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- (ii) differences in volume and type of grain entitlements;
- (iii) geographic and seasonal variations;
- (iv) available port capacity;
- (v) protecting the port terminal provider against liability; and
- (vi) the ability to commingle grain

7 Compliance

7.1 CBH Group employees should:

- (i) be aware that a failure to comply with ring-fencing obligations may constitute a disciplinary offence and expose both the individual and the CBH Group to penalties for a breach of the TPA; and
- (ii) contact the legal department if they have any concerns in relation to this policy, adherence to its objects by staff or its application to any particular conduct.

7.2 The CBH Group will provide training to individuals in high risk areas to ensure that they understand their obligations.

7.3 If any CBH employee is responsible for, or knowingly involved in conduct in breach of this policy, or any specific process created to implement this policy then:

- (i) the conduct of that employee will be taken into account in relation to that person's performance appraisal and remuneration review; and
- (ii) the relevant person shall receive training as determined by CBH's Compliance Manager.

7.4 Engaging in deliberate conduct in serious breach of this policy may be grounds for dismissal.

8 Complaints resolution process

8.1 CBH must appoint a panel of independent persons (**Panel**) to act as independent arbiters for the purpose of this clause 8 of the policy. Prior to their appointment, each member of that panel must be approved by the Economic Regulatory Authority of Western Australia (**ERA**).

8.2 If a Grower or a Marketer considers that CBH has not complied with clause 4 or 5 of this policy, they may lodge a complaint in writing with the CBH Group CEO (**Compliance Complaint**).

8.3 A Compliance Complaint must be referred to:

- (i) the **General Manager of CBH Operations**;
- (ii) CBH's General Counsel; and/or
- (iii) CBH's Compliance Officer.

- 8.4 Within 14 days of receiving a Compliance Complaint, CBH must attempt to contact the complainant and attempt to resolve the Compliance Complaint.
- 8.5 If the Compliance Complaint has not been resolved to the satisfaction of the complainant within 28 days after receipt of the complaint, CBH must, at the request of the complainant, appoint an independent arbiter from the Panel (**Arbiter**) to determine whether CBH has engaged in conduct in breach of this policy (**Determination**).
- 8.6 CBH will be bound by the Determination.
- 8.7 The Arbiter must dismiss the Compliance Complaint if the complainant does not agree to be bound by the Determination.
- 8.8 The Arbiter may prescribe procedural rules, at the discretion of the Arbiter, for the conduct of the dispute resolution process.
- 8.9 A Determination shall comprise:
- (i) a determination as to whether a breach of this policy has occurred;
 - (ii) a determination as to which, if any, party shall pay the costs of the dispute resolution process (including the Arbiter's costs and each party's legal costs); and
 - (iii) any reasons for decision.
- 8.10 The Arbiter may, in addition to the Determination, make recommendations as to any changes in CBH's conduct that may better secure compliance with this policy in future.
- 8.11 If the Arbiter determines that either party has acted unreasonably in commencing or prolonging the dispute, costs may be awarded on an indemnity basis.
- 8.12 The Arbiter and the parties must make reasonable endeavours to determine the dispute within 90 days of the appointment of the Arbiter.
- 8.13 The Determination shall be provided to the ERA.
- 8.14 CBH must make reasonable endeavours to implement any applicable recommendations made by the Arbiter.

9 Audit

- 9.1 CBH's compliance with this policy (and its related processes and procedures) must be independently audited within three months of the commencement of the implementation of this policy and every 12 months thereafter by an independent auditor (**Compliance Auditor**).
- 9.2 The Compliance Auditor will be selected by CBH but must be approved by the ERA.
- 9.3 The Compliance Auditor shall review:
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- (i) records of any Compliance Complaints;
- (ii) any Determination;
- (iii) **CBH's compliance** with clause 6 of this Policy;
- (iv) records held by the Compliance Officer;
- (v) the register of CBH employees with full access to CBH databases;
- (vi) any policies or procedures that implement or otherwise relate to this policy; and
- (vii) any other issue relevant to CBH's compliance with the principles and obligations stated in this policy.

9.4 The Compliance Auditor's report, which shall include:

- (i) details of each Compliance Complaint and any subsequent dispute resolution outcome;
- (ii) recommendations for any improvements in CBH's policy or processes; and
- (iii) a report on CBH's past compliance with any recommendations previously made by a Compliance Auditor,

must be provided to the ERA.