

Louis Dreyfus Commodities Australia Pty Ltd response to ACCC Issues Paper dated 21 April 2011 CBH 2011 Port Terminal Services Access Undertaking

Louis Dreyfus Commodities Australia Pty Ltd (**LDC**) is pleased to provide the following responses to the Issues Paper.

2.1.1 General Approach

Has the publish-negotiate-arbitrate approach in CBH's current undertaking assisted access seekers to gain access to port services on reasonable terms, including through commercial negotiation?

LDC believes that the publish-negotiate-arbitrate approach is appropriate, however it is not clear whether the approach has assisted access seekers as there is no counterfactual situation against which this can be judged.

2.1.2 Approach to Pricing

How has the approach to pricing in the 2009 Undertaking (i.e. publish, negotiate, arbitrate approach) worked in practice?

CBH published their terms. LDC elected not to enter into specific negotiations.

Is there a sufficient level of transparency in relation to the charges payable to export bulk wheat from a Western Australian grain port terminal?

The charges themselves are transparent as they are clearly expressed in Schedule 1 of the Port Terminal Services Agreement, however the basis for the existence and level of the charges is not always sufficiently clear.

CBH charges three primary fees for Bulk Export Capacity and Port Outloading Services and has indicated the following rates.

Upfront Marketer Fee	\$3.00/mt
Export Fee	\$14.10/mt
Lost Capacity Fee	\$7.00/mt (\$10.00/mt in the case of Base Load Capacity)

In the Port Terminal Services Agreement, Schedule 1, CBH states that;

- The Export Fee covers the provision of Port Terminal Services as described in the Port Terminal Services Agreement. Port Terminal Services are defined in the Port Terminal

Services Agreement, and are also specified in clause 5.1 of the Port Terminal Services Access Undertaking.

- 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. There is no reference in Schedule 1 of the Upfront Marketer Fee being applicable to Base Load Capacity.
- The Lost Capacity Fee is applied to any Lost Capacity as described in Port Terminal Rules, rule 11.

If the Export Fee covers the Port Terminal Services in their entirety, then it is unclear what service is provided by CBH against which it charges the Upfront Marketer Fee. There is no explanation of the actual cost incurred by CBH in providing this undefined service. The costs of operating the Auction are recovered by CBH, and the costs of advising the customer that they have been successful in obtaining capacity should be nominal at best. If the Upfront Marketer Fee is a down-payment for Port Terminal Services then this should be stated. However, as CBH have already implied that the entire costs of providing Port Terminal Services are already covered by the Export Fee, any move by CBH to alter the schedule in this way should be subjected to scrutiny by the ACCC.

There is no explanation from CBH as to the actual costs incurred when capacity is not used and therefore deemed to be Lost Capacity. It is therefore not possible for LDC to determine whether or not the level of the Lost Capacity Fee is appropriate.

In addition to the fees outlined above, CBH charges a fee of \$1.00/mt for Remedial Fumigation Services. This fee covers fumigation with phosphine where insects have been detected in Bulk Wheat delivered to the Port Terminal Facility. Where Bulk Wheat has been delivered to the Port Terminal Facility by CBH under Grain Express or any other bundled logistics service operated by CBH from time to time, having been outturned from a CBH upcountry facility, then this charge should not apply.

Are the arrangements for the rebate of auction premiums to customers who execute shipping slots appropriate?

LDC believes that rebating the auction premiums to customers who execute against shipping slots is appropriate. LDC considers that it would be appropriate for the auction premium to be held in a trust account, external to the CBH Group. This would create equality in the cash flow impact of auction premium payments comparing CBH against 3rd party access seekers.

Where CBH Grain fails to ship grain in the relevant shipping window, as provided for in rule 11 of the Port Terminal Rules, and is charged the Lost Capacity Fee, the fee should not be recovered by CBH Operations as it would be for other customers. Instead the monies should be placed in

the trust account, and rebated to customers who execute shipping slots in the same manner as the auction premium.

2.1.3 Substance of the Standard Access Agreement

How has the approach to the provision of standard terms in the form of the Standard Access Agreement worked in practice?

No comments.

Were access seekers able to negotiate and reach agreement on access agreements with CBH to their satisfaction?

LDC elected not to enter into specific negotiations.

Does the Standard Access Agreement in the Proposed Undertaking appropriately balance the interests of CBH and access seekers as a starting point to commence commercial negotiations?

No comment

Is it appropriate that the Proposed Undertaking provides CBH with an ability to unilaterally vary its published Standard Terms for the provision of port terminal services without ACCC approval?[clause 6.1(c)]

No. At a minimum the circumstances under which CBH may seek to vary the Standard Terms, and the extent of any such variation, such as which clauses may be subject to variation, should be defined.

2.2.1 Definition of Available Capacity

Is the method by which CBH defines available “Capacity” for port terminal services under the Proposed Undertaking appropriate?

No. CBH has multiple definitions of capacity. The application of each definition is not sufficiently clear. Some definitions appear contradictory.

CBH defines Capacity in the Port Terminal Services Agreement as meaning “the capacity of a Port Terminal Facility to put grain on board a vessel at a Port Terminal Facility during a defined period, measured in tonnes”. This definition is not qualified.

LDC believes that this definition is appropriate.

Separately CBH defines Annual Capacity in the Port Terminal Rules as meaning “the tonnage of grain capable of being exported through the Port Operator’s grain terminals during a year from November to October, as determined by the Port Operator, taking into account the efficient deployment of resources (including fixed assets and labour) over the year. This definition is heavily qualified.

CBH defines Core Capacity in the Port Terminal Rules as meaning “the Capacity of each Port Terminal Facility calculated in accordance with the process set out in rule 4.2(a).”

Rule 4.2(a) refers to Base Load Capacity. Presumably the correct reference is to rule 3.2(a). If this is the case it should be clearly stated in rule 3.2(a) that this refers to Core Capacity.

CBH seemingly does not propose to publish the quantity of Annual Capacity that it will make available. By our reading of the documents customers must infer this from the quantity of Base Load Capacity as published by CBH on its website on or before 15 August each year.

CBH will publish Harvest Capacity on its website on or before 15 September each year, and will announce on or before 15 October each year the amount of Base Load Capacity that has been taken up, and the proposed amount of Core Capacity it intends to offer for the following Annual Shipping Period.

The timing of the Auctions for capacity in the Harvest Shipping Period and the Annual Shipping Periods is not defined. CBH proposes to publish a schedule of the Capacity on offer at each Auction five business days prior to the commencement of the Auction. It is not clear that auction participants will know whether or not Base Load Capacity has been acquired, and if it has, what quantity of Base Load Capacity has been acquired. Again, this must seemingly be inferred.

Logically the sum of Harvest Capacity, Base Load Capacity and Core Capacity should be equal to Annual Capacity but this is not explicitly confirmed by CBH. It is therefore possible that CBH may use its right to vary the Port Terminal Rules and thereby reduce the amount of Auction Capacity available.

CBH states the criteria and process for estimating available Capacity in rule 3.2 of the Port Terminal Rules. “Available” is not defined. The criteria specified in rule 3.2 serve to heavily qualify Capacity, and reduce the capacity that CBH is willing to allocate to a quantity that is less than the actual capacity of the Port Terminal Facilities.

Many of the criteria specified under rule 3.2 are subjective. This is not appropriate in determining the quantity of capacity that CBH is willing to allocate at the Port Terminal Facilities to customers who are willing to pay the full charges specified by CBH for the services offered at Port Terminal Facilities.

The reduced capacity, as estimated by CBH applying the criteria in rule 3.2, may be appropriate to determine the amount of capacity that CBH is willing to make available under bundled logistics service offerings.

However, given that CBH proposes only to make its Port Terminal Facility capacity available by means of the Port Terminal Rules, and that the price paid by users is to be determined in part by the Auction Premium paid, and/or the undetermined cost of surge capacity, it is inappropriate that CBH should be able to artificially reduce the quantity of capacity in this manner.

Is there any aspect of this method that has or could have the effect of deterring third party access to CBH port terminal facilities? If so, how?

No comment.

2.2.2 Port Terminal Rules – the auction system

Have access seekers found that the auction system under CBH's Port Terminal Rules has worked well and has efficiently allocated port loading capacity?

The CBH auction system is an adequate and appropriate means of allocating capacity.

However as noted above the artificial constraint to supply that CBH is able to impose by virtue of the inconsistent definitions of capacity and the application of subjective criteria to reduce available capacity is not appropriate.

Is the existing auction system appropriate for the allocation of capacity in a high-yield year where demand exceeds supply?

The CBH auction system is an adequate and appropriate means of allocating capacity, when demand for capacity exceeds the supply.

However as noted above the artificial constraint to supply that CBH is able to impose by virtue of the inconsistent definitions of capacity and the application of subjective criteria to reduce available capacity is not appropriate.

Have access seekers found the process of seeking spare capacity via the spare capacity allocation system under the Port Terminal Rules an efficient approach to allocating port loading capacity?

Accessing spare capacity on a first come first served basis is an adequate and appropriate method.

2.2.3 Port Terminal Rules – CBH’s proposed two-tiered capacity allocation system

Do access seekers have concerns with the current capacity allocation model (comprising of the auction system, spare capacity allocation and a secondary market) to efficiently allocate capacity? If so what improvements or alternatives could be made to current arrangements to address any concerns?

See previous comments.

Do access seekers consider the CBH two-tiered capacity allocation to be appropriate to allocate port loading capacity for bulk wheat in Western Australia?

No – see separate submission on base load capacity.

Will the allocation of ‘base load capacity’ to customers that meet CBH’s ‘eligibility requirements’ unreasonably discriminate in favour of customers that typically have large volumes of bulk wheat for export, to the detriment of bulk wheat exporters with relatively smaller bulk wheat volumes?

See separate submission on base load capacity.

Is the offer of 40 per cent of available port terminal capacity for auction sufficient to meet the port terminal loading capacity requirements of all access seekers that do not wish to obtain ‘base load capacity’ on a take-or-pay basis under CBH’s proposed two-tiered capacity allocation system?

See separate submission on base load capacity.

What are the expected consequences of introducing the allocation of ‘base load capacity’ (up to 60 per cent of total available capacity) on the operation of the auction system and residual capacity (a minimum of 40 per cent of available capacity)?

See separate submission on base load capacity.

Are the eligibility requirements for ‘base load capacity’ access seekers appropriate?

See separate submission on base load capacity.

Is the requirement to negotiate a Supply Chain Agreement appropriate? Is

there sufficient clarity about the requirement to enter into a Supply Chain Agreement and what that involves?

No comment.

Is it appropriate that eligible customers for 'base load capacity' under CBH's proposed two-tiered capacity allocation system are not permitted to transfer port terminal capacity?

See separate submission on base load capacity.

2.2.4 Direct Port Access

Are the Direct Port Access arrangements in the Proposed Undertaking adequate and is there sufficient transparency of services, fees, charges, accumulation and storage provisions?

No. As outlined above CBH artificially constrain capacity at their Port Terminal Facilities, thereby potentially forcing parties wishing to utilize Direct Port Access arrangements to pay excessive charges in the form of Auction Premiums, despite the fact that there would be remaining available capacity at the Port Terminal Facility under the unqualified definition contained in the Port Terminal Services Agreement.

Does the CBH proposed two tiered port capacity allocation model provide sufficient detail about Direct Port Access for eligible customers taking up base load capacity?

No comment

2.2.5 Secondary market for port terminal capacity

Have access seekers found that there is an effective secondary market for the trading of port terminal capacity in Western Australia?

Yes.

How important is the effective operation of a secondary market for the allocation of port terminal capacity to the efficient operation of the bulk wheat export industry in Western Australia?

LDC believes that transferability of slots between users, ports, time periods and grains is important and necessary to allow exporters to execute shipping programs, and to ensure that exporters who initially choose not to participate in the capacity allocation methods prescribed, may still have an opportunity to access capacity when there is no spare capacity available.

Are there any impediments in the Proposed Undertaking (for example particular rules in the Port Terminal Rules and/or the Auction Rules), which would inhibit the development of an effective secondary market?

No comment.

What effect would CBH's proposed two-tiered capacity allocation model, in which customers who acquire base load capacity will not be permitted to transfer such capacity on the secondary market, have on the development of a secondary market?

See separate submission on base load capacity.

Are there any impediments in the Proposed Undertaking (for example particular rules in the Port Terminal Rules or processes in the Auction Rules), which prevent access seekers who opt for direct port access (e.g. not utilising CBH's up-country storage and/or transport services) from transferring port capacity on the secondary market?

No comment.

2.3.1 Port Terminal Rules variation process

Are access seekers satisfied with the proposed consultation process CBH will conduct prior to varying its Port Terminal Rules?

Unclear on what the consultation process entails. Clause 10.2 of the Port Terminal Services Undertaking does not mention a consultation process.

What has been the experience of access seekers in variation consultations under CBH's 2009 Undertaking?

No comment.

Is it appropriate that CBH be provided with the flexibility to vary the Port Terminal Rules under 'exceptional circumstances' (as defined under the Proposed Undertaking) without prior consultation with interested parties?

No comment

In the event that CBH disputes an 'objection notice' issued by the ACCC under clause 10.6 of the Proposed Undertaking in relation to a proposed variation to the Port Terminal Rules, is it appropriate that the matter be referred to arbitration for determination? [clause 10.6(f)(iii)]

No comment

2.4 Ring-fencing arrangements

Should the current ring-fencing arrangements maintained by CBH for the purpose of the Grain Express Exclusive Dealing Notification be included in the Proposed Undertaking? If not, describe what, if any, ring-fencing arrangements should be included.

It is unclear if those arrangements would survive any revocation by ACCC of the Exclusive Dealing Notification. LDC has not recently reviewed the ring fencing arrangements contained in the Grain Express Exclusive Dealing Notification. Consideration should be given to ring fence the Port Terminal Facility operations from the rest of CBH.

2.5 Dispute resolution

How have the dispute resolution provisions in the 2009 Undertaking worked in practice?

LDC has not tested these.

Are the listed exclusions to the definition of 'dispute' under the Proposed Undertaking appropriate?[Clause 1.1 Definitions]

No comment.

2.6 Term of the Proposed Undertaking and transition arrangements

Is the three year term of the Proposed Undertaking appropriate?

Yes.

Is the Proposed Undertaking drafted in a way to ensure a smooth transition from the 2009 Undertaking to the Proposed Undertaking?

It is sufficient.

Does the Proposed Undertaking adequately plan, and allow sufficient time, for

the introduction of the two-tiered capacity allocation model for the 2011/2012 shipping calendar; including appropriate lead in times to allocate base load capacity, negotiate access agreements and commence the auction timetable?

No comment.

2.7 Publication of key port information and performance indicators

Have access seekers found that CBH's publication of key port information met their information needs, particularly in relation to available capacity at CBH's port terminals?

No comment

Does the publication of 'estimated annual capacity' by CBH provide a sufficient level of information to access seekers, or should CBH be required to also publish detail on the 'available capacity' at its port terminals?

See above under section 2.2.1

Have access seekers found CBH's publication of key port performance indicators met their information needs?

No comment.