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DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE

## Working Party No. 2 on Competition and Regulation

### COMPETITION ISSUES IN LINER SHIPPING

-- Australia --

19 June 2015

*This document reproduces a written contribution from Australia submitted for Item IV of the 59th meeting of the Working Party No. 2 on Competition and Regulation on 19 June 2015.*

*More documents related to this discussion can be found at: <http://www.oecd.org/daf/competition/competition-issues-in-liner-shipping.htm>*

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-- Australia --

**1. Please provide a broad characterization of the liner shipping sector in your jurisdiction, describing any competition concerns you may have identified.**

1. Australia is almost exclusively dependent on foreign carriers for its liner cargo shipping services (liner shipping services). Australian shippers in all States and Territories require liner shipping services of adequate capacity, frequency and reliability to provide them with stable access to world markets.

2. Liner shipping services are vital to Australia's export and import industries. Australia faces particular challenges in securing stable and economical liner shipping services due to its geographical isolation – it is “at the end of the line” for most shipping routes; only ships going to New Zealand from or through Asia pass Australia on the way. In addition, although the size of Australia's economy is substantial, it is not so large as to constitute a mecca for the world's liner shipping operators.

3. Australia provides liner shipping conferences<sup>1</sup> exemptions, limited in scope, from anti-competitive provisions in the Competition and Consumer Act 2010 (CCA) and currently allows for agreements between liner shipping providers that allow for price fixing, capacity limitations, pooling resources and exchange of commercial information.

4. Competition concerns have been raised by Australian shippers, in relation to the spread of certain non-binding conference agreements and the general ineffectiveness of importers/exporters ability to negotiate with carriers to deliver adequate shipping services at prices which reflect the cost of providing the service.<sup>2</sup> However, shipping worldwide has seen an oversupply since the Global Financial Crisis. The level of freight rates may not be the prime consideration in many cases, although unforeseen or rapid increases in rates are often a problem for shippers. Competition concerns stem primarily from allowing competing foreign shipping lines to cooperate to restrict capacity, or increase freight rates with no assessment of the net public benefit.

**2. Please provide a description of the regulatory framework and the application of competition law to liner shipping in your jurisdiction. In your description, please refer to the potential impact on competition, as well as to the potential efficiencies of each type of agreement. If applicable, please list the main elements taken into account in the competitive assessment of these agreements.**

5. Part X of the CCA enables liner shipping operators to enter into collaborative agreements for supplying joint or co-ordinated shipping services to Australian exporters and importers by giving such agreements immunity from competition laws. Under the agreements the operators can fix routes, capacity, sailing schedules and prices, share operational functions and/or exchange commercial information, as long as the conditions specified in Part X are fulfilled.

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<sup>1</sup> Liner shipping conference can include any commercial agreement between liner shipping service providers.

<sup>2</sup> Productivity Commission 2005, Review of Part X of the Trade Practices Act 1974: International Liner Cargo Shipping, Report No. 32, Productivity Commission, March.

6. The objective of Part X is to ensure that Australian exporters and importers have access to internationally competitive shipping liner cargo services of satisfactory frequency, reliability and port coverage. In particular, it is designed to address concerns that general competition regulation may prevent liner shipping operators servicing “thin” (i.e. low volume) Australian routes from realising potential efficiencies that would be available to liner shipping operators through market sharing and operational collaboration, making shipping services uneconomic or subject to big fluctuations in availability and price.

### **2.1 *Types of agreements between liner shipping operators***

7. There are four broad types of collaborative agreements (agreements) between liner shipping operators which are covered by Part X:

- *Conference agreements* - route-specific agreements in which the parties agree on one or more key elements of the liner shipping service to be provided on the route, such as sailing schedules, the capacity that is to be provided (capacity is typically designated as container “slots”), the freight rates that are to be charged, etc.
- *Discussion agreements* - agreements that provide for the sharing of commercial information about matters like routes, schedules, capacity and freight rates. They may specify recommended freight rates.
- *Operational agreements (consortia)* - agreements that provide for technical co-operation between shipping line operators, e.g. slot sharing or vessel sharing.
- *Alliances* – agreements that apply to a number of routes and provide for full operational integration of services, but not extending to freight rates.

### **2.2 *Application of competition law to liner shipping conferences vs consortia***

8. Part X uses the term “conference agreement” in a broad sense, to cover all four types of agreements described above, it does not differentiate by conference names or labels. The rules apply based on conduct. For example consortia and conference agreements are registered under the same application process. However, there are rules that relate to freight rates, negotiating minimum service levels and applying countervailing powers.

#### **2.2.1 *Registration of agreements***

9. Part X exempts agreements between liner shipping operators relating to the supply of international liner shipping services from a number of key anti-competitive conduct provisions in Part IV of the CCA, through the mechanism of registration, which is effected by the Registrar. Registration of such agreements is not compulsory; the incentive for liner shipping operators to apply to the Registrar for registration of their agreements is the exemption that registration confers.

10. The anti-competitive conduct provisions from which registration confers exemption are the prohibition against cartel conduct (including price- and capacity-fixing)<sup>3</sup> and the prohibition against agreements between competitors that restrict competition;<sup>4</sup> registration also confers exemption from the prohibition against exclusive dealing (i.e. full line forcing and third line forcing),<sup>5</sup> but only in limited circumstances (as indicated in the paragraph after next). Registration does *not* confer exemption from the prohibition against misuse of market power<sup>6</sup> or the restrictions on mergers and acquisitions.<sup>7</sup>

11. The main criteria for registration are as follows:

- a copy of the agreement has been provided to the relevant designated peak shipper body (a designated peak shipper body is an association representing shippers' interests that has been designated by the Minister<sup>8</sup>);
- the agreement provides that it is governed by Australian law;
- the agreement provides that any party to the agreement may withdraw from it on reasonable notice without penalty;
- the agreement specifies the minimum level of shipping services that are to be provided under the agreement; and
- either:
  - the agreement only deals with routes, capacity, freight rates, the pooling or apportionment of earnings, losses or traffic between the parties to the agreement and/or the regulation of the entry of new parties to the agreement; or
  - if the agreement also deals with other matters, and/or if the agreement contains a provision that requires or permits exclusive dealing, then the anti-competitive provisions in the agreement *must be necessary for the effective operation of the agreement and must be of overall benefit to exporters or importers.*<sup>9</sup>

12. The last-mentioned criterion is not purely objective but requires the making of an evaluative judgement about the need for and benefits of the relevant anti-competitive provisions in the agreement. However, the Registrar has advised that, in practice, agreements that are lodged for registration do not deal with other matters or contain exclusionary provisions, and hence they do not rely on this criterion.

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<sup>3</sup> Section 44ZZRD of the CCA. (References to sections are to sections of the CCA unless otherwise indicated.)

<sup>4</sup> Section 45.

<sup>5</sup> Section 47.

<sup>6</sup> Section 46.

<sup>7</sup> Section 50.

<sup>8</sup> The current designated peak shipper bodies are the Australian Peak Shippers Association (APSA), which represents exporters, and the Importers Association of Australia (IAA), which represents importers.

<sup>9</sup> Regarding the criteria for registration see sections 10.06, 10.07, 10.08, 10.27A, 10.28, 10.29 and 10.33.

13. Registration of an agreement involves a two-step process: provisional registration and final registration.

14. When the parties to an agreement lodge the agreement with the Registrar for provisional registration, they have to provide a copy of the agreement to the relevant designated peak shipper body.<sup>10</sup> During the period of fourteen days after provisional registration, the designated peak shipper body can require the parties to the agreement to negotiate with the designated peak shipper body about the minimum level of liner shipping services offered under the agreement, and to provide relevant information to assist the negotiations.<sup>11</sup> The requirement is only to negotiate; there is no obligation to reach agreement on anything. The designated peak shipper bodies rarely exercise their right to call for negotiations – they only do so if they have particular concerns about the agreement which they cannot resolve informally with the liner shipping operators who are parties to the agreement.

15. The parties to an agreement that has been provisionally registered can apply to the Registrar for final registration of the agreement. Final registration cannot take place until any negotiations that were called by the peak shipper body have been concluded.<sup>12</sup>

16. After final registration, the parties to the agreement must, whenever reasonably requested by the designated peak shipper body, negotiate with that body about the terms and conditions on which shipping services are provided under the agreement, and provide relevant information to assist the negotiations.<sup>13</sup>

17. Variations of registered agreements (except variations that only vary freight rates) must also be registered to obtain protection from the anti-competitive conduct provisions.<sup>14</sup>

18. The register of agreements and the agreements entered on the register are available for public inspection<sup>15</sup> (other than certain confidential details in the agreements which are redacted at the parties' request<sup>16</sup>).

### **2.3 Rationale for exempting from competition law:**

19. Australia has historically allowed liner shipping conferences exemptions, limited in scope,<sup>17</sup> from competition law following the practices of Australia's major trading partners. The exemptions have been subjected to a number of reviews over the last few decades. The main reasons for retaining the exemptions given by the various reviews have been that:

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<sup>10</sup> Section 10.27A.

<sup>11</sup> Section 10.29.

<sup>12</sup> Section 10.33.

<sup>13</sup> Section 10.41.

<sup>14</sup> Section 10.42.

<sup>15</sup> Section 10.10.

<sup>16</sup> Sections 10.34 to 10.38.

<sup>17</sup> Exemptions to liner shipping companies are granted for many different types of anti-competitive conduct; however, the exemptions are limited in scope and a blanket exemption covering all of Australian anti-competition laws is not provided.

- if the exemptions were abolished, the parties to each agreement would have to apply for an ‘authorisation’ under the trade practices legislation, which would be a lengthy, and costly process, uncertain in outcome, and predominantly legal and bureaucratic rather than commercial;
- evidence that the exemption approach has been successful, promoting good commercial relationships and dispute resolution, and facilitating good service and price outcomes for Australian exporters. Moreover, it has been done at a comparatively low administrative cost;
- serious doubts about whether, due to the international nature of liner shipping, Australia could enforce its competition laws in the event that an authorisation for an agreement was not granted.

**3. Please describe the main regulatory/legal reforms undertaken (or currently underway) in your jurisdiction (e.g., abolishment of liner shipping conferences anti-trust exemptions). What impact did these have (or are expected to have) on the market (e.g., in terms of market entry and exit, concentration, profitability, prices, quality of service and consumer welfare)?**

20. In 2015, Australia conducted a review of competition laws (the Harper Review)<sup>18</sup> which included a review of liner shipping conferences anti-trust exemptions.

21. The Harper Review recommended:

*"Part X of the CCA should be repealed. A block exemption granted by the ACCC<sup>19</sup> should be available for liner shipping agreements that meet a minimum standard of pro-competitive features. The minimum standard of pro-competitive features to qualify for the block exemption should be determined by the ACCC in consultation with shippers, their representative bodies and the liner shipping industry. Other agreements that risk contravening the competition provisions of the CCA should be subject to individual authorisation, as needed, by the ACCC.*

*Repeal of Part X will mean that existing agreements are no longer exempt from the competition provisions of the CCA. Transitional arrangements are therefore warranted. A transitional period of two years should allow for the necessary authorisations to be sought and to identify agreements that qualify for the proposed block exemption."*

22. The Government is currently considering the recommendations of the Harper Review and is in the process of consulting with stakeholders.

23. If the recommendations are accepted a block exemption regime will be introduced that will allow operational agreements but is likely to exclude exemptions for ratemaking/capacity fixing agreements.

**4. Please describe your understanding concerning the impact, on the sector, of differences in how competition law applies to liner shipping in different countries.**

24. Liner shipping regulation is in a state of flux. Many countries are moving towards a repeal of exemptions while allowing some scope for operational agreements. In Asia-Pacific region, New Zealand has attempted to address competition issues in liner shipping and is undertaking reform in this area. Malaysia has a block exemptions system for liner shipping agreements. Liner shipping is the only sector

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<sup>18</sup> Harper I., Anderson P., McCluskey S., and O’Bryan M., March 2015, *Competition Policy Review Final Report*.

<sup>19</sup> Australian Competition and Consumer Commission (ACCC).

formally exempt from provisions of Malaysia's Competition Act. Singapore has extended its block exemption for liner shipping agreements to the end of 2015.

**5. Please provide some details on the degree of concentration in liner shipping on the trade to and from your jurisdiction and its evolution over time. What have been the main determinants of this evolution?**

25. The data are not available to answer this question.

**6. Please characterise the relative importance, in terms of shipping volumes, of a) liner shipping conferences and b) consortia and other alliances operating in liner shipping routes to and from your jurisdiction. How have these evolved through time? What have been the main determinants of that evolution?**

26. The data are not available to answer this question.

**7. Please provide information on sector inquiries, market studies or reports, undertaken in your jurisdiction, which relate to competition in liner shipping, describing the conclusions and recommendations proposed.**

#### **7.1 *Hilmer Review, 1993***

*Hilmer F., Rayner M., Taperell G., National Competition Policy, Australian Government Publishing Service (AGPS), Canberra, 1993.*

27. The Committee recommended that any decision to continue special treatment should be reviewed regularly to ensure that the alleged benefits of anti-competitive activity exceed the costs of such behaviour, and that liner shipping policy objectives are being pursued in a way that is least injurious to competition. However the Committee refrained from making comprehensive recommendations in circumstances where the Brazil Review was on foot.

#### **7.2 *Brazil Review 1993***

*Brazil P., Kolsen H.H. and Evans J. 1993, Liner Shipping Cargoes and Conferences: Report of the Part X Review Panel, AGPS, Canberra.*

28. The Panel recommended that Part X be retained. It was found that there are constraints on anti-competitive behaviour by shipping lines. The international liner shipping industry is reasonably contestable. Non-conference ships accounted for some 45% of tonnage carried in and out of Australia in 1991-92 and this share had been increasing. Furthermore, the countervailing power that shipper bodies are able to exert under Part X reduces the ability of conferences to exploit market power. Arrangements between ship operators facilitate provision of the regular scheduled sailings that shippers prefer. The authorisation process under Part VII of the then-called Trade Practices Act, that ship operators would have to use in the absence of Part X are can be 'lengthy, costly and uncertain in outcome', and are 'predominantly legal and bureaucratic rather than commercial'. 'Competition is seen as an end in itself rather than a means to an end'.

29. The Panel suggested that any attempt by one jurisdiction to outlaw combinations could see their arrangements shift overseas so as to be beyond the effective reach of that jurisdiction.

### **7.3 Productivity Commission 1999**

*Productivity Commission 1999, International liner cargo shipping: a review of Part X of the Trade Practices Act 1974, Report no. 9, AusInfo, Canberra.*

30. The Commission recommended that Part X be retained. Since the 1993 Brazil review, liner shipping had become more concentrated via mergers and acquisitions, while average vessel size continued to grow as carriers attempted to capture scale economies. Rationalisation was being driven by technological change. Intense competition in most trades which had seen freight rates fall significantly in real terms and profitability decline. The trend towards greater industry concentration did not appear to have reduced competition. On the contrary, it appeared the expansion of global shipping companies had increased competition on individual routes. Conferences compete with each other, with transshipment operators, and with independent direct operators.

31. If conferences were proscribed, it is likely that some carriers would merge and others would exit individual trades allowing remaining providers to expand and take larger shares of the trade. In other words, the economics of liner shipping are such that there will inevitably be market cooperation and concentration in some form in order to provide the service currently provided by conferences.

32. Conference shares of major inward and outward trades had continued to decline since the Brazil review. There is no trade route into or out of Australia in which a conference has a monopoly or close to a monopoly, so shippers always have a choice. Freight rates for conference and non-conference liner shipping services on most major Australian trade routes continued to decline in nominal and real terms since the early 1990s, continuing a trend evident since the late 1970s. At the same time, the quality of service provided by non-conference operators had improved since the 1993 Brazil Review. Conferences as a whole continued to offer a better quality service than individual non-conference lines in terms of their overall frequency of services, reefer and dry capacity and port coverage. The difference between conference and nonconference freight rates had narrowed, though conference services typically continue to attract a premium reflecting the higher level of service provided.

33. Evidence available to the Commission suggested that the approach in Part X had been successful, promoting commercial relationships and dispute resolution and facilitating good service and price outcomes for Australian exporters. Moreover, it was done at a comparatively low administrative cost and had not caused international jurisdictional conflicts. There were also serious doubts as to whether Australia could enforce its competition laws in the event that an authorisation was not granted. Administrative and compliance costs also would appear to be significantly higher under authorisation.

34. The Commission was not persuaded by the argument that liner shipping should not be treated differently from other Australian industries. Uniformity of regulation is not an end in itself — the ultimate objective must be a regulatory regime which best serves the national interest.

### **7.4 Productivity Commission 2005**

*Productivity Commission 2005, Review of Part X of the Trade Practices Act 1974: International Liner Cargo Shipping, Report No. 32, Productivity Commission, March.*

35. In an about turn from the finding of its 1999 review, the Productivity Commission recommended in 2005 that Part X be repealed, with transitional arrangements put in place. If Part X was retained, the Commission in 2005 suggested three alternatives for modifying Part X.



- **Option 1:** select agreements by key characteristics: Agreements that seek cost savings from jointly managing shipping assets and the scheduling of services (for example, slot chartering and vessel sharing) would continue to be eligible for registration under Part X. Agreements that seek to influence markets by joint price setting and supply control (such as traditional conferences and discussion agreements) would require individual authorisation under Part VII.
- **Option 2:** exclude discussion agreements together with the introduction of confidential individual service contracts. Excluding discussion agreements alone would carry a risk of allowing some agreements with strongly anticompetitive provisions. Provisions providing for, and specifically protecting, individual service contracts between carriers and shippers can effectively preclude formal price fixing arrangements. Making such a change in Australia was supported by Shipping Australia Limited (SAL), representing ocean carriers, as well as by representatives of many individual shippers.
- **Option 3:** introduce confidential individual service contracts. Even if no selective registration process were introduced into Part X, it would still be worthwhile to modify Part X to provide for and protect confidential individual service contracts. This would involve making ineligible for registration those agreements that specifically limit the ability of carriers to enter into confidential individual contracts, or require that the terms and conditions of such contracts be disclosed to other agreement parties or otherwise be made public. Whether such contracts are entered into should remain a matter for negotiation between the individual parties involved. They would not be mandatory but, if entered into, confidentiality provisions would need to be respected. Part X should clearly state that carriers shall not discuss or otherwise disclose, directly or indirectly, the provisions of individual service contracts to other carriers, whether they are members of the registered agreement or not.

36. The Commission noted several changes that had occurred since its 1999 review.

- The US and EU had narrowed the scope of anti-trust immunities provided to conferences.
- Discussion agreements with high market shares had emerged on many Australian trade routes.
- Tighter international market conditions had highlighted the effects of collaborative price-setting arrangements.
- Australian shippers, who had previously provided unqualified support for Part X, had become critical of aspects of its operation, with some calling for its abolition. Many had become concerned about the effects of the spread of non-binding discussion agreements and the general ineffectiveness of their collective negotiations with carriers to deliver adequate shipping services at prices that reflect the costs of providing the service.

37. The Commission found in the 2005 Review a lack of evidence to support the destructive competition argument. Deregulation of airline, road and rail transport industries has occurred without evidence of unacceptable market instability. Indeed, deregulation, with regulatory approval of operational agreements, has generally been associated with improved service provision and lower prices. Efficient asset management techniques (such as consortia and joint ventures) have evolved to allow carriers to redeploy vessels across several routes and benefit from network economies, that is, hub and spoke route systems provide carriers with numerous opportunities to shift cargoes among ships and better manage capacity.

38. The Commission also found in the 2005 Review that the countervailing power of shipper bodies does not appear to work effectively because the shipper bodies have no contractual influence over the supply of cargo and are therefore unable to exercise any true market power. At best they can discuss quality control issues. The majority of cargo is now carried under individually negotiated service contracts. Freight rates that are negotiated collectively between Australian shippers and ocean carriers have little relevance to the actual rates at which cargo is carried, other than sometimes providing a point of reference for individual negotiations and a ceiling rate in some circumstances.

39. The Commission was unconvinced about the contestable markets argument that the market power of conferences is limited by the possibility of entry. While entry costs are not especially high, high worldwide demand for capacity, the desire to maintain networks (reducing incentives to shift vessels from one trade to other) and predatory behaviour by incumbents may raise entry costs and reduce the degree of route contestability.

40. The Commission found in the 2005 Review that the existence of Part X was based on the judgment that so few agreements would fail a net public benefit test that the added costs of individual authorisation were not warranted. At best, this judgment is untested. Exchange of commercial information on price and quantity among carriers can be a means of enforcing collusive agreements and may result in a limiting of competition. The evidence as to whether conferences raise freight rates above levels necessary to sustain industry equilibrium is mixed. Conferences with high market share appear to have more success in raising freight rates. Where the confidentiality of service contracts are protected by law — such as on US trade routes — conferences appear to have less success in fixing and raising rates. Exchange of information, particularly in regard to shipper demand, increases the influence of discussion agreements over prices. The ability of discussion agreements to influence rates increases with market share and is greater at times of strong shipper demand.

41. The potential for operational agreements that do not include provisions for price fixing to reduce competition is less than those which involve collusion over rates. The potential for an operational agreement to reduce competition increases with market share.

42. The Commission acknowledged that the costs of demonstrating a net public benefit would be high if authorisation was sought for highly anticompetitive behaviour (such as price fixing and supply control) as it would be difficult to demonstrate that such behaviour could result in a net public benefit. The Commission considered that this is not unreasonable given the potential of some agreements to provide significant anticompetitive detriment. However, as indicated above, for many agreements, it would be clear that authorisation would offer significant cost savings with little anticompetitive risk. It could be expected that such agreements would be authorised expeditiously at modest cost and, indeed, some may not even require authorisation.

43. The Commission also found in the 2005 Review that conflicts with the laws of other countries from repeal of Part X should not occur because no jurisdiction requires carriers to engage in anticompetitive behaviour.

## **7.5 Australian and New Zealand Productivity Commissions Joint Study 2012**

*Australian Productivity Commission and New Zealand Productivity Commission 2012, Strengthening trans-Tasman economic relations, Joint Study, Final Report, Supplementary paper B: Transport services.*

44. Exemptions for liner shipping from competition were addressed by the Joint Study in a supplementary paper on transport services (ANZ PC 2012). Consistent with the most recent inquiries by both Productivity Commissions, the Joint Study recommended that the exemption for ratemaking agreements under the competition acts in both countries should be removed. It noted that The Australian Peak Shippers' Association (APSA) supported the removal of the exemption for discussion (ratemaking) agreements, in line with its position in the 2005 Australian Commission review. The Joint Study noted that the benefits of removing the exemption are unlikely to be large for the Australian and New Zealand economies, given the low reliance on such agreements. Nevertheless, removal will reduce the likelihood of future carrier collusion. The exemption for non-ratemaking agreements should be retained based on the potential risk that authorisation requirements may deter the making of productivity enhancing non-ratemaking agreements.

## **7.6 Competition Policy Review 2015**

*Harper I., Anderson P., McCluskey S., and O'Bryan M., March 2015, Competition Policy Review: Final Report.*

45. No other industry enjoys legislative exemption from Australia's competition laws. This is despite the fact that other industries have similar economic characteristics to the liner shipping industry, particularly the international airline industry. If participants in other industries wish to make agreements that would otherwise contravene the competition law, they are required to seek authorisation from the ACCC.

46. The Panel therefore considers that Part X should be repealed and the liner shipping industry should be subject to the normal operation of the CCA.

47. The Panel recommended the ACCC should be given power to grant block exemptions for agreements that meet a minimum standard of pro-competitive features. The Committee suggested conference agreements that co-ordinate scheduling and the exchange of capacity, while allowing confidential individual service contracts and not involving a common conference tariff and pooling of revenues and losses, should be eligible for a block exemption. Other forms of agreement that do not qualify for the block exemption should be subject to individual authorisation.

48. The Panel also recommended a transition period to establish which agreements qualify for the block exemption and for other agreements to either seek authorisation or be modified if needed to comply with the CCA. The Panel considers a transition period of two years should be sufficient.