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SAL 15051 / LP24

Shipping Australia Limited's Response to Recommendation 4 of

The Competition Policy Review Final Report of 31 March 2015

1. The competition review report findings and recommendations in relation to Part X of the CCA contains both errors of fact and misleading statements which are not supported by case study or example. These matters will be highlighted in this response. As a minor element of a broad *root and branch* review of overall competition policy, the review of Part X of the CCA has not received the detailed analysis and attention that a proper understanding of this important regulation requires. This regulation has undergone five comprehensive reviews in the last 30 years, and has been found to benefit the public interest. Only ten submissions to this review partly or substantively addressed Part X, compared to twenty-three submissions solely addressing Part X in the 2004 review. Importantly, the report contains no consideration whatsoever of the implications of removing Part X from the CCA. The Panel's largely unsubstantiated recommendations appear to reflect the simplistic ideology, that all industry sectors must be treated the same. Part X operates in the national interest by providing a stable regulatory environment that minimises barriers to participation in liner shipping and supports competition. This is evidenced by continuing low shipping rates for imports and exports. Of course any regulation can be improved in its operation and impact but it is fundamental that any adjustments to improve Part X should only be considered after a full dedicated review has been undertaken.

2. **The final report's recommendation to abolish Part X will:**

- increase uncertainty and red tape compared to the current regime of regulation;
- promote more instability in services and pricing;
- reduce the leverage exporters and importers have to negotiate the best terms and conditions of service;
- reduce competition rather than enhance it;
- put Australia at odds with the regulatory regimes of our major trading partners;
- have a deleterious impact on the international competitiveness of our container exporters and importers.

3. These impacts will be disruptive and destructive at a time of forecast unprecedented growth in Australia's container trade in the medium to long term. The Panel does not seem to have reviewed the operation of the current legislation at all. There is no acknowledgement that Part X's light-handed and low cost regulatory regime which places serious obligations on parties to such agreements already successfully delivers a highly competitive shipping market. The report makes recommendations for change but does not provide any evidence or even describe the problem that

needs to be solved; neither does it make any detailed assessment of how the recommended action would improve shipping services.

4. SAL's comprehensive submission specifically addressing the points raised in the issues paper appears to have been largely ignored and the report does not address most of these matters. Whilst the Panel had numerous meetings with stakeholders, there were no meetings with SAL or importantly, the peak shipper bodies designated under Part X: the Australian Peak Shippers' Association, and the Importers' Association of Australia**.** This can only be described as a critical failure in of review process and shows that the operation of Part X, and whether it meets Australia's national interests, was not given proper consideration.

5. The Panel claims to have assessed Australia's competition policy to see if it is still 'fit for purpose', based on the following relevant criteria:

- Does it focus on making markets work in the long term interests of consumers?
- Does it establish laws & regulations that are clear, predictable & reliable?
- Does it encourage innovation, entrepreneurship and the entry of new players?
- Does it secure necessary standards of access & equity?
- Does it promote efficient use of infrastructure and natural resources?

6**. The Panel appears to have completely ignored its own criteria when accessing Part X of the CCA.** The regulatory regime for international liner shipping contained in Part X fully meets these criteria. The outcome of Recommendation 4 will not.

7. Whilst the panel accepts that international liner shipping requires special treatment, it provides this in the form of a proposed block exemption which should be granted by the ACCC. This introduces a high level of unnecessary uncertainty into the regulatory environment whereas Part X is clear and transparent. How a 'block exemption' would improve on the current approach in Part X is not explained. Any shipping Line falling outside these unknown limits of a block exemption will then require the full ACCC authorisation process which even the panel agrees, "might lead to unnecessary compliance costs."

8. The existing Part X is not a block exemption. It contains limited exemptions conditional on the members of registered Agreements fulfilling the obligations that have been set out over the years by successive Governments as part of their international liner shipping policies. Promoting competition is an important part of those policies, as is meeting the interests of Australian container exporters and importers for adequate, economic and efficient shipping services. The Panel has clearly misinterpreted the operation of Part X.

9. The report has overlooked or in some cases misrepresented important facts, which indicates a lack of due diligence to this component of the review. Illustrative examples of this follow:

- **Part X is already pro-competitive**. It minimises barriers to entry to the Australian trade and ensures a high level of contestability from both direct new entrants and transhipment operators with individual shipping Lines competing fiercely for market share. This is evidenced by the fact that current freight rates in our Asian container trades are less than a third of what they were in monetary terms thirty years ago (less than one sixth in real

terms). Global consolidation of container shipping Lines, more efficient consortia arrangements and the adoption of new technology have all combined to assist the Lines in meeting the challenges of persistent low returns in the Australian international liner trades.

- The objects of Part X include are required to be achieved “by permitting continued conference operations while enhancing the competitive environment for international liner cargo shipping services through the provision of adequate and appropriate safeguards against abuse of conference power” and the Minister may exercise his powers in relation to an Agreement “if the conduct or proposed conduct has not resulted in, or is unlikely to result in, a benefit to the public that outweighs the detriment to the public constituted by any lessening of competition.” There are many references to competition that require consideration and assessment by the Registrar of Liner Shipping

- **Part X implements the Government’s international shipping policy** which, in exchange for limited exemptions from some Sections of the CCA , provides, amongst other things, for a transparent process of registration of Agreements, guaranteed minimum levels of service, compulsory negotiations with the users of the services when requested to do so and importantly the provision of detailed information in support of such negotiations and 30 days warning to shipper bodies of impending changes in the terms and conditions of service provided under the Agreement. There are clear provisions for the ACCC to investigate complaints. These on-going processes must be in Australia’s national interest compared to any alternative regulatory regime.

- The report states that no other industry enjoys legislative exemption from Australia’s competition laws and suggests other industries have similar economic characteristics to the liner shipping industry, particularly the international airline industry. This is misleading without reference to the Government’s bilateral air service agreements as most air freight is carried in the belly holds of passenger aircraft. The majority of capacity for airfreight is thus strictly regulated. The Australian Government has negotiated 90 bilateral air service agreements and associated arrangements and international aviation is regulated by a complex web of over 3000 interlocking bilateral air service agreements. Governments must continually negotiate new treaties to allow international aviation to grow and to expand their carriers’ access to new and emerging markets.[1] Whilst the panel considers that air service agreements should not be used to protect Australian carriers from competition and Australia’s policy on such agreements should be to aim to ensure there is sufficient capacity on all routes to allow for growth, international liner shipping suffers from chronic excess capacity and there is no international regulation governing access to individual trades. There are no other industries with very similar economic characteristics to the international liner shipping industry.

- **In comparison with the EU, the wrong impression is given by the comment that “over the last two decades other jurisdictions have moved to more competitive regimes and this has not led to excessive instability or ‘destructive competition’.”** Whilst retaining the block exemption for consortia, the EU did remove the block exemption for Liner Conferences in 2008 and expected other countries to follow suit but this did not eventuate.

[1] http://www.infrastructure.gov.au/aviation/international/bilateral_system.aspx. Internet accessed on 9 October, 2014

"As identified by recent government reports in the United States[2] and Japan, numerous structural problems exist in the European trade, including prolonged freight rate volatility, newer and higher surcharges, and a number of service issues, including overall service reductions and a lack of available vessel capacity to meet the basic needs of importers and exporters. These types of structural problems as experienced in the EU have not been experienced in other trade lanes like the Transpacific or Intra-Asia, where competition law exemptions for carriers' agreements still exist."[3] There continues to be a clear exemption in many of Australia's major trading partners (including China, Japan, Republic of Korea and the USA) and many others, following reviews in the last five years, have decided to introduce or maintain the exemption. It is important to note that no country in the world has removed the exemption for consortia. In fact the EU has recently renewed its separate block exemption for consortia for a further five years following a thorough review of its benefits but this has not been mentioned in the final report!.

- **The contrast to the US approach is misleading.** The report states "the requirements that carrier agreements cannot prohibit or limit confidential individual service contracts means that US shipping regulation still creates competition between shipping carriers. This is because agreements on pricing are effectively non-binding and the terms of individual service contracts that deviate from the conference tariff are not observable."[4] Leaving aside the fact that there are no conference tariffs, as such, in the Australian trades, **this is actually how Discussion Agreements in Australia operate under Part X today**. Individual service contracts are already treated confidentially. It should be noted that SAL supported the proposed reform in 2006 that Part X be amended to ensure that individual service contracts be kept strictly confidential. Collective pricing discussions within Discussion Agreements under Part X are non-binding.

10. It is important to note that in Australia Discussion Agreements have replaced the old Conference type Agreement which had a public tariff and collective decisions being binding on the parties to the Agreement. Also that there is no distinction in Part X between a Discussion Agreement (which can collectively agree pricing on a non-binding basis) and a consortia Agreement which is primarily an operational Agreement. There are very few operators in Australia's international liner trades who would not be party to one or other or both of these types of Agreements. Thus the risk of legislative change will impact on virtually the entire liner shipping sector.

11. **Recommendations not supported by evidence**. There is no evidence presented to support the conclusion that Part X somehow inhibits competition and works against the public interest. SAL would expect that there should be evidence to support the risky and potentially damaging recommendation to repeal Part X.

12. The final report has not considered the potential negative consequences of its recommendations on Australia's trade. It appears that the panel has made a recommendation to

[2] Refer www.fmc.gov/assets/1/Documents/FMC_EU_Study.pdf
[3] Paragraph 24 of the submission to the Competition Policy Review in Australia by the International Container Lines Committee (New Zealand)
[4] Part 4-Competition laws. Third last paragraph of Box 20.4 p.383.

remove it without ever putting in the effort to properly understand it. A proper and considered review of Part X would have made recommendations to improve the operation of Part X to meet the interests of both shipowners and shippers. Shipping Australia would support such action. It would not have recommended repeal which will introduce a much higher degree of uncertainty in regulating an international liner shipping market already facing serious challenges of falling returns, shipping capacity outstripping demand, increasing costs (particularly in Australia), meeting the demand for specialised (e.g. refrigerated) containers and handling the high level of empty containers as a result of imbalances in trade flows and seasonal peaks.

13. The removal of Part X would increase the risk to shipping companies participating in the Australian trade and it will put Australia out of step with our major trading partners. The result is likely to undermine some of the benefits that are expected to derive from the recent free trade agreements with China, Japan and Korea who all have exemption provisions relating to shipping. The recommendation is also at odds with the USA's arrangements for shipping exemptions administered through the US Federal Maritime Commission. The recommendation to repeal Part X and replace it with a block exemption seems to ignore the regimes in place in our major trading partners and align Australia more closely with the EU which is not one of our top five trading partners.

14. SAL recommends that the Government reject this dangerous recommendation to repeal Part X of the CCA. It is important to retain the competition exemptions in legislation and not to remove the certainty that the industry depends on. If the Government considers that any changes to Part X are warranted, then a dedicated review of Part X should be undertaken before any such action is initiated.

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Chief Executive Officer

26 May 2015