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Australian Competition and Consumer Commission

(By email to: adjudications@accc.gov.au)

Shipping class exemption - submission

References:

A. Proposed Class Exemption for Ocean Liner Shipping – ACCC Discussion paper, 3 Dec 2019.

B. Comments of the World Shipping Council to the Australian Competition and Consumer Commission in the matter of Proposed Class Exemption for Ocean Liner Shipping Discussion Paper, 28 Feb 2020.

About Shipping Australia Limited

Shipping Australia Limited (SAL) is a peak shipowner association with 28 member Lines and shipping Agents and with 45 corporate associate members, which generally provide services to the maritime industry in Australia. Our member Lines are involved with over 80 per cent of Australia's international liner container and car trade as well as over 70 per cent of our break bulk and bulk trade. A number of our members are also engaged in the provision of coastal cargo services to Australian consignors and consignees. For a list of members and details of our structure and activities please visit: www.shippingaustralia.com.au

About this submission

Shipping Australia is pleased to make a submission on a proposed class exemption for ocean liner shipping. We note that this paper is the first stage of formal consultation between the ACCC and industry sectors and that there will be further opportunities to discuss and expand on various aspects of the proposed class exemption and liner shipping industry needs.

We note that the purpose of the paper is to seek information on:

- Which aspects of Part X are in the public interest and could be included in a class exemption and why; and

- Which aspects of Part X are detrimental to competition and should not be included in a class exemption and why.

We note also that the future of Part X itself will be a Government decision and is not the subject of this paper. However, subject to a suitable class exemption for liner shipping being agreed and pending that class exemption proving effective in operation, Shipping Australia would be in a position to support a recommendation to repeal Part X.

Part A of this submission comments on the comprehensive background provided in the ACCC Discussion paper. Some aspects of that background require clarification/amplification or are not agreed. Overall these matters are considered minor.

Part B of this submission directly answers the questions posed in the discussion paper at reference A. For completeness, each question part is answered independently without reliance on previous responses, thus there is a degree of repetition throughout the document.

At question 4 we provide general comments on the provision of liner shipping to Australia, the successful history of Part X of the CCA to promote a competitive shipping environment that has proven to serve Australian and provide public benefit. The changing global trends that support the move to a light touch regulatory regime class exemption which provides a lower level of competition protection that enables cooperative agreements that do not substantially reduce competition and provide a public benefit. Such a light touch regulatory regime has the potential to improve the agility of ocean liner services such that they can respond more quickly to match demand with supply.

Common descriptive terms. Throughout this submission the terms "liner operators" and "carriers" are used interchangeably. The generic term "operational agreements" is also used extensively. Operational agreements allow carriers to jointly operate a service or exchange or share space on vessels. They include space charters and slot exchanges, vessel sharing agreements (also called consortia) and alliances. They do not include any commercial matters such as shipping rates, charges or service contracts. Sales and marketing are conducted separately by each carrier party to the operational agreement to each of their customers.

Other submissions and supporting information

Shipping Australia has consulted fully with our membership and also with the World Shipping Council. We are aware that some member liner shipping companies may decide to make their own submissions to ensure that they cover all matters specific to their own operations. We are confident that they are consistent with this submission.

The World Shipping Council will also make a submission which we support. The WSC's submission is underpinned by substantial economic analysis of the liner trades globally and in Australia by RBB Economics. Shipping Australia has made reference to elements of the WSC submission (Ref.B) which calls on the RBB economic analysis. Please refer to the WSC submission (Ref.B) for details where referenced as such information is not repeated in this submission.

PART A

Comments and Clarifications on ACCC Discussion Paper (Ref A)

The background sections of the ACCC Discussion paper provide a general overview of the container global liner services. Some aspect of that background warrant clarification/amplification or are not agreed.

Australian liner trades. Page 1, last paragraph notes that the "had previously been categorised as having relatively low volumes of cargo and long distances travelled between origin and destination". This situation still exists today. Additionally, Australia is at the 'end of the line' as a destination and does not benefit from the incidental through traffic passing our ports. One further unique feature is the highly unbalanced nature of the trade with much greater demand for imports (southbound trade) than for exports (northbound trade). This distorts pricing but generally benefits Australian exporters as the supply of container slots usually significantly exceeds demand. The one exception is reefer (refrigerated) cargo. There is a finite number of reefer plugs on ships of the size servicing the Australian market and the demand for these sometimes exceeds supply.

Liner vs Charter services and trade routes. Page 2, the description of liner services in the second paragraph states that "liner services typically carry 'general' cargo packed into standardised container sizes." It is important to recognise that that breakbulk cargo such as vehicles and machinery can also be carried by Roll on Roll off vessels operating liner services.

Major east west alliances. Page 3, paragraphs 1 and 2 refer to the 3 major east west alliances. It is important to note that the major east west alliances are not a significant factor in the liner services serving Australia at present but may become more significant over time as the networks continue to expand to provide additional services. The Australia/China liner trade is currently served by around 37 separately marketed services which arise from around 9 shared or individually provided services by 15 participating lines. Some of these shared services include global alliance partners, but most have additional liner operators also.

Types of coordination, page 3. The definitions in Table 1 are not fully consistent with common understanding and the reasoning given for the various agreement types needs to be clarified. A comprehensive description of operational agreements and their characteristics is provided in the WSC submission[1].

Regulatory oversight, page 4. Table 2 is overly generalised and the lists of countries incomplete. This table references ITF/OECD (2018) 'The Impact of Alliances on Container Shipping' which is known to contain misleading information. Its analysis republished 19 March 2019 as "Container Shipping in Europe - Data for the Evaluation of the EU Consortia Block Exemption" has been roundly disputed by the World Shipping Council in its submission to the EU.[2]

There are differences between the treatment regimes in each country that need to be fully described if they are to be used as guidance. All block exemptions are not the same, just as the rules and conditions for accessing "Exemptions for all agreements" (line 3) also differ. This lack of clarity is highlighted by the asterisked note, which is misleading, particular in

[1] Reference B, pp.5-6 (1. Forms of Operational Agreements) and pp.9-10 (2. Carrier Alliances)
[2] World Shipping Council – Comments on Report prepared my Mr Olaf Merk available at: http://www.worldshipping.org/public-statements/regulatory-comments/WSC-Comments_on_Olaf_Merk_Report_Final_25_March_2019.pdf

circumstances where lines have separate agreements with customers in Australia which have similar effect of service contracts in the US they do not require filing.

A detailed description of the competition exemption regimes in Australia's major trading partners is provided in the WSC submission[3].

Role of peak shipper bodies, page 5**.** Part X of the CCA was designed to ensure that Australian container exporters and importers have access to adequate, economic and efficient shipping services at competitive rates of freight, in a regulatory regime that was compatible with those of our major trading partners. From its outset, Part X provided exemptions from the CCA (formerly Trade Practices Act) to allow lines to coordinate services, share space and to discuss and fix pricing, the further requirement to negotiate minimum service levels through peak shipper bodies served to balance the aspects of price and service levels. If a future class exemption no longer contains protections for price setting, and lines would only have access to operational agreements (i.e. cooperative arrangements that are unlikely to substantially lessen competition and /or are likely to lead to an overall public benefit), then services and prices will be driven solely by the forces of demand and supply and be subject to direct bilateral negotiation between shippers and carriers, so it would be unreasonable to impose any additional requirement for lines to negotiate service levels with peak shipper bodies. Similarly, with all lines marketing their services individually and negotiating their rates, charges and conditions directly with customers there is no reason to carry over any specified notice periods for rates and charges.

Application of Part X, page 6 first paragraph. While the application of Part X is not the point of this discussion, the last sentence of this paragraph states that "Part X also required Liners to provide 30 days' notice to the peak shipper body for changes to freight rates and surcharges". This statement is not agreed. Part X 10.41(2) clearly requires that:

> "The parties to the agreement shall give each relevant designated shipper body at least 30 days' notice of any change in negotiable shipping arrangements unless the shipper body agrees to a lesser period of notice for the change."

In defining *negotiable shipping arrangement* 10.41(3) refers to arrangements and conditions "under the conference agreement". Accordingly, Shipping Australia contends that such notice only applies to freight rates and surcharges if freight rates and surcharges are included in the agreement (which in practice rarely occurs).

Limits on making class exemptions, page 6. International liner shipping requires long term investment, and this investment is unlikely to occur unless there is certainty of regulation. We note that the ACCC must specify the duration of a class exemption and that it may last up to 10 years. The existing Part X regime has been operating successfully to support adequate and economic shipping at competitive freight rates for more than 50 years with minimum change. This stability has supported the expansion of liner shipping services and the maintenance of competitive freight rates. Shipping Australia contends that if a class exemption is granted then stability of regulation should be a primary consideration and we recommend that the period of the exemption should be 10 years.

We note with concern the negative implication of the last paragraph, that if a class exemption is granted the ACCC is able to vary or revoke that exemption once in place or withdraw the benefit of the exemption from particular businesses. However, establishing the class exemption with a duration of 10 years will send a positive message that the intent is to provide as stable a regime as is legally possible.

[3] Reference B, pp.11-19

PART B

Response to discussion paper questions (responses in blue)

1. What forms of coordination between Liners should the class exemption permit?
Types of conduct a Liner shipping class exemption might permit. A list of common forms of Liner cooperation are set out below. For each type of coordination, please provide submissions addressing: Considering the impact on competition and/or the public benefit, should Liners covered by the class exemption be permitted to:

a) coordinate and/or jointly fix sailing timetables and the determination of port calls in Australia;

I. Is this form of coordination relied upon in agreements that are currently being utilised by Liners servicing Australia?

Yes, this is the underlying nature of the operational coordination conducted under the current *operational agreements*[4] between liner operators currently being provided on numerous routes in and out of Australia which provides effective, efficient and economically viable shipping services to consumers.

II. Should such coordination be permitted by a class exemption and if so, why?

Yes. Such coordination meets the legal test for the ACCC to make a 'class exemption', as such coordination is unlikely to substantially lessen competition and/or is likely to lead to overall public benefits.

The operational coordination of sailing timetables and port calls is a necessary element of providing a shared service. Such services provide for economic viability, allows larger capacity ships to be utilised and more ports to be stably serviced thus improving efficiency, reducing costs and reducing marine pollution and greenhouse gas emissions. This type of operational coordination helps to sustains adequate frequency and supports reliability of liner shipping services.

It also facilitates entry to market for smaller shipping lines by reducing cost barriers to entry as by coordinating timetables and port call rotations, each operator does not need to supply a large number of ships in order to provide a regular service at adequate frequency to be viable.

On shared services carriers must manage the joint utilisation of vessels and coordinate berth availability with stevedores to minimise inter-terminal transfers of containers for best efficiency.

III. How would allowing such coordination impact competition or otherwise cause detriment?

[4] ***Operational Agreements*** allow carriers to jointly operate a service or exchange or share space on vessels. They include: space charters and slot exchanges, vessel sharing agreements (also called consortia) and alliances. They do not include any commercial matters such as shipping rates, charges or service contracts. Sales and marketing are conducted separately by each carrier party to the operational agreement.

It is important to emphasise that each operational partner separately determines their terms and conditions and markets their service, in competition with their operational partners and all other carriers operating on the trade.

The operational coordination of sailing timetables and port calls to provide a shared service actually increases competition by increasing the frequency of services on the same ports and facilitating entry to market for smaller players (reduces cost barriers to entry). A shared service enables larger capacity ships to be utilised size thus reducing unit costs. It also increases the number of services being offered by enabling services to be provided that would not be economically viable by a single operator and by providing network connections to a wider variety of ports.

Multiple parties on a shared service also broadens the global networks of ports connected to Australia, thus providing more options for shippers.

IV. Would allowing such coordination impart a public benefit (e.g. an economic efficiency)? If so, please provide reasons and supporting information.

Yes. Coordination of timetables and port calls allows each carrier to offer more services in more routes, with more network connections to different global destinations. The resultant service requires less investment in vessels for each partner liner operator, thus less risk than would be the case for individual ocean liner companies to provide a similar service.

It enables larger capacity ships to be used, improving efficiency by improving vessel utilisation, thus reducing waste and providing environmental benefits of fuel efficiency and reduced greenhouse gas emissions for similar level of cargo carried in smaller ships.

Increasing the number of operators sharing the same timetables and port calls increases competition on freight rates and customer service, benefiting customers. Due to operational agreements providing shared services there are currently 37 advertised ocean liner shipping services between Australia and China whereas there are only 15 liner operators.

The effectiveness of these benefits is evidenced by the fact that Ocean liner freight rates are have been reducing in real terms for decades. Spot rate analysis by Drewry has shown that freight rates were the same in dollar terms in 2018 as they were in 2011[5], showing a reduction in shipping costs in real terms. Confirming this analysis, a recent Deloitte study for the Victorian Government's Port Pricing and Access Review[6] found that between 2010 and 2019 the price of import containers had only increased 6 per cent and exports 13 per cent in a period when inflation had increased 19.4 per cent.

[5] RBB Economics report referenced in WSC Submission (ref. B) p.6.
[6] As briefed by Steve Kanowski, Partner, Deloitte at Melbourne Ports Roundtable 30 Jan 2020

b) exchange, sell, hire, or lease (or sublease) spaces (slots) on vessels;

I. Is this form of coordination relied upon in agreements that are currently being utilised by Liners servicing Australia?

Yes, slot swapping/leasing/exchange is common to numerous operational agreements currently operating in relation to Australia and other jurisdictions all around the world, consistent with many different competition regimes. It enables carriers to augment their service networks and provide more comprehensive catalogue of shipping destinations, thus making the carrier a more effective carrier on a global scale.

It also enables operational partners to provide services on routes that they do not supply vessels, expanding their network coverage and increasing competition. Overall it increases the utilisation of the vessels on the service, thus reducing the unit costs of transport and unit greenhouse gas emissions.

II. Should such coordination be permitted by a class exemption and if so, why?

Yes, Such Slot Agreements meet the legal test for the ACCC to make a 'class exemption', as they are unlikely to substantially lessen competition and/or is likely to lead to overall public benefits. Slot agreements are a necessary component of a shared service and benefit both the shipping line and the consumer.

It allows larger capacity ships to be utilised with more efficient utilisation of slots thus, reducing costs and reducing marine pollution and greenhouse gas emissions.

Slot Agreements improve competition as they lower barriers to entry and expansion, especially for small and medium shipping lines, and/or for all lines that wish to enter into a new shipping market.

This type of operational coordination also increases the coverage network of ports being serviced by each shipping line, broadening competition and providing more choice of the customer.

III. How would allowing such coordination impact competition or otherwise cause detriment?

Such coordination allows best utilisation of vessel slots and larger capacity vessels to operate which are more efficient on a unit cost basis. It creates opportunities to call at ports where there would not be sufficient incentive for a single operator.

Slot exchanges/sales/hire/lease reduce barriers to entry allowing smaller lines to compete on more routes. The result is to put more competitors on the same service route and schedule, thus increasing competition and driving a focus on customer service.

IV. Would allowing such coordination impart a public benefit (e.g. an economic efficiency)? If so, please provide reasons and supporting information.

Yes. Being able to exchange/swap or lease spots between liner operators allows each carrier to expand their global network and offer more services in more routes and with less investment in vessels than would be possible individually.

It enables more services to be available, providing more choice to customers. It enables larger capacity ships to be used, improving efficiency by improving vessel utilisation, reducing unit costs, reducing waste and providing environmental benefits of fuel efficiency and air emissions.

Increasing the number of operators sharing the same vessel increases competition on freight rates and customer service benefiting customers. Due to operational agreements providing shared services there are currently 37 advertised ocean liner shipping services between Australia and China whereas there are only 15 liner operators.

Slot swap arrangements are an important element of VSAs which have enabled carriers to reduce their unit operating costs. These benefits are evidenced by the fact that Ocean liner freight rates have been reducing in real terms for decades. Spot rate analysis by Drewry has shown that freight rates were the same in dollar terms in 2018 as they were in 2011, showing a reduction in shipping costs in real terms. Confirming this analysis, a recent Deloitte study for the Victorian Government's Port Pricing and Access Review found that between 2010 and 2019 the price of import containers had only increased 6 per cent and exports 13 per cent in a period when inflation had increased 19.4 per cent.

c) Pool* their vessels to operate a network*;

*following clarification from ACCC the following definitions have been apply to this question: *pool* = vessel sharing, and *network* = Service (or group of services)

I. Is this form of coordination relied upon in agreements that are currently being utilised by Liners servicing Australia?

Yes, lines currently share their vessel capacity through operational agreements, with some lines providing more ships that others and liner operators who do not provide a vessel on a particular service also sometimes taking space on the service to expand their networks.

II. Should such coordination be permitted by a class exemption and if so, why?

Yes. Such coordination meets the legal test for the ACCC to make a 'class exemption', as it is unlikely to substantially lessen competition and/or is likely to lead to overall public benefits.

The sharing of vessels and slots allows each participant in the operational agreement to provide a broader range of shipping services to more destinations and on high frequencies than would otherwise be possible.

It enables larger capacity ships to be used, improving efficiency by improving vessel utilisation, reducing unit operational costs, reducing waste and providing environmental benefits of fuel efficiency and reduced greenhouse gas emissions.

For example: a liner operator "X" with 10 vessels can either operate one weekly loop with those 10 vessels, or X joins force with three other carriers with each 10 vessels and then they can jointly either:

a) Operate one loop each (which provides a total of four services) and share space on each other's loops. They have less space (allocation) on each vessel, but across four services, possibly with slightly different ports-pairs, which provides better port coverage for each of them, and instead of one weekly sailing where X has to fill whole ship, X has now has to fill a smaller allocation per vessel across all four vessels, but same in aggregate. X has the same space to sell as before but as a the result, a better network is established, which may reduce feeder costs.

b) They join forces and deploy 10 vessels, each of about four times the size of previous vessels, which operate much more efficiently and result in lower costs and carbon footprint per TEU compared to the vessels before. Each carrier can still only offer one weekly sailing just as before as individual carrier, but at greater efficiency.

III. How would allowing such coordination impact competition or otherwise cause detriment?

The network of destinations is increased and the number of operators able to provide services in increased, thus increasing both service levels and competition. Another effect is to increase the efficiency of each vessel in the service or network, bringing down unit costs and ultimately benefiting consumers.

Vessel sharing (pooling) reduces the cost and risk to each liner operator, thus making it more economically feasible to commence new services to meet emerging demand.

IV. Would allowing such coordination impart a public benefit (e.g. an economic efficiency)? If so, please provide reasons and supporting information.

Yes. As stated at a. and b. above, operating shared services between liner operators allows each carrier to expand their global network and offer more services in more routes and with less investment in vessels than would be possible individually.

It enables more services, , such as more ports called and faster transit times between markets to be made available, providing more choice to customers. It enables larger capacity ships to be used, improving efficiency by improving vessel utilisation, reducing unit costs, reducing waste and providing environmental benefits of fuel efficiency and reduced greenhouse gas emissions.

Increasing the number of operators sharing the same vessel increases competition on freight rates and customer service, benefiting customers. Due to operational agreements providing shared services there are currently 37 advertised ocean liner shipping services between Australia and China whereas there are only 15 liner operators.

Vessel sharing arrangements have enabled carriers to reduce their unit operating costs and expand their networks. These benefits are evidenced by the fact that Ocean liner freight rates have been reducing in real terms for decades. Spot rate analysis by Drewry has shown that freight rates were the same in dollar terms in 2018 as they were in 2011, showing a reduction in shipping costs in real terms. Confirming this analysis, a recent Deloitte study for the Victorian Government's Port Pricing and Access Review found that between 2010 and 2019 the price of import containers had only increased per cent and exports 13 pre cent in a period when inflation had increased 19.4 per cent This is testament to the effectiveness of the current regime which permits such coordination, increasing the efficiency of each vessel in the service or network and results in lower unit operating costs, ultimately benefiting consumers.

d) adjust capacity in response to fluctuations in supply and demand for international liner shipping services;

I. Is this form of coordination relied upon in agreements that are currently being utilised by Liners servicing Australia?

Yes, but this aspect could be significantly improved by the introduction of a class exemption.

Currently, under Part X of the CCA, lines are only able to react quickly to adjust service capacity within the limits of the minimum level of services negotiated with the peak shipper body. Should a substantial change in demand levels occur, there is a long process for amending minimum levels of service (or changing port rotations) which cannot keep up with demand changes.

Conversely, the ability to commence a new service to meet a new or increased demand is hampered by the operation of Part X. Registration of a new operational agreement and gaining protections from Part 4 of the CCA will take at least 72 days (plus time to prepare submission and additional time for periods of negotiations, in practice normally around 100 days) which does not allow shipping to react quickly enough to efficiently meet the demands changing markets.

It is recommended that a class exemption should provide a less bureaucratic and restricted regime that allows ocean liner shipping to be nimble and adjust capacity in response to changes in market demand and market conditions.

II. Should such coordination be permitted by a class exemption and if so, why?

Yes. Such coordination meets the legal test for the ACCC to make a 'class exemption', as it is unlikely to substantially lessen competition and/or is likely to lead to overall public benefits by providing that ocean carriers can adjust their capacity / supply of slots on vessels to meet changes in demand for such slots.

Being flexible and agile in provision of ocean liner services reduces wastage by matching supply and demand to maximise utilisation and thus reducing costs. Operational agreement partners need to be able to adjust capacity to ensure that they have the right tonnage on the trade just as an individual carrier is able to do when competing in the market.

Shipping is a business and cannot continue to operate at if loses are sustained. Thus, allowing lines to adjust capacity to maintain efficiency and cost effectiveness of services benefits all parties, potentially enabling the continuance of services (albeit at a reduced level) that may otherwise be discontinued. If shipping were not able to reduce capacity when demand falls, they would be forced to increase the cost of freight services to cover overheads.

III. How would allowing such coordination impact competition or otherwise cause detriment?

Allowing lines to adjust capacity downwards allows for the most efficient provision of services. A reduction in capacity on a shared service does not reduce competition, it allows ocean carriers to continue to operate at a more sustainable and economic level. Where demand on certain routes falls below that where a ship can operate economically there will need to be a reduction in service frequency or price increase to maintain that frequency.

Also, allowing lines to increase capacity to meet demand just makes logical sense. It improves the service and capacity available thus improving the satisfaction of shippers. This sort of capacity / schedule adjustment is commonly seen in airlines where a service may be slipped if undersubscribed.

IV. Would allowing such coordination impart a public benefit (e.g. an economic efficiency)? If so, please provide reasons and supporting information.

Yes, the ability to react to changes in market demand supports the efficiency and viability of shipping services, helping to ensure that those services are maintained. The aim is to align supply and demand for an efficient, cost effective service for the benefit of consumers and ocean carriers. Part X is cumbersome in this regard and more flexibility and agility should be provided under a class exemption.

e) fix or coordinate freight prices,

I. Is this form of coordination relied upon in agreements that are currently being utilised by Liners servicing Australia?

Members have advised that there is one remaining Vessel Discussion Agreement, Pacific Islands Discussion Agreement (PIDA) which contains the ability to discuss price, though such provisions have not been utilised in recent years.

Apart from the above, liner shipping services to and from Australia have not conducted binding price discussions for more than a decade, and since 2018 there have been no other Vessel Discussion Agreements (which had previously been authorised to conduct non-binding price discussions). All other current agreements are operational agreements that do not include fixing, or coordinating of freight prices or setting of any voluntary guidelines.

II. Should such coordination be permitted by a class exemption and if so, why?

No. Liner ocean shipping operators no longer see a need for or support the principal of discussions on price.

Though currently permitted in Australia, Japan, China, Singapore and USA, pricing coordination is not permitted in many other jurisdictions around the world.

III. How would allowing such coordination impact competition or otherwise cause detriment?

This question is not directly relevant for the ocean liner class exemption as pricing coordination is not sought.

However, it is informative to note that pricing discussions were historically permitted under Part X of the CCA to ensure that sufficient regular liner shipping services could be delivered to support Australia's export needs within an economically sustainable framework. The requirement for liner agreements to negotiate a guaranteed Minimum Level of Service with the designated shipper body constituted a balance to the pricing discussions. With the expansion of globalisation over the past 50 years there is a higher level of demand for liner freight to most locations, at the same time ocean liner operations have improved their efficiency by deploying larger ships with better utilisation and small crews. As a result discussion of price is no longer necessary in order to provide an economically sustainable shipping service. The consequence is that service levels are now driven by the laws of supply and demand and negotiations on Minimum Levels of Service are also obsolete.

[For specific small Pacific Island countries where provision of liner shipping services at defined minimum service levels would otherwise be uneconomic, Governments require a common tariff schedule to be provided in order to issue an Entry Assurance Certificate. Applying for access permits is a competitive bidding or tender process between liner operators and relevant Governments][7].

IV. Would allowing such coordination impart a public benefit (e.g. an economic efficiency)? If so, please provide reasons and supporting information.

This question is not directly relevant for the ocean liner class exemption as pricing coordination is not sought.

f) fix or coordinate surcharges,

I. Is this form of coordination relied upon in agreements that are currently being utilised by Liners servicing Australia?

No

[7] This aspect of ocean liner operations falls outside the scope of this discussion paper and is not currently covered under Part X of the CCA. The task of assuring sufficient services to support small Pacific Island countries is managed by the Central Pacific Shipping Commission on behalf of contracting governments (including Niue, Tuvalu, Kiribati, Nauru and Micronesia.) If further information is required ACCC can contact Shipping Australia Limited or Neptune Pacific Line.

II. Should such coordination be permitted by a class exemption and if so, why?
No

III. How would allowing such coordination impact competition or otherwise cause detriment?

This question is not relevant as coordination of surcharges is not sought.

IV. Would allowing such coordination impart a public benefit (e.g. an economic efficiency)? If so, please provide reasons and supporting information.

This question is not relevant as coordination of surcharges is not sought.

g) pool or apportion earnings, losses or traffic,

I. Is this form of coordination relied upon in agreements that are currently being utilised by Liners servicing Australia?

There is currently one revenue and cost pooling agreement (AUSPAC) operating between Australia and South Pacific islands. The parties to this agreement are in the process of amending it to remove the pooling aspects and revert to a slot chartering agreement which will no longer retain pricing provisions.

Other than the above, ocean liner services do not utilise this form of coordination.

II. Should such coordination be permitted by a class exemption and if so, why?
No

III. How would allowing such coordination impact competition or otherwise cause detriment?

This question is not relevant as pooling is not requested for the ocean liner class exemption.

IV. Would allowing such coordination impart a public benefit (e.g. an economic efficiency)?

This question is not relevant as pooling is not requested for the ocean liner class exemption.

h) restrict capacity (slots) offered;
(Following clarification from ACCC this has been interpreted as "fixing the capacity of the service"
This response does NOT address restricting the capacity of a service to manipulate prices which would be clearly anti-competitive and not supported.)

I. Is this form of coordination relied upon in agreements that are currently being utilised by Liners servicing Australia?

Yes. For all shared service operational agreements Lines need to agree vessel capacities in order to coordinate trade services. Each vessel provided for the service must meet the size (nominal TEU, plugs and deadweight) and capability of the agreed slot allocations. Slot allocations are normally on the basis of dry TEU and reefer plugs though nominal gross mass of containers may also be applied to manage vessel safety.

The total nominal TEU capacity may not always be available depending on vessel stability and draught limitations for various ports in a service loop.

II. Should such coordination be permitted by a class exemption and if so, why?

Yes. Such coordination meets the legal test for the ACCC to make a 'class exemption', as it is unlikely to substantially lessen competition and/or is likely to lead to overall public benefits. The agreement and standardisation of capacities is required to maintain vessel safety (draught, stability and navigational under-keel clearance for safety) and to optimise the efficiency of services. It may also be required to comply with Coastal Trading Licence conditions where licence conditions strictly control the amount of coastal cargo permitted to be carried.

The restriction of capacity to "operational capacity" is an operational necessity in order to operate safely. For example, services between Australia and China, cargos from Australia to China are generally heavy in weight while cargos from China to Australia are generally light in weight. Vessels are only able to carry a limited weight with the declared slot capacity. Therefore, if the average cargo weight is higher, the number of slot needs to be adjusted.

III. How would allowing such coordination impact competition or otherwise cause detriment?

This operational coordination should have no impact on competition. It is a normal aspect of operational agreements.

IV. Would allowing such coordination impart a public benefit (e.g. an economic efficiency)? If so, please provide reasons and supporting information.

Yes, public benefit is achieved by supporting the safety, efficiency and reliability of the service. Ensuring that all vessels in a service have similar cargo carrying capabilities. It ensures that vessels are suitable for entry to the ports selected on the port rotations and also allow for the appropriate carrying capacity to meet the frequency demand of cargo intended to be carried (eg: required weekly cargo demand on a weekly system frequency).

i) allocate markets (e.g. ports, trade routes or regions);

I. Is this form of coordination relied upon in agreements that are currently being utilised by Liners servicing Australia?
No

II. Should such coordination be permitted by a class exemption and if so, why?
No

III. How would allowing such coordination impact competition or otherwise cause detriment?

This question is not relevant as market allocation not requested in the ocean liner class exemption.

IV. Would allowing such coordination impart a public benefit (e.g. an economic efficiency)? If so, please provide reasons and supporting information.

This question is not relevant as market allocation not requested in the ocean liner class exemption.

j) share commercially sensitive information;

I. Is this form of coordination relied upon in agreements that are currently being utilised by Liners servicing Australia?
No

II. Should such coordination be permitted by a class exemption and if so, why?
No

III. How would allowing such coordination impact competition or otherwise cause detriment?

This question is not relevant as market allocation not requested in the ocean liner class exemption.

IV. Would allowing such coordination impart a public benefit (e.g. an economic efficiency)? If so, please provide reasons and supporting information.

This question is not relevant as market allocation not requested in the ocean liner class exemption.

k) collectively bargain with suppliers (e.g. stevedores);

I. Is this form of coordination relied upon in agreements that are currently being utilised by Liners servicing Australia?

Yes, collective bargaining is conducted between operational agreement partners (consortia) and stevedores, this function is necessary to coordinate berth windows and access, and to secure capacity for all vessels in the operational agreement.

II. Should such coordination be permitted by a class exemption and if so, why?

Yes. Such coordination meets the legal test for the ACCC to make a 'class exemption', as it is unlikely to substantially lessen competition and/or is likely to lead to overall public benefits.

It is essential that all vessel operators in an operational service agreement can get access to the same terminal on their jointly scheduled berthing window and have

sufficient service capacity available to work the ship efficiently and conduct the required container exchange within the window. This requires collective bargaining with stevedores.

III. How would allowing such coordination impact competition or otherwise cause detriment?

Collective bargaining between consortia partners and stevedores provides both an efficient service and a level playing field for fair competition between consortia partners by minimising the requirement for inter-terminal transfers, providing equal terms of access including window access and productivity commitments on cranes, crane density alongside and cargo exchange rates for vessels operated by the consortia. The result is an enhanced consumer experience and overall best performance and efficiency for vessels operated by the different partners.

IV. Would allowing such coordination impart a public benefit (e.g. an economic efficiency)? If so, please provide reasons and supporting information.

Collective bargaining between consortia partners and stevedores improves the efficiency of the consortia by minimising the requirement for inter-terminal transfers of containers and by working all the ships efficiently no matter who the operator is. It also assists in levelling the playing field for competition between the consortia partners. Both these aspects provide a public benefit and enhanced consumer experience.

l) any other activity. Class exemption protections for pre-agreement negotiations

I. Is this form of coordination relied upon in agreements that are currently being utilised by Liners servicing Australia?

Yes. Under the current Part X, operators have 30 days after an agreement is made to register the agreement in order to access competition protections.

II. Should such coordination be permitted by a class exemption and if so, why?
Yes. Liner operators should be permitted (and protected) when they discuss matters relating to the development of a new shared liner service i.e vessel size, capacity, port rotations, schedule etc.

III. How would allowing such coordination impact competition or otherwise cause detriment?

It would improve certainty and reduce regulatory risk for liner shipping operators thus encouraging participation and the negotiation of new joint service operational agreements. It would not impact on competition during the initial discussion stage of a new service but would serve to increase competition should a new service be established.

IV. Would allowing such coordination impart a public benefit (e.g. an economic efficiency)? If so, please provide reasons and supporting information.

Yes. It would enable lines to develop new shared services at lower regulatory risk thus and improve shipping service provision increase competition to deliver a public benefit.

2. What eligibility conditions (if any) should limit which Liners can access the class exemption?

a) Is it appropriate to restrict which Liners are eligible for the class exemption?

Only liner shipping operators should be eligible for a class exemption for ocean liner services as they are the parties who must engage in operational agreements in order to provide joint/shared services.

In order to provide efficient shipping service to support exporters and importers, no other restrictions should be applied to liner shipping operators accessing the class exemption as these would increase barriers to entry, increase compliance costs and create uncertainty.

b) If it is appropriate to restrict access, should this be achieved by:

i) a market share cap

- Is a cap on the combined market share of the coordinating Liners the most appropriate mechanism?
- How should market share be calculated?
- What level should the market share cap be set at and why?

A market share cap is not supported as it would undermine key potential benefits of a class exemption by increasing regulatory uncertainty, increasing compliance cost and reducing the flexibility of liner operators to change services quickly. Additionally, market share caps are extremely difficult to define and to measure, which tends to make them practically unworkable.

It is also unclear what competition benefit a market share cap would deliver when all members of liner operational agreements independently market their service and compete against one another on price, terms and conditions, hardware and customer service.

It is noted that the majority of competition exemption regimes do not contain market share restrictions. Examples include New Zealand, China, USA, Malaysia, Japan and India. It is recognised that market share conditions do exist in other agreements such as the EU, Hong Kong and Singapore but even in those regimes it has not been effectively implemented or tested. It is very difficult to determine market share as it could be defined in multiple ways over various time scales and may vary unpredictably due to the actions of other liner operators with who there is no relationship. Market share could be by regions, port pairs, by capacity or actual cargo carriage, and what period would it be determined over?

Trade patterns and volumes vary rapidly, applying a market share cap on eligibility would undermine the certainty of a class exemption. For example; a line or consortia (A) may in good faith consider that they are eligible for the class exemption by conducting an a priori estimate of the anticipated market and their expected trade share, but the regulator may later analyse the market retrospectively and decide that the line or consortia had exceeded the market cap and were not eligible for the protections under the class exemption. This situation could occur if other liner operators (B) who had no relationship with consortia (A) subsequently changed their behaviour.

Even if that were resolved to have a market share cap, what would be the appropriate limiting market share target?

It is an important consideration that Australia is a destination market and is not on transit routes. In Australia's circumstance some routes are only serviced by one or two lines so a 50 per cent market share could easily by exceeded and 100 per cent market share is a reasonable possibility on some routes. The very existence of a service provides a public benefit. The existence of a market share cap may discourage liner operators from visiting/opening new ports as this could cause them to exceed the market share for that port or port pair.

Attempting to define an appropriate market share for each route/region or port pair for the Australian market (and over what time period) would be impractical. It would increase administrative and compliance costs and be cumbersome or impossible to monitor. It would also unnecessarily increase uncertainty of protection and cost of compliance without any clear benefit.

In summary, while a market share cap may give the regulator a feeling that they are putting a limit on the market power of shipping lines, this is simply an illusion. Such a limit would substantially increase compliance costs and increase regulatory uncertainty and would not deliver any public benefit. Ocean liner operators participating in consortia are subject to more vigorous competition on price and customer service that a liner operator providing an independent service in any case. A market share cap provides no identifiable benefit, would increase compliance cost and regulatory uncertainty and is difficult, if not impossible to define, apply, measure and enforce.

ii) any alternative approach to defining eligibility?

Protections under a class exemption should be available to all ocean liner operators. Liner operators do not see the need for a formal registration process as it would provide little benefit and erode one of the key potential benefits of a class exemption, that of providing liner operators the agility to respond and adapt their services quickly to meet changes in the market.

Similarly, in a self-assessment class exemption regime there should be no requirement to register operational agreements. However, in the interests of certainty and to minimise compliance risk, ocean liner operators would accept a registration

requirement if it resulted in the Government signing off that the behaviour met the Class Exemption.

3. Should cargo owners be able to collectively bargain with Liners?

The ACCC is interested in your views as to whether such provisions would be beneficial and what elements such a framework should include.

a) ***Would it be beneficial for a potential class exemption to enable collective bargaining and negotiation by cargo owners, with Liners?***

Collective Bargaining. It is not immediately apparent how this question specifically relates to the creation of a class exemption for ocean liner services or why cargo owners are being considered differently than the rest of industry.

Small business shippers will already have access to the ACCC's collective bargaining class exemption for small business. This class exemption is limited to small business and it seems incongruous that a special collective bargaining condition should be considered for large business cargo owners which would give them an unfair advantage over each ocean liner operator who is independently marketing their service. Additionally, large business cargo owners could also place smaller business owners at risk of competitive disadvantage within a given market.

The international liner industry is already highly competitive as evidenced by the fact that in real terms international container freight is less expensive now than it has ever been. Ocean liner shipping is not seeking any protections to negotiate or discuss commercial matters thus each line will operate completely independently from a commercial aspect, just like every other industry. Rates and charges will be negotiated with individual customers and there is no justification to maintain any of the former provision from Part X in relation notices of variations.

Service Levels. Part X of the CCA was designed to ensure that Australian container exporters and importers have access to adequate, economic and efficient shipping services at competitive rates of freight, in a regulatory regime that was compatible with those of our major trading partners. From its outset, Part X provided exemptions from the CCA (formerly Trade Practices Act) to allow lines to coordinate services, share space and more specifically, to discuss and fix pricing, the further requirement to negotiate minimum service levels through peak shipper bodies served to balance the aspects of price and service levels. If a future class exemption no longer contains protections for price setting (and price protection is not requested by liner operators), and lines would only have protections for operational agreements (i.e. cooperative arrangements that would not have the effect or likely effect of substantially lessening competition and /or would result or be likely to result in overall public benefit), then service levels and prices will be driven solely by the forces of demand and supply and it would be unreasonable to impose any requirement for lines to negotiate service levels with peak shipper bodies. To reinforce this point, there is no precedent for

requiring negotiation of service levels in any shipping block exemption anywhere in the world.

Finally, the main perceived benefit of a class exemption is to reduce regulatory burden and allow the ocean liner shipping industry to become agile and to respond and adapt quickly to changing market conditions. Adding an extra burden to collectively negotiate with shippers is likely to undermine this potential benefit.

b) ***What, if any, limitations and requirements should be placed on the formation of collective bargaining or negotiating groups?***

Collective bargaining for small businesses will be able to be undertaken under the ACCC's Collective Bargaining class exemption it should not be expanded to large businesses.

4. Industry Background

ACCC are also interested in the views of Liners, cargo owners and other industry participants on:

a) the structure of the relevant markets

b) prices, costs and profitability in those markets

Ocean liner shipping is a highly competitive business which is characterised by:

- High fixed costs, high capital expenditures (CAPEX) and generally a high cost of entry into new trade lanes & markets;
- "Lumpy" supply (ie capacity must be added or withdrawn in large units such as one or more whole vessels);
- "long-life" capital assets, irrespective of ownership;
- Low marginal costs and relatively inelastic demand for services (reductions in freight rates rarely increases demand);
- Relative inelastic supply (eg need to meet peak and seasonal demands);
- Significant costly imbalances of container flows by volume, as well as type;
- Positioning of container stocks (eg empty containers) can mean the difference between a profit and a loss because of significant trade imbalances;
- Provision of high cost refrigerated containers and other specialised equipment;
- Significant costly imbalances of container flows by volume, as well as type.
- Dealing with market distorting Government subsidies of one sort or another
- unique challenges of complying with the operational requirements and legal regimes in every port serviced.

Despite these challenges ocean liner services have flourished and there are now around 500 liner services operating world-wide[8].

Ocean liner shipping provides regular scheduled services to transport a wide variety of manufactured goods, semi-finished goods and raw materials all around the world. It is the conduit that has both enabled and benefited from the trend towards globalisation in

[8] WSC at Reference B, p.4

recent decades. Since the introduction of containerisation in the 1960's the efficiencies in moving produce and products by container have grown exponentially. Globally, containerisation started with the *Ideal-X* carrying 56 x 33 foot containers and today vessels of 23,000 TEU are servicing the main east west trades. The scale difference for Australia's trade is apparent in our more modest rate of growth. In 1969 Australia's first dedicated international container vessel, the *Encounter Bay* had a capacity of 1300 TEU, this has grown to regular visits of ships of 9000 TEU capacity today.

The ACCC recognises that "Australia had previously been categorised as having relatively low volumes of cargo and long distances travelled between origin and destination" [9]. In fact, this situation still exists today. Australia has some of the longest trade routes in the world, on relatively low volumes and substantial seasonal variations in demand. Additionally, Australia is at the 'end of the line' as a destination and does not benefit from the incidental through traffic passing our ports. One further unique feature is the highly unbalanced nature of the trade with much greater demand for imports (southbound routes) than for exports (northbound trade). This distorts pricing and benefits Australian exporters due to supply of container slots usually significantly outpacing demand. It should also be noted that Australia relies on its high valued refrigerated and perishable trades around the world. Ocean carriers also have to contend with the peaks, and troughs, of high and low seasonal demands in terms of managing refrigerated capacity in containers and plugs/power on board vessel systems.

Liner shipping is a global service, and to be competitive, liner operators need to provide services that offer connectivity to major ports across our global markets. Virtually all ocean liner operators rely on operational agreements to provide more comprehensive, more reliable and more cost-effective services to importers and exporters than they could if operating independently.

Part X and Conference Agreements and the move to operational agreements.

In Australia the liner industry has operated under protections from competition law under Part X of the CCA (formerly Trade Practices Act) since 1966. Part X provides a wide range of protections for what are termed "conference agreements". Broadly, a conference agreement may include freight rate agreements and operational agreements. The vast majority of agreements registered under Part X have been operational agreements. Some early forms of conference agreements contained a contractual commitment to agreed prices. Such commitments were phased out by the early 2000's and replaced by Voluntary Discussion Agreements (VDAs) which allowed prices to be discussed without commitment, and parties were free to set their own rates. Operational agreements have continued to exist alongside VDA's

The year 2018 proved to be an historic one for the liner shipping industry. For a combination of reasons including changes in competition protections in trading partners and commercial considerations, major shipping lines walked away from any form of rate discussions and withdrew from VDAs.

[9] Reference A, p.1

In Australia, the sudden withdrawal of lines from the major VDAs operating between Australian, New Zealand and the USA, was quickly followed by a similar exodus from the north Asia Trade Facilitation Agreement and the southbound Asia Australia Discussion Agreement. In the second half of the year the remaining Australia Fiji Discussion Agreement was also terminated.

Since October 2018 ocean liner operators in Australia[10] have focused only on operational agreements to provide efficient shipping services and provide links to global networks. As a result of this evolution there is no longer a liner shipping requirement for any exemption/protection relating to commercial matters in a future class exemption for ocean liner shipping.

Alliances, Vessel Sharing Agreements (VSAs), Slot Charter Agreements (SCAs), Slot Exchange Agreements (SEAs) and Consortia (which are a combination of VSAs and SCA's/SEAs) are purely operational arrangements in which carriers agree to jointly operate a service, exchange or share space on vessels. Such agreements have no commercial alignment and no exchange of commercial information whatsoever. Each party to an operational agreement independently markets their services and decides on their own rates, charges, customers, markets and terms of sale.

The types of operational agreements were introduced in the ACCC discussion paper[11] and are more fully described in at Reference B[12].

The key elements of operational agreements that are necessary to in order to provide an efficient service are the ability to:

a. Coordinate or jointly set sailing timetables and the determination of port calls;
b. Exchange, sell, hire or lease or sublease spaces (slots) on vessels;
c. Pool (share) vessels to operate a network; and
d. Adjust capacity in response to market and/or seasonal fluctuations in demand.

It is important to emphasise that virtually every major trading nation in the world that has competition law either provides exemption from these laws, or otherwise permits these operational agreements to exist. A detailed description of competition regimes in Australia's important trading partners is included in the WSC commentary[13].

Industry Consolidation and its impact on Australia

Over a three-year period 2015-18 the global liner industry was revolutionised by a series of mergers and acquisitions and the liquidation of Hanjin. COSCO acquired CSCL and OOCL; CMA-CGM acquired APL-NOL; Hapag Lloyd acquired UASC;

[10] With the one exception of the legacy PIDA agreement which, although it contains provisions for pricing discussions, no pricing discussions have taken place since 2018.
[11] Reference A p.3, also defines the term consortia as an agreement containing a combination of operational agreements to provide a shared service on a particular service loop (or 'string').
[12] Reference B, pp5-6.
[13] Reference B, pp11-19.

Maersk acquired Hamburg Sud, and NYK, MOL and K-LINE formed the Ocean Network Express liner joint venture.

Despite these changes the liner shipping market serving Australia has remained very competitive. Spot rate analysis by Drewry[14] has shown that freight rates between Melbourne and Shanghai were the same in dollar terms in 2018 as they were in 2011, showing a reduction in shipping costs in real terms. Corroborating this analysis, a recent Deloitte study for the Victorian Government's Port Pricing and Access Review[15] found that between 2010 and 2019 the price of import containers had only increased 6 per cent and exports 13 per cent in a period when inflation had increased 19.4 per cent.

Operational agreements providing shared services make a substantial contribution to this strong level of competition. For example, though only 15 liner companies operate services between Australia and China there are currently 37 advertised ocean liner shipping services which are separately marketed.

Further evidence of the continual improvement of Australia's liner shipping services is provided in the UNCTAD's Liner Shipping Connectivity index[16] which can be considered a proxy for the accessibility to global trade. Australia's index has increased from 27.85 to 34.35 between 2006 to 2019. However, to put that number into perspective China's index has increased from 100.0 to 151.91 over the same period.

Submission authorised by:
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[14] RBB Economics report referenced in WSC Submission (ref. B) p.7 (at 2.B.2.2).
[15] As briefed by Steve Kanowski, Partner, Deloitte at Melbourne Ports Roundtable 30 Jan 2020
[16] UNCTAD Liner Shipping Connectivity Index 2006-2019 available at:
https://unctadstat.unctad.org/wds/TableViewer/tableView.aspx?ReportId=92