

COMPETITION AND CONSUMER ACT 2010

UNDERTAKING TO THE AUSTRALIAN COMPETITION & CONSUMER COMMISSION GIVEN FOR THE PURPOSES OF SECTION 87B

BY

CO-OPERATIVE BULK HANDLING LIMITED

ABN 29 256 604 947

1. PERSON GIVING THIS UNDERTAKING

- 1.1 This Undertaking is given to the Australian Competition and Consumer Commission (**ACCC**) by Co-operative Bulk Handling Limited (ABN 29 256 604 947) (**CBH**) of 30 Delhi Street, West Perth, Western Australia, for the purposes of section 87B of the *Competition and Consumer Act 2010* (Cth) (**CCA**).

2. BACKGROUND

- 2.1 The CBH Group is a co-operative 100% owned by its 4,200 grower members in Western Australia.
- 2.2 At the time of wheat export deregulation in Australia in 2008/2009, CBH put into place a service structure in relation to integrated grain receipt, transport and export supply chain services intended to address the needs of customers in Western Australia in that changing commercial and regulatory environment. This service structure, known as the Grain Express service, included:
- (a) Grain Express Export, dealing with exports using CBH rail or road transport to port; and
 - (b) Grain Express Domestic, dealing with receipt at harvest sites for outturn at those sites or for transport to areas for outturn to domestic customers.
- 2.3 On 11 June 2008, CBH lodged a notification of exclusive dealing with the ACCC, pursuant to section 93(1) of the *Trade Practices Act 1974* (Cth) (**TPA**), now called the CCA, in relation to CBH offering to supply grain storage and handling facilities and services on condition that growers or marketers also acquired supply chain co-ordination services and transport services from CBH (**Notified Conduct**) which involved a tie of transport and storage in relation to Grain Express Export.
- 2.4 The ACCC initially allowed the Notified Conduct to stand. However, on 29 June 2011, the ACCC issued a final notice to CBH pursuant to section 93(3) of the CCA revoking the notification, because the ACCC was satisfied that the Notified Conduct had, or would be likely to have, the effect of substantially lessening competition in the supply of grain transport services and that, in all the circumstances, any benefit to the public resulting or likely to result from the Notified Conduct would not outweigh the detriment to the public constituted by the lessening of competition.
- 2.5 CBH sought review of the ACCC decision by the Australian Competition Tribunal (**Tribunal**). In a decision made on 19 April 2013, the Tribunal affirmed the ACCC's decision to revoke the notification. The Tribunal was not satisfied that in the grain transport market that the tie involved, the Notified Conduct would not lead to a substantial lessening of competition in the market in Western Australia for grain transport services (**Grain Transport Services Market**), and concluded that CBH had not satisfied the Tribunal that the public benefits that were likely to arise from the Notified Conduct outweighed the anti-competitive detriment. The Tribunal recognised efficiencies in the export of grain from Western Australia arising from the Grain Express

system but was not convinced that in the absence of the Notified Conduct that the Grain Express system would not continue.

- 2.6 In 2013, following the Tribunal's decision, CBH began offering an unbundled grain supply chain service known as the Non Grain Express service. This service provided an opportunity for growers and marketers to opt out of the Grain Express service and obtain Site Based Entitlement to grain at certain sites so that they could outturn grain at those sites using non-CBH transport providers to port.
- 2.7 In early 2014, the ACCC raised concerns with CBH that its export supply chain arrangements may have the effect, or likely effect, of substantially lessening competition in contravention of section 47 of the CCA given:
- (a) growers wishing to use the Non Grain Express service were required to opt out of the Grain Express service in writing within seven days of the grower delivering each parcel of grain to a CBH receival site (**Opt-Out Requirement**);
 - (b) growers and marketers using the Non Grain Express service were prevented from using 31 (reduced to 30 after 31 January 2015) CBH receival sites which were designated as Grain Express only sites (**GEO Sites Conduct**); and
 - (c) the price for the Non Grain Express service was set above the price of the Grain Express service (excluding transport charges) in most situations, with the price differential amounting to, in effect, a charge to opt out of the Grain Express service (**Outturn Fee**).
- 2.8 The ACCC considers that from 1 October 2013:
- (a) the likely effect of the Opt-Out Requirement, GEO Sites Conduct and Outturn Fee, in combination, was that growers and marketers would not, or would not except to a limited extent, be able to use the Non Grain Express service and acquire grain transport services from a competitor of CBH;
 - (b) the effect of this conduct was the same as, or similar to, the effect of the tie under the Notified Conduct described in clause 2.3 that was the subject of the Tribunal's decision; and
 - (c) the conduct had the effect, or likely effect, of substantially lessening competition in the Grain Transport Services Market.
- 2.9 In relation to the concerns in clauses 2.7 and 2.8 raised by the ACCC, CBH believes:
- (a) the efficiencies involved in the Grain Express service required that growers nominate grain transport arrangements so that CBH knew who was obligated to arrange transport from CBH's silos within a short period of time so that they did not congest the CBH export network and thus the Opt Out Requirement was a reasonable restriction;
 - (b) that the costs of a non integrated network are higher as reasonably reflected in the Outturn Fee;
 - (c) that, as recognised by the Productivity Commission and the National Competition Council, upcountry receival sites are not monopoly infrastructure and are able to be replicated and therefore the GEO Sites Conduct could not lessen competition; and
 - (d) that rival transport operators and exporters could develop their own upcountry receival sites as has occurred on the East Coast of Australia or utilise up to 150 other sites operated by CBH.
- 2.10 During 2014 and 2015, CBH commenced a review of its grain supply chain export arrangements, involving rationalising the number of grain receival sites and seeking to

increase export efficiencies for the benefit of its grower members and Western Australian grain growers in general that would apply for the 2016/2017 harvest season. The review was based upon providing growers with greater choice intended to:

- (a) facilitate the most efficient supply chain path for growers and customers;
- (b) allow growers and customers increased choice of CBH products and services based on their own circumstances as to how they:
 - (i) use the supply chain;
 - (ii) choose alternative transport providers; and
 - (iii) choose delivery to ships or port terminals;
- (c) support payment for site based quality and volume under Site Based Entitlement for both domestic and export customers; and
- (d) increase transparency for growers and customers in terms of pricing so as to facilitate growers and customers to make efficient choices.

2.11 In June 2016, CBH announced it would offer new services for growers and marketers to utilise its storage and handling network, and in particular two new grain services:

- (a) "CBH Integrated" which is a fully integrated service managed by CBH from receival point to export or domestic markets ("**Integrated Service**"); and
- (b) "CBH Site Select" which is a service that will allow marketers to buy grain at a site level and maintain Site Based Entitlement, and to choose to use CBH or a transport provider other than CBH to transport the grain to port or domestic customers ("**Site Select Service**").

CBH has elected not to offer Site Based Entitlement at Integrated Only Sites in order to allow efficient operation of the Integrated Service for its growers and customers, while making the majority of its grain receival sites accessible by third party transport providers contracted by marketers to collect their grain entitlement. As the vast majority of grain delivered to CBH receival sites is delivered by 31 December each season, the Opt Out Date will allow growers with grain that is delivered to sites that are not Integrated Only Sites at least 30 days to consider whether or not they wish to provide marketers with a Site Based Entitlement at the relevant sites.

CBH has determined the charges and fees set out in Schedules C and D on the basis of its existing costs and forecast Incremental Costs of providing the Site Select Service.

2.12 CBH considers that in making changes to its export supply chain arrangements as set out in clauses 2.10 and 2.11, it is important that it has the ability to manage the export supply chain efficiently for growers and in particular export grain operations on behalf of CBH's own export operations. The ACCC considers that CBH's changes for the 2016/2017 harvest season adequately address the ACCC's concerns under the CCA.

2.13 CBH acknowledges the ACCC's concerns but does not agree that its previous conduct in the 2013/14, 2014/2015 and 2015/2016 harvest seasons which was implemented following and taking into account the Tribunal's decision, has had or would have had any adverse competitive effect in any relevant market. However, CBH has given this Undertaking to address the ACCC's concerns outlined in clauses 2.7 and 2.8 of this Undertaking, and the ACCC has agreed to accept this Undertaking to resolve those concerns without court proceedings.

3 COMMENCEMENT AND TERMINATION OF THIS UNDERTAKING

3.1 This Undertaking comes into effect when:

- (a) this Undertaking is executed by CBH; and
- (b) the ACCC accepts the Undertaking so executed,

(Commencement Date).

- 3.2 This Undertaking will apply to four harvest seasons being the 2016/2017, 2017/2018, 2018/2019 and 2019/2020 harvest seasons (**Relevant Harvest Seasons**) in Western Australia and will expire on 31 January 2020.
- 3.3 Notwithstanding clause 3.2, this Undertaking will terminate if the ACCC consents in writing to the withdrawal of this Undertaking in accordance with section 87B of the CCA and the ACCC will consider in good faith any requests and submissions by CBH for the early termination of this Undertaking.
- 3.4 If CBH believes it is necessary to vary this Undertaking due to changed circumstances (including any material change in the markets in which it operates), then CBH and the ACCC agree that they will review the Undertaking and negotiate in good faith a variation or withdrawal of all or any of the terms of the Undertaking in light of such circumstances. The ACCC agrees to consider in good faith any submission from CBH under this clause within a period of 30 days from receipt of the submission.

4 UNDERTAKINGS

- 4.1 CBH will offer the Site Select Service at all CBH receival sites that it opens during the Relevant Harvest Seasons with the exception of Integrated Only Sites, identified in Schedule A of the Undertaking, effective from the commencement of the 2016/17 harvest season.
- 4.2 CBH will allow growers and marketers up until the Opt Out Date in each Relevant Harvest Season to opt their grain out of the Integrated Service where that grain has been delivered:
 - (a) in that harvest season on or before the Opt Out Date; and
 - (b) to a CBH receival site that is not a designated Integrated Only Site.
- 4.3 CBH will not make any change to the Opt Out Date for each Relevant Harvest Season during the term of this Undertaking without first providing the ACCC with written notice of the proposed change at least 30 days prior to introducing the change in reasonably sufficient detail to provide the ACCC with an opportunity to consider the proposed change and provide any written comments to CBH. CBH will provide any information that the ACCC reasonably requests for the purposes of its consideration.
- 4.4 In accordance with CBH's proposed changes, CBH will implement for the Relevant Harvest Seasons the following pricing structure and supply chain service charges effective from the commencement of the 2016/17 season:
 - (a) for growers and marketers who use the Integrated Service to export grain, CBH will apply the charges set out in Schedule B of this Undertaking; and
 - (b) for growers and marketers who use the Site Select Service, CBH will apply the applicable charges and fees set out in Schedules C and D of this Undertaking.
- 4.5 CBH must publish indicative supply chain charges for users of the Integrated Service and the Site Select Service by 31 August in each calendar year for the Relevant Harvest Seasons. At least 14 days prior to the publication of these charges, CBH must:
 - (a) provide the ACCC with a certificate signed by the Chief Financial Officer of CBH certifying that the charges for the forthcoming season are the same as those

applicable for the current season or are in accordance with either clause 4.6(a)(i) or clause 4.6(a)(ii); or

- (b) provide the ACCC with an Approved Independent Auditor's report and certification in accordance with clause 4.6(b), or if CBH is unable to obtain such a report and certification, it first obtains the ACCC's consent in writing in accordance with clause 4.6(b).

4.6 CBH will not make any change to the user charges described in Schedules B, C or D of this Undertaking for the Relevant Harvest Seasons unless at least 14 days prior to publishing or initially implementing the change (whichever occurs first):

- (a) it has provided the ACCC with a certificate signed by the Chief Financial Officer of CBH certifying that either:

- (i) the proposed change will involve CBH applying the same percentage increase or decrease across all of the Integrated Service and Site Select Service user charges described in Schedules B, C and D of this Undertaking, and will not involve the introduction of any new charge for users of the Site Select Service; or

- (ii) each of the various price differentials as at 1 October 2016 (in \$ per metric tonne) between the supply chain charges for users of the Integrated Service (described in Schedule B) and the supply chain charges for users of the Site Select Service (described in Schedules C and D) will not increase as a result of the proposed change; or

- (b) where clause 4.6(a) does not apply, it has provided the ACCC with a report from an Approved Independent Auditor, appointed in accordance with Schedule E of this Undertaking, certifying that all charges for the Site Select Service under the proposed change reflect CBH's Incremental Costs of providing the Site Select Service, or if CBH is unable to obtain an Approved Independent Auditor report with such certification, CBH has obtained the ACCC's prior written consent to the proposed change.

4.7 CBH must provide the Approved Independent Auditor referred to in clause 4.6(b) with all relevant pricing and cost data detailing CBH's calculations of its supply chain charges for the Integrated Service and the Site Select Service, and any other relevant information the Approved Independent Auditor reasonably requests for the purpose of preparing any report requested by CBH, and will provide copies of this material to the ACCC upon request.

5 ACKNOWLEDGMENTS

5.1 CBH and the ACCC acknowledge that:

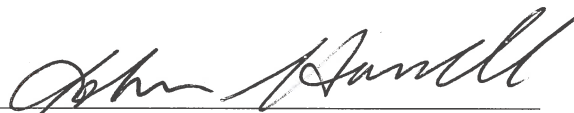
- (a) the ACCC has agreed to accept this Undertaking and CBH has agreed to provide this Undertaking on the basis of CBH's commitment to provide the Integrated Service and Site Select Service to growers and marketers having regard to the objectives set out in clauses 2.10 and 2.12 of this Undertaking;
- (b) the ACCC has agreed to accept this Undertaking and CBH has agreed to provide this Undertaking, on the basis that CBH's supply chain arrangements outlined in this Undertaking, resolves the ACCC's concerns under the CCA (including as set out in clauses 2.7 and 2.8) without court proceedings;
- (c) the information provided to the ACCC by CBH or by CBH to the Independent Auditor (including for the avoidance of any doubt by the Independent Auditor to the ACCC at the request of the ACCC) under this Undertaking is commercially confidential information and is to be kept confidential by the ACCC;

VAD 

- (d) the ACCC will make this Undertaking publicly available, including by publishing it on the ACCC's public register of section 87B undertakings on its website;
- (e) the ACCC will, from time to time, make public reference to this Undertaking including in news media statements and in ACCC publications; and
- (f) this Undertaking in no way derogates from the rights and remedies available to any other person arising from the conduct alleged in this Undertaking.

EXECUTED as an undertaking

Executed by **Co-operative Bulk Handling Limited** (ABN 29 256 604 947) pursuant to section 48 of the Co-operatives Act 2009 (WA) by:


Signature of Director

JOHN PHILIP BEUCHTER
HASSELL
Name of Director in full


Signature of Secretary/other Director


VERNON ANDREW DEMPSTER
Name of Secretary/other Director in full

This 14th day of October 2016

Accepted by the **Australian Competition and Consumer Commission** pursuant to section 87B of the *Competition and Consumer Act 2010* (Cth) on:

This 17 day of 10/ 2016

and signed on behalf of the Commission:


Rodney Graham Sims

Chairman
This 17 day of 10/ 2016

Schedule A

List of designated Integrated Service Only sites

| | |
|----|---|
| 1 | Geraldton Port Complex (including associated Moonyoonooka depot) |
| 2 | Esperance Port Complex (including associated Chadwick and Brazier St depot) |
| 3 | Albany Port Complex (including associated Mirrambeena depot) |
| 4 | Kwinana Port Complex (including any future depot) |
| 5 | Mingenew |
| 6 | Kelleberin |
| 7 | Merredin |
| 8 | York |
| 9 | Brookton |
| 10 | Cranbrook |
| 11 | Lake Grace |

Schedule B

Relevant charges (per metric tonne) for customers using CBH's Integrated Service¹

| | |
|--|----------------|
| Receival Fee (for wheat) | \$10.80 |
| Storage and Throughput Fee (all grains) | \$7.50 |
| Shipping Fee (all grains) ² | \$12.20 |
| Standard Total Supply Chain Charges³ (excluding freight) | \$30.50 |

| Receival Fees for grains other than wheat | \$ per tonne |
|--|----------------------|
| Barley, Oats, Triticale, Cereal Rye, Lentils | \$12.20 |
| Field Peas, Chick Peas, Faba Beans | \$14.40 |
| Canola | \$17.70 |
| Other Grain | Price on Application |

¹ Note other charges may be applied by CBH which charges are not specific to either the CBH Integrated Service or the CBH Site Select Service.

² CBH's High Volume Direct to Vessel Port Service.

³ Where CBH's standard Integrated Service is utilised.

Schedule C

Receival Fees and Storage and Throughput Fees (per metric tonne) for customers using CBH's Site Select Service, and potential additional Shipping Fees and Upcountry Rail Weighing Fee (per metric tonne) where customers transport grain directly to CBH's port terminal for export⁴

| Charges in \$ per tonne | For outturn volumes greater than or equal to 2,000 tonnes per site / per day | For outturn volumes of greater than or equal to 1,250 and less than 2,000 tonnes per site / per day | For outturn volumes greater than or equal to 750 and less than 1,250 tonnes per site / per day | For outturn volumes less than 750 tonnes per site / per day |
|--|--|---|--|---|
| Receival Fee (for wheat) | \$10.80 | \$10.80 | \$10.80 | \$10.80 |
| Storage and Throughput Fee (all grains) | \$7.50 | \$8.00 | \$8.50 | Price on Application |
| Shipping Fee (all grains) ⁵ | \$12.20 | \$12.20 | \$12.20 | \$12.20 |
| Upcountry Rail weighing Fee (all grains) | \$0.90 | \$0.90 | \$0.90 | \$0.90 |
| Total Supply Chain Charges (excl Site Entitlement Fees⁶) | \$30.50 (road) \$31.40 (rail) | \$31.00 (road) \$31.90 (rail) | \$31.50 (road) \$32.40 (rail) | Price on Application |

| Receival Fees for grains other than wheat | \$ per tonne |
|--|----------------------|
| Barley, Oats, Triticale, Cereal Rye, Lentils | \$12.20 |
| Field Peas, Chick Peas, Faba Beans | \$14.40 |
| Canola | \$17.70 |
| Other Grain | Price on Application |

⁴ Note other charges may be applied by CBH which charges are not specific to either the CBH Integrated Service or the CBH Site Select Service.

⁵ Assuming that the Customer transports the grain directly to CBH's port terminal and utilises CBH's High Volume Direct to Vessel Port Service.

⁶ Assuming that the Customer transports the grain directly to CBH's port terminal and utilises CBH's High Volume Direct to Vessel Port Service.

Schedule D

Monthly Site Entitlement Fees (per metric tonne) applicable from March to September for customers using CBH's Site Select Service, charged on the 1st of the month specified for grain at the CBH site at that date

| Site Entitlement Fees (as at the 1 st of each month) | Where a customer owns greater than or equal to 2,000mt per grade per site, or grain is in a Domestic Priority site | Where a customer owns less than 2,000mt per grade per site, and grain is not in a Domestic Priority site |
|--|--|--|
| March | \$0.25 | \$1.05 |
| April | \$0.30 | \$1.05 |
| May | \$0.35 | \$1.05 |
| June | \$0.40 | \$1.05 |
| July | \$0.45 | \$1.05 |
| August | \$0.50 | \$1.05 |
| September | \$0.55 | \$1.05 |
| October | Revert to Time Based Storage | Revert to Time Based Storage |

Schedule E

APPOINTING AND MAINTAINING AN APPROVED INDEPENDENT AUDITOR

Process for approving a Proposed Independent Auditor

1. At least 15 Business Days before appointing its Proposed Independent Auditor, CBH must provide the ACCC with a notice for a Proposed Independent Auditor (**Proposed Independent Auditor Notice**), including draft terms of appointment.
2. The ACCC shall have the discretion to approve or reject in writing the Proposed Independent Auditor identified in the Proposed Independent Auditor Notice in accordance with this Schedule E.
3. In deciding whether to approve a Proposed Independent Auditor, the factors to which the ACCC may have regard include whether the:
 - (a) person named in the Proposed Independent Auditor Notice or identified by the ACCC has the qualifications and experience necessary to carry out the functions of the Approved Independent Auditor;
 - (b) person named in the Proposed Independent Auditor Notice or identified by the ACCC is sufficiently independent of CBH; and
 - (c) draft terms of appointment are consistent with this Undertaking.

Appointment of the Approved Independent Auditor

4. After receiving a written notice from the ACCC of its approval of a Proposed Independent Auditor, CBH must within five Business Days:
 - (a) appoint the person approved by the ACCC as the Approved Independent Auditor; and
 - (b) forward to the ACCC a copy of the executed terms of appointment.

Obligations and powers of the Approved Independent Auditor

5. CBH must procure that any proposed terms of appointment for the Approved Independent Auditor include obligations on the Approved Independent Auditor to:
 - (a) maintain his or her independence from CBH, apart from appointment to the role of Approved Independent Auditor for the period of his or her appointment; and
 - (b) provide an immediate report of any issues that arise in relation to the performance of his or her functions as Approved Independent Auditor or in relation to compliance with this Undertaking by any person named in this Undertaking.
6. CBH must procure that any proposed terms of appointment for the Approved Independent Auditor provide the Approved Independent Auditor with the authority to access any information or documents that the Approved Independent Auditor considers reasonably necessary for carrying out his or her functions as the Approved Independent Auditor.

CBH's obligations in relation to the Approved Independent Auditor

7. Without limiting its obligations in this Undertaking, CBH must:
 - (a) maintain and fund the Approved Independent Auditor to carry out his or her functions including indemnifying the Approved Independent Auditor for any expenses, loss, claim or damage arising directly or indirectly from the performance

by the Approved Independent Auditor of his or her functions as the Approved Independent Auditor except where such expenses, loss, claim or damage arises out of the negligence, fraud, misconduct or breach of duty by the Approved Independent Auditor; and

- (b) not interfere with, or otherwise hinder, the Approved Independent Auditor's ability to carry out his or her functions as the Approved Independent Auditor, including:
 - (i) directing CBH personnel, including directors, contractors, managers, officers, employees and agents, to act in accordance with this Schedule E; and
 - (ii) providing to the Approved Independent Auditor any information or documents he or she reasonably considers necessary for carrying out his or her functions as the Approved Independent Auditor.

Resignation, revocation or termination of the Approved Independent Auditor

- 8. CBH must immediately notify the ACCC in the event that the Approved Independent Auditor resigns or otherwise stops acting as the Approved Independent Auditor.
- 9. The ACCC may revoke an Approved Independent Auditor's status as the Approved Independent Auditor if the ACCC becomes aware that any information provided to it was incorrect, inaccurate or misleading.

Schedule F

Dictionary

“Approved Independent Auditor” means a qualified professional auditor appointed and maintained in accordance with Schedule E of this Undertaking;

“ACCC” means the Australian Competition and Consumer Commission;

“CBH” means the entity referred to in clause 1 of this Undertaking;

“CCA” means the *Competition and Consumer Act 2010* (Cth);

“Domestic Priority Site” means any site designated by CBH as a Domestic Priority Site from time to time. These are sites primarily for domestic outturns and are available for both the Integrated Service and Site Select Service;

“Incremental Costs” in relation to the Site Select Service means the additional costs actually incurred by, or reasonably forecast to be incurred by, CBH which are directly attributable to providing the Site Select Service relative to the cost of providing the Integrated Service;

“Integrated Only Sites” means certain designated “Integrated Only” sites identified in Schedule A of this Undertaking and any new sites or facilities built by CBH and so designated;

“Integrated Service” means the service referred to in clause 2.11(a) of this Undertaking;

“Notified Conduct” means the conduct described in clause 2.3 of this Undertaking;

“Opt Out Date” means 1 February;

“Site Based Entitlement” means a grower and/or marketer maintains entitlement to grain at a particular site as opposed to notional zone entitlement;

“Site Select Service” means the service referred to in clause 2.11(b) of this Undertaking, which allows growers and/or marketers to maintain Site Based Entitlement with the consequent ability for the grower and/or marketer to remove grain from the relevant site and transport their grain using a CBH or non-CBH transport provider;

“TPA” means the *Trade Practices Act 1974* (Cth); and

“Tribunal” means the Australian Competition Tribunal.

