

Our reference
WAK
Your reference
/COOP2260-9071023

Woodside Plaza
240 St Georges Terrace Perth WA 6000
GPO BOX 9925 WA 6001
Tel (08) 9460 1666
Fax (08) 9460 1667
www.corrs.com.au



Sydney
Melbourne
Brisbane
Perth

23 September 2010

By email: gavin.jones@accc.gov.au

Gavin Jones
Director
Adjudication Branch, Australian Competition and
Consumer Commission

Contact
Bill Keane (08) 9460 1600
Email: bill.keane@corrs.com.au

Dear Sir

Cooperative Bulk Handling Limited (CBH) Exclusive Dealing Notification N93439 – Form of Grain Express bundle and scope of notified conduct

We refer to the meeting between the ACCC and CBH representatives on 24 August 2010 in relation to the above notification (**Notification**).

1 The issues

- 1.1 This letter states CBH's position in relation to two related issues discussed in that meeting, these being:
- (i) does CBH prohibit grain growers or marketers from outturning grain from CBH up-country receival and storage sites (**Receival Sites**) for the purpose of that grain being transported to port independently (ie, not using Grain Express)?; and
 - (ii) does CBH's conduct in relation to outturns of grain from Receival Sites fall within the scope of the exclusive dealing conduct that is defined in and described by the Notification (**Notified Conduct**)?

2 Summary of CBH position

- 2.1 In relation to each of these issues, the information provided in this letter confirms that:
- (i) CBH does not prohibit grain growers or marketers from outturning grain from CBH Receival Sites for the purpose of that grain being transported to port independently; and
 - (ii) CBH's conduct falls within the scope of the Notified Conduct because CBH's conduct controls the transport of grain in CBH custody only. CBH does not purport to control the movement of grain once it is outturned.

3 Background

- 3.1 During the meeting, ACCC staff asked a series of questions concerning the costs that would be incurred by marketers wishing to outturn grain from CBH Receival

Sites. An issue that appeared to be of interest to ACCC staff was whether the combination of CBH's outturn charges and the prices nominated by CBH for storage, handling and transport to port under the CBH Grain Express offer effectively excluded marketers from by-passing Grain Express.

- 3.2 In response to these questions, CBH representatives stated that under the current Grain Express agreement structure, marketers would not usually be able to outturn domestic grain from CBH's up country storage for the purpose of transporting it to port independently. ACCC staff responded that they were not previously aware of this.
- 3.3 We then discussed the difference between a tying arrangement (in which CBH would compel any user of its storage system to also use its transport service) and a bundling arrangement (in which CBH would offer a combined storage, handling and transport service at a particular price but users would be free to acquire a part of that bundle only, subject to different prices).
- 3.4 Unfortunately, in that discussion, we may not have drawn a sufficiently clear distinction between the manner in which services are offered and supplied to growers and marketers. As a result, the ACCC may have been left with the impression that CBH prohibits marketers from by-passing the Grain Express service. That is not the case. Rather, as is explained in more detail in this letter, marketers are not generally in a position to request outturn of grain from a Receival Site or to arrange their own land transport for grain held in CBH storage. This is because marketers acquire grain entitlement at a Destination Site (usually at port), not at a Receival Site.
- 4 Growers acquire bundled storage, handling and transport; marketers acquire "delivered grain"**
- 4.1 One of the key changes implemented by Grain Express was the shift from transport services that were acquired by marketers to services being acquired by CBH and then paid for not by marketers but by growers. In this sense, Grain Express has a similar effect to a scheme in which growers collectively acquire transport in order to supply grain on a delivered basis.
- 4.2 Under Grain Express, CBH offers a bundle of storage, handling and transport services to growers. In practice, for a typical delivery of grain, this works as follows:
- (i) a grower delivers a quantity of grain at a CBH Receival Site;
 - (ii) the grower nominates an export marketer and Destination Site (usually a port) where the marketer will outturn the grain;
 - (iii) the grower pays for its part of CBH's services, including transport to port;

- (iv) the marketer nominates a vessel and provides notice to CBH of its intention to outturn a quantity of grain onto a vessel at the nominated Destination Site;
 - (v) CBH checks that the marketer has sufficient grain entitlement in the CBH system to outturn the nominated quantity onto the vessel as nominated;
 - (vi) CBH outturns the nominated grain onto the vessel; and
 - (vii) the marketer pays for its part of CBH's services.
- 4.3 Importantly, it is not marketers but growers who acquire the relevant bundle of storage handling and transport services from CBH under their agreements with CBH.
- 4.4 Clause 6.5.2 of the CBH Delivery and Warehousing Terms (Grower Terms)¹ states as follows:
- "6.5.2 Freight**
- (a) *It is a condition of CBH offering the Services under these Terms that CBH moves Grain between the Receival Site and the Destination Site nominated by YOU or between Destination Sites (if required by YOU and accepted by CBH). CBH will be entitled to charge YOU for Grower Freight whether or not the grain has actually moved".*
- 4.5 The first sentence of this clause embodies the Notified Conduct.
- 4.6 Importantly, Growers are not forced to acquire the Grain Express bundle. They may opt to "warehouse" grain. Under the Grower Terms "Warehoused Grain" means: *"grain that has been delivered to and stored by CBH at a Site which has not been nominated to an Acquirer and accordingly is being held in Your name."*
- 4.7 A grower may outturn Warehoused Grain from CBH storage by arrangement with CBH. When a grower makes such a request and asks for grain to be outturned at a particular non-Destination Site, CBH must assess and respond to the request on a case by case basis. In most cases the request is accommodated but in some cases, warehoused grain may have already been moved away from the Receival Site. In any event, the grain outturned is likely not to be the same grain and is not guaranteed to be the same grain.
- 4.8 This is because of the limited storage capacity of Receival Sites. In order to keep a particular storage facility "open" and eligible to receive further grain during the harvest period, CBH may move grain away from a site notwithstanding the fact that the grower that delivered the grain has not yet nominated an acquirer. If that has occurred and CBH does not have grain of the correct grade remaining at the site, CBH may offer to outturn the grain at an alternative site. It should be

¹ As at 14 October 2009.

remembered that the CBH system is essentially a facilitator of the exporting of grain (between 90 and 95% of all grain is exported). Any differential in freight between the two locations will be adjusted according to CBH freight costs.

4.9 Marketers acquire grain entitlement at a Destination Site. This obviates the need for a marketer to arrange transport independently. Therefore, the scenario posited by ACCC staff (ie, could a marketer outturn grain in the CBH system from an up-country site and then independently transport it to port, whereupon it could acquire the port terminal service under the access undertaking) could only arise in circumstances where a grower had:

- (i) delivered grain into CBH storage at a Receival Site;
- (ii) elected to warehouse that grain (and not nominated an acquirer for the relevant grain);
- (iii) contacted CBH to arrange for the grain to be outturned;
- (iv) paid a grower outturn fee (currently \$8.50);
- (v) from 1 October 2011 onwards, paid a storage fee;
- (vi) obtained samples of the grain to be outturned and paid the relevant fee for sampling;
- (vii) provided the samples to a marketer for provision to CBH;
- (viii) made arrangements for the marketer to make transport available which matched the grower's outturn arrangements; and
- (ix) accepted liability for the marketer's transporter failing to meet those arrangements.

4.10 CBH does not impose any restriction upon the choice of transporter of any person moving grain outside the CBH system. Similarly, CBH does not, and would not, refuse a reasonable request of any entity with an entitlement to outturn grain at a particular site, even if it knew that a person was intending to load that grain on to independently arranged transport in order for it to be taken to a port or any other destination.

However, CBH will not be responsible for the logistical coordination of people who wish to arrange their own transport.

5 CBH's conduct falls within the scope of the Notified Conduct

5.1 The Notification states as follows:

"2. Description of the conduct or proposed conduct:

We refer to the attached submission, which describes the notified conduct in detail.

**Cooperative Bulk Handling Limited (CBH) Exclusive
Dealing Notification N93439 – Form of Grain Express
bundle and scope of notified conduct**

In substance, CBH will offer to supply storage and handling services on the condition that Growers or Marketers acquire:

- (i) supply chain coordination services from CBH; and*
- (ii) to the extent that grain remains in CBH's custody, that they acquire transport services from CBH (through its nominated carrier)."*

5.2 The conduct is described in the CBH Submission in detail, as follows.

"Freight agreement structure

Under current arrangements, CBH and Marketers acquire road and rail freight services directly, despite the fact that CBH has custody of grain in its system.

Under Grain Express, CBH will negotiate agreements to acquire bulk grain haulage services from ARG and road haulage carriers. CBH will use the freight services it acquires to move grain in its system between the Receival Site and, depending upon the requirements of the Grower and Marketer:

- (i) one of 10 larger grain storage and loading facilities, where grain may be outturned by the Grower or Marketer (Destination Sites);*
- (ii) the MGC (which is also an Destination Site), where grain may be loaded into containers or outturned for domestic supply;*
- (iii) one of the four port storage and loading facilities (which are also Destination Sites).*

To this extent, CBH will replace AWBS and GPPL as the primary grain freight purchaser in Western Australia.

Bundled service

CBH will offer grain receival, storage and handling services to Growers and Marketers on the condition that, CBH will arrange for haulage of that grain to the point where it is outturned from CBH's custody, which may be done at any of the 17 Destination Sites selected by Growers or Marketers.

This condition will be implemented in CBH's contracts with both Growers (who acquire receival and storage services from CBH) and Marketers (which acquire storage and handling services).

Receival conditions

Under current arrangements, a Grower delivers grain to CBH and, in most cases, nominates an acquirer (usually a Marketer), which acquires

the grain at the Receival Site. Marketers do not always acquire grain at all Receival Sites. Nomination of an acquirer is made on a paper delivery form and frequent errors are made at this point.

In the 2007/2008 harvest, marketing options were selected by Growers at the point of delivery in about 50% of cases. Of those occasions, the details regarding that load need to be corrected about 60% of the time. That is, about 30% of overall deliveries (113,896) required manual adjustment in some fashion due to errors on the Carter's Delivery Form – such as the wrong marketing option selection (eg there may be multiple pool choices for a single Marketer and the wrong selection is made or the wrong payment option is selected). CBH considers that this level of manual intervention is unsustainable.

If an acquirer is not nominated at this point, the grain is held in storage by CBH (a practice called "warehousing") and time-based storage fees may be charged to the Grower.

Under Grain Express, Growers will not be required to make a nomination immediately at the Receival Site. Rather, grain will be received by CBH and the Grower will have 21 days to nominate its chosen acquirer and marketing arrangement.

That choice is made electronically, via CBH's Loadnet system, which lists each of the marketing options offered by the various grain Marketers. The various marketing options will include different transport costs and marketing options for grain, depending upon the point at which the Marketer expects to outturn grain or load it onto a vessel for export. For example, a marketing option may be offered for grain at the nearest Destination Site, or at the relevant downstream port.

Outturns at Destination Site

Under Grain Express, transfer of grain entitlement to Marketers will no longer necessarily occur at the moment grain is delivered at the Receival Site. Instead, each marketing choice on Loadnet provides for a specific point at which the Marketer will outturn the grain. When the Grower nominates a choice of marketing option and outturn point, the Marketer becomes entitled to outturn grain at the nominated Destination Site at that time.

There will be 15 Destination Sites (including the 4 port terminals, the MGC and 10 of the larger country sites). While Growers will be able to outturn grain from a Receival Site where they have warehoused grain, Marketers will only be able to outturn their grain entitlements at a Destination Site.

23 September 2010

Adjudication Branch, Australian Competition and Consumer
Commission

**Cooperative Bulk Handling Limited (CBH) Exclusive
Dealing Notification N93439 – Form of Grain Express
bundle and scope of notified conduct**

CORRS
CHAMBERS
WESTGARTH
lawyers

Marketers that have acquired grain for domestic outturn will be able to change their mind and outturn it at port but they, and not the Grower, will be liable for the transport cost for the movement to port.

Marketers that have acquired grain at port which they wish to outturn at an inland Destination Site can also change their mind in certain limited circumstances.

Transparent billing

Under current arrangements, Marketers quote prices on a port basis, and therefore generally deduct freight charges from Growers' payments. The actual cost under marketing options of carrying a Grower's grain to port is not transparently disclosed.


Under Grain Express, once a Grower has nominated a marketing option, CBH will arrange transport to the nominated Destination Site and invoice the Grower for its services (including a distinct and transparent freight charge) to that point. CBH will not add a profit margin to freight costs.

The Marketer will be charged storage and handling fees for the grain in relation to the Destination Site where it is outturned."

- 5.3 The conduct described in the Notification corresponds with CBH's actual conduct.
- 5.4 Importantly, the Notified Conduct creates a structure of arrangements in which marketers acquire grain on a delivered basis. For this reason, marketers are not in a position to outturn grain at a Receival Site and transport it independently to port.

Please let us know if you require further information or assistance.

Yours faithfully
Corrs Chambers Westgarth


Bill Keane
Partner