

**Louis Dreyfus Commodities Australia Pty Ltd Submission
ACCC Issues Paper dated 21 April 2011
CBH 2011 Port Terminal Services Access Undertaking
Base Load Capacity**

Louis Dreyfus Commodities Australia Pty Ltd (**LDC**) is pleased to provide the following submission addressing CBH proposed Base Load Capacity service and in response to the ACCC Issues Paper.

LDC objects to the Base Load Capacity service proposed by CBH within the Port Terminal Rules and the associated Port Terminal Services Access Undertaking on the following grounds:

The Base Load Capacity proposal is inconsistent with the requirement that access should be fair and not discriminate in favour of CBH's own trading activity.

To the extent that it is likely that CBH Grain would be deemed eligible and would seek to acquire significant quantities of Base Load Capacity, it must be clear that the terms and conditions of Base Load Capacity do not confer an advantage or benefit to CBH Grain that is not available to other customers who have been deemed ineligible to acquire Base Load Capacity.

Rule 4.4(c) of the Port Terminal Rules says that Base Load Capacity must be supplied to all eligible customers, and that price must not exceed the price for Auction Capacity excluding any Auction Premium.

Therefore the price for Base Load Capacity may be lower than the price for Auction Capacity (excluding any Auction Premium).

The Schedule 1 of the proposed 2011/2012 Season Port Terminal Services Agreement states that the Upfront Marketer Fee "is applied to each tonne of grain where a customer obtains Capacity through the Port Capacity Auctions or Spare Capacity Bookings". The \$3.00/mt Upfront Marketer Fee is not applied to customers who obtain Base Load Capacity. This is an advantage of 17.5% of the fees charged by CBH for Bulk Export Capacity and Port Outloading Services, which is likely to be available to CBH Grain itself, but not available to customers who are deemed by CBH to be ineligible to acquire Base Load Capacity.

While other Base Load Capacity terms appear to have been cleverly designed to make it appear that Base Load Capacity is a less advantageous service offering than the standard Auction Capacity service offering, it is not possible to perform a comprehensive cost/benefit analysis of the Base Load Capacity in order to reach a decisive conclusion. The fact that Base Load Capacity customers cannot transfer slots is not necessarily a disadvantage or a cost given Base Load Capacity customers can acquire transferable slots at auction.

Where the maximum quantity of Base Load Capacity is allocated to customers it is significantly more difficult for customers to achieve eligibility in the future. It is unclear what criteria CBH would use to discriminate between a customer who has previously been and remains eligible, and a customer who is equally eligible but has not previously acquired, or been able to acquire Base Load Capacity. This is a potentially significant impediment to new entrants and mid-size companies who are seeking to expand their presence in Western Australia. It is not clear that this discrimination is beneficial for the market for other services related to grain exporting, in particular competition to acquire grain, including wheat, from growers.

The Base Load Capacity proposal is inconsistent with the Objectives outlined in the CBH Port Terminal Services Undertaking

In clause 2(b) of the Port Terminal Services Access Undertaking CBH states that the Undertaking has as an objective “establishing a workable, transparent, non-discriminatory and efficient process for lodging and processing Access Applications”.

CBH has proposed eligibility criteria to determine which customers would be eligible to acquire Base Load Capacity. Eligibility criteria are by their very nature discriminatory. The criteria outlined in rule 4.2 of the Port Terminal Rules have the specific purpose and intent of separating certain customers who would be eligible to acquire services from other customers who are deemed not eligible to obtain the same services.

It is not appropriate that CBH should use subjective criteria to discriminate between customers. Subjective criteria include rules 4.2(b)(ii), 4.2(b)(iii), 4.2(b)(iv).

It is not appropriate that CBH should set subjective criteria and also be the judge of eligibility against such criteria.

The proposed Base Load Capacity service offering is likely to distort the market for capacity and adversely impact upon non eligible customers seeking to acquire capacity via the auction system.

CBH determines, on a subjective basis, the Annual Capacity that they will make available for customers. Eligible acquirers of Base Load Capacity may each acquire up to 20% of the Annual Capacity, subject to a limit that the total quantity of Base Load Capacity does not exceed 60% of Annual Capacity.

Assume that CBH determines Annual Capacity is 12 million tonnes, and that this capacity is available in even amounts each month. Further assume that the quantity of Base Load Capacity allocated in a given year is 6 million tonnes, and that at least one customer has acquired the maximum amount of Base Load Capacity being 2.4 million tonnes.

Base Load Capacity acquirers can participate in the Capacity Auctions.

If the capacity is available in even amounts each month there should be 500,000 tonnes available as Auction Capacity in any given month. If the customer who holds the maximum amount of Base Load Capacity wishes to acquire all of the Auction Capacity in a particular month where there is expected to be peak demand for capacity, they can do so by bidding up the Auction Premium.

Assume that this customer bids the Auction Premium to \$10/mt to acquire the entire 500,000 tonnes available in a particular month. By spreading this additional \$10 of Auction premium across their entire program of 2.9 million tonnes they will incur an incremental cost of only \$1.72/mt, whereas the customer who wishes to acquire Auction Capacity in that period faces paying the Auction Premium over a much smaller program. This is not redressed by the Auction Premium rebate as it is averaged by the formula applied across all tonnes acquired in the auction that have actually been shipped.

As demonstrated in this example, even without allocating the maximum quantity of Base Load Capacity, it is conceivable there will be circumstances that allow the acquirer(s) of Base Load Capacity to leverage smaller customers out of an ability to acquire capacity from CBH on fair and reasonable terms.

Whilst CBH provide restrictions for Base Load Capacity as a percentage of Annual Capacity (max 60%), there is no provision for restrictions for Base Load Capacity on a per Port basis, or on a per Month basis. The proposed Base Load Capacity service offering would allow eligible parties to completely book out the capacity at specific Port zones, in turn leaving no available capacity available for participants in the Auction process.

There is also the opportunity for Base Load Capacity participants to exert greater control of capacity on a monthly basis. Base Load Capacity participants are required to limit their Base Load Capacity allocations to 10% for any specific month, and there is a strong likelihood that Base Load Capacity participants will allocate their maximum monthly allocation in high demand periods. On the assumption that Annual capacity is evenly spread on monthly basis, this means that Base Load Capacity allocations could comprise up to 72% of the total monthly capacity.

The Base Load Capacity Proposal is inconsistent with the common principles LDC believes should underpin all Port Terminal Access Undertakings

As outlined separately LDC believes that;

- The standard Port Terminal Service offering(s) provided by the BHC should be made under the same terms and conditions for all Users, and where demand for Port Terminal Services exceeds supply in any given period, price should be the determinant of capacity allocation; and

- Against these criteria it is not appropriate that CBH discriminate between customers using eligibility criteria. If a Base Load Capacity service offering is to proceed it should be offered to all CBH customers on the same terms and conditions. If the demand for such a Base Load Capacity program exceeded the quantity that CBH was willing or able to supply, then price should be the determinant of the allocation of Base Load Capacity. This could be determined in an auction format.