

Undertaking to the Australian Competition and Consumer Commission

Given under section 87B of the *Competition and Consumer Act 2010* (Cth)
by Cotton Seed Distributors Ltd ACN 000 568 730

1. Person giving the Undertaking

- 1.1 This undertaking is given to the Australian Competition and Consumer Commission (ACCC) by Cotton Seed Distributors Ltd ACN 000 568 730 (CSD) for the purposes of section 87B of the *Competition and Consumer Act 2010* (CCA) (Undertaking).

2. Background

- 2.1 CSD is a member-owned company incorporated in Australia. CSD carries on a business as the sole supplier of cotton planting seed (CSD Seed) in Australia. CSD is also involved in cotton breeding, research and development and the development and licensing of biotechnology traits for cotton.
- 2.2 As part of recognised industry protocols to control the transmission of fungus pathogens, all cotton seed supplied by CSD is treated with a fungicide seed treatment. CSD also supplies cotton seed that has been treated with an optional insecticide seed treatment. CSD acquires these fungicide and insecticide treatments from third party suppliers selected by CSD following a detailed testing process (CSD-Approved Suppliers).
- 2.3 CSD supplies cotton seed to growers via a network of agents (CSD Agents). CSD Agents are retailers that supply agricultural seed, agronomic advice and business services to growers. CSD has a contractual relationship with each of the CSD Agents in the form of an agency agreement (Agency Agreement). CSD Agents accept cotton seed orders from growers who enter into an agreement with CSD (Grower Agreement).
- 2.4 CSD's Agency Agreement has, since 2018, included the following provision:
- 1.5 During the term of this Agreement, Agent must not:
- ...
- 1.5.11 Apply or have applied or encourage or assist any Growers to apply or have applied, any third party overtreatments of CSD Seed...or otherwise alter or have altered, or encourage, permit or allow the alteration of, CSD Seed in any way;
- (the Overtreatment Clause).
- 2.5 CSD's Agency Agreement provides that third party overtreatment means 'the application to CSD Seed of, or treatment of CSD Seed with, biological and/or chemical products not supplied by CSD, after the CSD Seed has been bagged or otherwise packaged by CSD.'

2.6 CSD's Agency Agreement has also included the following clause:

1.5 During the term of this Agreement, Agent must not:

...

1.5.8 Remove, obscure, damage or alter any CSD packaging or any labels or notices on bags of CSD Seed supplied by CSD;

1.5.9 Rebag CSD Seed, or remove or authorise the removal of CSD Seed from the bags in which it is supplied by CSD, prior to its delivery to the grower who has purchased the seed, without the prior, specific, written permission of CSD;

1.5.10 Add any labels or notices to the bags in which CSD Seed is supplied by CSD, without the prior, specific, written permission of CSD;

(Packaging Clause).

3. ACCC concerns

3.1 The ACCC is concerned that, by preventing CSD Agents from facilitating the overtreatment of CSD Seed, the Overtreatment Clause (either alone or together with the Packaging Clause and/or other clauses of the Agency Agreement):

- (a) hinders or prevents suppliers of insecticide which are not CSD-Approved Suppliers from supplying their products to CSD Agents for use in overtreatment;
- (b) indirectly hinders growers from acquiring products from suppliers of insecticide which are not CSD-Approved Suppliers or otherwise overtreating CSD Seed using an insecticide acquired from a supplier which is not a CSD-Approved Supplier because growers are unable to appoint a CSD Agent to provide them with logistical and product support in respect of those products; and
- (c) signals to suppliers of insecticide, including new entrants, that supply of their insecticide to CSD Agents or growers is not possible unless they are a CSD-Approved Supplier.

3.2 The ACCC is concerned that the Overtreatment Clause (either alone or together with the Packaging Clause and/or other clauses of the Agency Agreement) may have had the effect or be likely to have the effect of substantially lessening competition in the market for the supply of insecticide treatments for cotton seed in Australia, in contravention of sections 45(1)(a) and 45(1)(b) of the CCA.

4. Acknowledgement and resolution

4.1 In response to the ACCC's investigation, CSD acknowledges that the Overtreatment Clause (either alone or together with the Packaging Clause and/or other clauses of the Agency Agreement):

- (a) may have the capacity to hinder competition between CSD-Approved Suppliers and other suppliers of insecticide, including new entrants; and
- (b) may raise concerns about CSD's compliance with sections 45(1)(a) and 45(1)(b) of the CCA.

4.2 CSD has offered this Undertaking to the ACCC.

5. Commencement of this Undertaking

5.1 This Undertaking comes into effect when:

- (a) this Undertaking is executed by CSD, and
- (b) this Undertaking so executed is accepted by the ACCC (the Commencement Date).

5.2 The Undertaking has effect for three years after the Commencement Date (the Term).

5.3 On and from the Commencement Date, for the Term, CSD undertakes to assume the obligations set out in paragraphs 6.1–7.2 and Annexure C for the purposes of section 87B of the CCA.

6. Undertaking

Current growing season

6.1 CSD undertakes that it will:

- (a) during the 2023/24 cotton growing season:
 - (i) not enforce or purport to enforce the Overtreatment Clause; and
 - (ii) not enforce or purport to enforce any other clause of the Agency Agreement, including the Packaging Clause, so as to prevent or hinder any CSD Agent from (for or as agent of a grower) applying or having applied or encouraging or assisting any grower to apply or have applied, any third party overtreatment of CSD Seed;

- (b) within 7 days of this Undertaking coming into effect, at its own expense, send the notice at Annexure A to all CSD Agents and prospective agents (being those to which CSD sent a draft Agency Agreement for the 2023/24 cotton growing season) to notify them of CSD's commitments under this Undertaking; and
- (c) within 7 days of this Undertaking coming into effect, at its own expense, send the notice at Annexure B to all CSD members to notify them of CSD's commitments under this Undertaking.

Future growing seasons

6.2 CSD undertakes that, with effect from the 2024/25 cotton growing season, it:

- (a) will revise its Agency Agreements to:
 - (i) remove the Overtreatment Clause; and
 - (ii) clarify that the Agency Agreement does not prevent or hinder any CSD Agent from (for or as agent of a grower) applying or having applied or encouraging or assisting any grower to apply or have applied, any third party overtreatment of CSD Seed; and
- (b) will not include in future Agency Agreements:
 - (i) the Overtreatment Clause; or
 - (ii) any other clause, including the Packaging Clause, to the extent that the clause prevents or hinders any CSD Agent from (for or as agent of a grower) applying or having applied or encouraging or assisting any grower to apply or have applied, any third party overtreatment of CSD Seed.

Seed warranty claims

- 6.3 CSD undertakes to continue to assess, in good faith, warranty claims by growers concerning CSD Seed which was subsequently overtreated to establish whether the seed complied with CSD's description of the seed and/or was of acceptable quality (as defined in section 54 of the Australian Consumer Law) at the time it was supplied by CSD.
- 6.4 CSD acknowledges that nothing in this Undertaking is intended to qualify, alter or otherwise derogate from any obligations CSD has at law (including under statute) in respect of CSD Seed or any other goods or services supplied by CSD.

Compliance program

6.5 CSD undertakes that it will:

- (a) establish and implement a Competition Law Compliance Program (Compliance Program) in accordance with the requirements set out in Annexure C; and
- (b) maintain and continue to implement the Compliance Program for the Term of this Undertaking.

Reporting to the ACCC

6.6 Prior to offering Agency Agreements for the 2024/25 cotton growing season, and in any event by 30 April 2024, CSD will provide to the ACCC a copy of its proposed revised Agency Agreement prepared in accordance with paragraph 6.2 above.

7. ACCC enquiries

- 7.1 For the purpose of monitoring compliance with this Undertaking, the ACCC may make reasonable enquiries with CSD, and CSD will respond to such enquiries at its own expense and within a reasonable period of time.
- 7.2 If requested by the ACCC during the Term of this Undertaking, CSD will, at its own expense, cause to be produced and provide to the ACCC copies of all documents evidencing CSD's compliance with the obligations set out in this Undertaking, excluding any documents protected by legal professional privilege.

8. Acknowledgements

8.1 CSD acknowledges that:

- (a) 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;
- (b) the ACCC will, from time to time, make public reference to this Undertaking including in news media statements and in ACCC publications; and
- (c) this Undertaking in no way derogates from the rights and remedies available to any other person arising from the alleged conduct.

Executed as an Undertaking

Executed by Cotton Seed Distributors Ltd ACN 000 568 730 pursuant to section 127(1) of the Corporations Act 2001 by:

	
Signature of director	Signature of a director /company secretary (delete as appropriate, or entire column if sole director company)
PETER THOMAS CRAHAN	Kelly Christianson
Name of director (print)	Name of director/company secretary (print)
	26/7/23
Date 26 July 2023	Date

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

27 July 2023

Date

and signed on behalf of the Commission:



Chair

27 July 2023

Date

**ANNEXURE A:
NOTIFICATION TO CSD AGENTS**

CSD Letterhead

[Date]

[Agent's name and address]

Dear #

Overtreatment of CSD Seed

The purpose of this letter is to advise you of an important change to the operation of your Planting Seed Agency and Service Agreement (**Agency Agreement**) with CSD.

Following concerns raised by the Australian Competition and Consumer Commission (**ACCC**), the Agency Agreement will no longer prevent you from overtreating CSD Seed.

The ACCC's concerns

As you would be aware, the Agency Agreement provides in Clause 1.5.11 that an Agent must not:

"Apply or have applied or encourage or assist any Growers to apply or have applied, any third party overtreatments of CSD Seed (as defined in Clause 12.4), or otherwise alter or have altered, or encourage, permit or allow the alteration of, CSD Seed in any way;"

Clause 12.4 provides that third party overtreatment means "*the application to CSD Seed of, or treatment of CSD Seed with, biological and/or chemical products not supplied by CSD, after the CSD Seed has been bagged or otherwise packaged by CSD*".

The ACCC is concerned that Clause 1.5.11 of the Agency Agreement may have had the effect or be likely to have the effect of substantially lessening competition in the market for the supply of insecticide treatments for cotton seed in Australia.

CSD has acknowledged those concerns and has agreed to enter into a court enforceable undertaking with the ACCC. A copy of the undertaking is available at [insert link].

Arrangements for the current growing season

The change to the operation of your Agency Agreement is in place for the current growing season.

During the 2023/24 season, CSD has undertaken:

- (a) not to enforce Clause 1.5.11, and
- (b) not to enforce other clauses of the Agency Agreement that may prevent or hinder you from (for or as agent of a grower) applying or having applied or encouraging or assisting any grower to apply or have applied, any third party overtreatment of CSD Seed. Without limitation, this includes Clauses 1.5.8, 1.5.9 and/or 1.5.10 of the Agency Agreement.

Arrangements for future growing seasons

The change to the operation of the Agency Agreement will continue into future growing seasons.

CSD has undertaken that the Agency Agreement for the 2024/25 season will:

- (a) not contain Clause 1.5.11, and
- (b) clarify that no other clause prevents or hinders any CSD Agent from (for or as agent of a grower) applying or having applied or encouraging or assisting any grower to apply or have applied, any third party overtreatment of CSD Seed.

CSD has also agreed not to include clauses of this kind in future Agency Agreements.

Agency relationship

It is important that you understand that CSD is NOT approving or endorsing any particular third party overtreatment of CSD Seed, and that if you facilitate the overtreatment of CSD Seed (or apply or have applied overtreatments of CSD Seed yourself), you will NOT be doing that as CSD's agent.

Seed warranties

CSD reiterates, as stated in Clause 12.4 of the Agency Agreement, that:

- (a) CSD's warranties are in respect of CSD Seed as supplied by CSD;
- (b) CSD gives no warranties in respect of third party seed overtreatments of CSD Seed which have not been approved in writing by CSD;
- (c) in particular, CSD gives no warranty that such third party seed overtreatments will not kill or damage CSD Seed or negatively impact on its germination rates or other performance; and
- (d) no third party overtreatments of CSD Seed have been approved by CSD.

CSD will continue to assess, in good faith, warranty claims by growers concerning overtreated CSD Seed to establish whether the seed complied with CSD's description of the seed and/or was of acceptable quality at the time it was supplied by CSD.

If you have any queries, please contact Peter Graham, James Quinn or Peter White.

Yours faithfully
Cotton Seed Distributors Ltd

Peter Graham
Managing Director

**ANNEXURE B:
NOTIFICATION TO CSD MEMBERS**

CSD Letterhead

[Date]

[Member's name and address]

Dear #

Overtreatment of CSD Seed

Cotton Seed Distributors Limited (**CSD**) has been cooperating for some months with an investigation being conducted by the Australian Competition and Consumer Commission (**ACCC**).

The ACCC is concerned that a clause in our Agency Agreement restricting our Agents from facilitating overtreatment of CSD Seed with insecticide may have had the effect or be likely to have the effect of substantially lessening competition in the market for supply of insecticide treatments for cotton seed in Australia.

CSD has acknowledged those concerns and has agreed to enter into a court enforceable undertaking with the ACCC. A copy of the undertaking is available at [insert link].

As part of the undertaking, CSD has agreed not to enforce that clause and to notify Agents that they are no longer prevented from (for or as agent of a grower) applying or having applied or encouraging or assisting any grower to apply or have applied, any third party overtreatment of CSD Seed. CSD will also take steps to ensure that no other clauses of our Agency Agreement indirectly prevent or hinder our agents from (for or as agent of a grower) applying or having applied or encouraging or assisting any grower to apply or have applied, any third party overtreatment of CSD Seed going forward.

It is important that members understand that CSD is NOT approving or endorsing any particular third party overtreatment of CSD Seed, and that if Agents facilitate the overtreatment of CSD Seed (or themselves apply or have applied overtreatments to CSD Seed), they will NOT be doing that as CSD's agent.

CSD also reiterates that:

- (a) CSD's warranties are in respect of CSD Seed as supplied by CSD;
- (b) CSD gives no warranties in respect of third party seed overtreatments of CSD Seed which have not been approved in writing by CSD;
- (c) in particular, CSD gives no warranty that such third party seed overtreatments will not kill or damage CSD Seed or negatively impact on its germination rates or other performance; and
- (d) no third party overtreatments of CSD Seed have been approved by CSD.

CSD will continue to assess, in good faith, warranty claims by growers concerning overtreated CSD Seed to establish whether the seed complied with CSD's description of the seed and/or was of acceptable quality at the time it was supplied by CSD.

If you require further clarification, please contact our Managing Director, Peter Graham, or James Quinn or Peter White.

Kind regards

Tony Quigley

CSD Chair

**ANNEXURE C:
COMPETITION LAW COMPLIANCE PROGRAM**

Cotton Seed Distributors Ltd (**CSD**) will establish a competition law compliance program (**Compliance Program**) that complies with each of the following requirements:

Appointments

1. Within three months of the Commencement Date, CSD will appoint a director or a senior manager with suitable qualifications or experience in corporate compliance as responsible for ensuring the Compliance Program is effectively designed, implemented and maintained (**Compliance Officer**).
2. Within three months of the Commencement Date, CSD will appoint a suitably qualified, internal or external, compliance professional with expertise in competition law (**Compliance Advisor**).

Risk Assessment

3. CSD will instruct the Compliance Advisor to conduct a competition law risk assessment within six months of being appointed as the Compliance Advisor (**Risk Assessment**) and to provide a written report outlining their findings (**Risk Assessment Report**) to CSD within two months of conducting the Risk Assessment.
4. CSD will use its best endeavours to ensure that the Risk Assessment:
 - 4.1. identifies the areas where CSD is at risk of breaching Part IV of the *Competition and Consumer Act 2010 (Cth)* (**CCA**), taking into account but not limited to areas which are set out in the Undertaking;
 - 4.2. assesses the likelihood of these risks occurring;
 - 4.3. identifies where there may be gaps in CSD's existing procedures for managing these risks; and
 - 4.4. provides recommendations for any action to be taken by CSD based on the Risk Assessment.

Compliance Policy

5. CSD will, within one month of the Commencement Date, issue a policy statement outlining CSD's commitment to compliance with the CCA (**Compliance Policy**).
6. CSD will ensure the Compliance Policy:
 - 6.1. contains a statement of commitment to compliance with the CCA;
 - 6.2. contains an outline of how commitment to CCA compliance will be realised within CSD;

6.3. contains a requirement for all staff to report any Compliance Program related issues and CCA compliance concerns to the Compliance Officer; and

6.4. contains a clear statement that CSD will take action internally against any persons who are knowingly or recklessly concerned in a contravention of the CCA and will not indemnify them in the event of any court proceedings in respect of that contravention.

Complaints Handling System

7. Within six months of the Commencement Date, CSD will ensure that the Compliance Program includes a competition law complaints handling system (**Complaints Handling System**).

8. CSD will use its best endeavours to ensure the Complaints Handling System is consistent with the *Australian/New Zealand Standard AS/NZS 10002:2022 Guidelines for complaint management in organizations*, as in force or existing at the Commencement Date, tailored as required to CSD's circumstances.

9. CSD will ensure that staff, agents and customers are made aware of the Complaints Handling System.

Staff Training and Induction

10. CSD will ensure that the Compliance Program includes a requirement for directors, officers, employees, representatives and agents of CSD, whose duties could result in them being concerned with conduct that may contravene Part IV of the CCA to undergo regular (at least once a year) training that focusses on compliance with Part IV of the CCA (**Staff Training**).

11. CSD will ensure that the Compliance Program includes a requirement that awareness of CSD's obligations under Part IV of the CCA forms part of the induction of all new directors, officers, employees, representatives and agents whose duties could result in them being concerned with conduct that may contravene Part IV of the CCA (**Induction**).

12. CSD will ensure that the Staff Training and Induction is conducted by a suitably qualified compliance professional or legal practitioner with expertise in competition law.

Reports to Board/Senior Management

13. CSD will ensure that the Compliance Officer reports to CSD's Board and senior management every six months on the continuing effectiveness of the Compliance Program.

Compliance Review

14. CSD will, at its own expense, cause an annual review of the Compliance Program (**Review**) to be carried out in accordance with each of the following requirements:

14.1. **Scope of Review** – the Review should be broad and rigorous enough to provide CSD and the ACCC with:

- 14.1.1. a verification that CSD has in place a Compliance Program that complies with each of the requirements detailed in paragraphs 1-13 of this Annexure; and
- 14.1.2. the Compliance Reports detailed at paragraph 15 of this Annexure.
- 14.2. **Independence of Review** – CSD will ensure that each Review is carried out by a suitably qualified, independent compliance professional with expertise in competition law (**Reviewer**). The Reviewer will qualify as independent on the basis that he or she:
 - 14.2.1. did not design or implement the Compliance Program;
 - 14.2.2. is not a present or past staff member or director of CSD;
 - 14.2.3. has not acted and does not act for, and does not consult and has not consulted to, CSD in any competition law matters, other than performing Reviews; and
 - 14.2.4. has no significant shareholding or other interests in CSD.
- 14.3. **Evidence** – CSD will use its best endeavours to ensure that each Review is conducted on the basis that the Reviewer has access to all relevant sources of information in CSD’s possession or control, including without limitation:
 - 14.3.1. the ability to make enquiries of any officers, employees, representatives, and agents of CSD;
 - 14.3.2. documents relating to the Risk Assessment, including the Risk Assessment Report;
 - 14.3.3. documents relating to CSD’s Compliance Program, including documents relevant to CSD’s Compliance Policy, Complaints Handling System, and Staff Training and Induction program; and
 - 14.3.4. any reports made by the Compliance Officer to the CSD Board and/or senior management regarding CSD’s Compliance Program.
- 14.4. CSD will ensure that a Review is completed within one year of this Undertaking coming into effect, and that a subsequent Review is completed within each year for two years.

Compliance Reports

- 15. CSD will use its best endeavours to ensure that within 30 days of the completion of a Review, the Reviewer includes the following findings of the Review in a report to the Compliance Officer of CSD (**Compliance Report**):
 - 15.1. whether the Compliance Program of CSD includes all the elements detailed in paragraphs 1-13 of this Annexure and if not, what elements need to be included or further developed;
 - 15.2. whether the Compliance Program adequately covers the parties and areas identified in the Risk Assessment, and if not, what needs to be further addressed;

- 15.3. whether the Staff Training and induction is effective, and if not, what aspects need to be further developed;
- 15.4. whether CSD's Complaints Handling System is effective, and if not, what aspects need to be further developed; and
- 15.5. whether there are any material deficiencies in CSD's Compliance Program, or whether there are or have been instances of material non-compliance with the Compliance Program, (**Material Failure**), and if so, recommendations for rectifying the Material Failure¹.

CSD Response to Compliance Reports

16. CSD will ensure that the Compliance Officer, within 14 days of receiving the Compliance Report:
 - 16.1. provides the Compliance Report to the CSD Board;
 - 16.2. where a Material Failure has been identified by the Reviewer in the Compliance Report, provides a report to the CSD Board identifying how CSD can implement any recommendations made by the Reviewer in the Compliance Report to rectify the Material Failure;
17. CSD will implement promptly and with due diligence any recommendations made by the Reviewer in the Compliance Report to address a Material Failure.

Reporting Material Failures to the ACCC

18. Where a Material Failure has been identified by the Reviewer in the Compliance Report, CSD will:
 - 18.1. provide a copy of the Compliance Report to the ACCC within 21 days of the CSD Board receiving the Compliance Report; and
 - 18.2. inform the ACCC of any steps that have been taken to implement the recommendations made by the Reviewer in the Compliance Report; or
 - 18.3. otherwise outline the steps that CSD proposes to take to implement the recommendations and inform the ACCC once those steps have been implemented.

Provision of Compliance Program documents to the ACCC

19. CSD will maintain copies of all documents relating to and constituting the Compliance Program for a period not less than five years.

¹ Material Failure means a failure, that is non-trivial and which is ongoing or continued for a significant period of time, to:

- Incorporate a requirement of the Undertaking in the design of the Compliance Program, for example, if a Complaints Handling System did not provide any mechanism for responding to complaints; or
- Comply with a fundamental obligation in the implementation of the Compliance Program, for example if no Staff Training has been conducted within the Annual Review period.

20. If requested by the ACCC during the period of five years following Commencement Date, CSD will, at its own expense, cause to be produced and provided to the ACCC copies of all documents constituting the Compliance Program, including:

20.1. the Compliance Policy;

20.2. the Risk Assessment report;

20.3. an outline of the Complaints Handling System;

20.4. Staff Training and Induction materials;

20.5. all Compliance Reports that have been completed at the time of the request; and

20.6. copies of the reports to the CSD Board and/or senior management referred to in paragraphs 13 and paragraph 16.

ACCC Recommendations

21. CSD will implement promptly and with due diligence any recommendations that the ACCC may make that the ACCC deems reasonably necessary to ensure that CSD maintains and continues to implement the Compliance Program in accordance with the requirements of this Undertaking.