Representing the container shipping sector in New Zealand

SUBMISSION BY

INTERNATIONAL CONTAINER LINES COMMITTEE (NEW ZEALAND)

TO THE

COMPETITION POLICY REVIEW

For any enquiries relating to this submission please contact:

Noel Coom
Chairperson
International Container Lines Committee
Auckland
New Zealand

Email: coomn@anlnz.com
DDI : 64 9 366 2879

9 June, 2014

Representing the container shipping sector in New Zealand

INTERNATIONAL CONTAINER LINES COMMITTEE (NEW ZEALAND) SUBMISSION TO THE COMPETITION POLICY REVIEW

THIS SUBMISSION ADDRESSES THE QUESTION UNDER PARA 5.33 - DO THE STATUTORY EXEMPTIONS INCLUDING LINER SHIPPING, OPERATE EFFECTIVELY, AND DO THEY WORK TO FURTHER THE OBJECTIVES OF THE COMPETITION AND CONSUMER ACT?

1. The ICLC is an unincorporated working committee within the industry body Shipping New Zealand/New Zealand Association of Ship Agents. The ICLC members comprise all of the international container shipping lines presently active in providing sea freight services into and out of New Zealand:

Australian National Line
CMA CGM
China Navigation Company
Maersk Line
China Ocean Shipping Company
Hamburg Sud
Hapag Lloyd
Neptune Shipping
NYK Line
Marfret
Mediterranean Shipping Company
Mitsui OSK Line
Pacific Forum Line
Pacific International Lines, Singapore
OOCL, Hong Kong
Pacific Direct Line
Sofrana Unilines Matson South Pacific

Many of these shipping lines also have extensive Australian based operations that fall within the jurisdiction of that country's shipping law.

2. The ICLC exists to liaise with and assist New Zealand Government stakeholders, regulators, consumers and other industry groups (including New Zealand ports, importers and exporters) on the operational requirements and policy developments affecting the international container shipping sector. While the ICLC represents the interests of international shipping lines, it is also uniquely well-positioned to comment on the impact and perception that New Zealand policy developments will find internationally, through ICLC members' head offices, international networks and port, governmental connections, or international trading links.

3. The ICLC has never previously made a submission to a statutory review being conducted within a foreign jurisdiction but we are strongly motivated to do so here by the very close links that exist between our two countries as important trading partners, each highly dependent upon efficient shipping lanes and international synchronicity of regulatory regimes governing the operation of container lines.

4. The ICLC is aware that the Competition Policy Review Panel is considering whether the statutory exemptions provided to liner shipping under Part X of the Competition and Consumer Act (CCA) are operating effectively and further the objectives of that Act.

The New Zealand Reforms – a serious threat to shipping line efficiency

5. As the Panel may be aware, the New Zealand Government reviewed the regulatory framework for shipping competition law in 2012 and determined that the existing Shipping Act should be repealed and replaced with a requirement that shipping should come within the full ambit of the Commerce Act. This change is currently contained within the Commerce (Cartels and Other Matters) Amendment Bill (the Cartels Bill) which is awaiting its second reading in the House.

6. The Cartels Bill goes far beyond the recommendations of the New Zealand Productivity Commission review in 2012 which favoured removing the exemption for rate making agreements and retaining the exemption for non-rate making agreements. Additionally we note that a joint study undertaken by the Productivity Commissions on both sides of the Tasman in 2013 called for any reform that might eventually be considered necessary to be conducted between trans-Tasman partners "preferably in a co-ordinated way", and focussed on ratemaking agreements.

7. In May 2014 Governments on both sides of the Tasman (as part of an overall response to the wide-ranging recommendations of the Joint Productivity Council review) decided to defer any decision on this recommendation "pending finalisation of processes in both Australia and New Zealand".

8. The ICLC views this separation of processes between our respective jurisdictions with real concern since there are significant risks of a commercially cumbersome and highly inefficient outcome where a shipping regulatory framework between two key and close trading partners has a different set of rules prevailing in each market. We return to this need for international synchronicity later in our submission.

9. On the other hand, while uniformity between jurisdictions is extremely desirable for an efficient international shipping line industry, we would strongly urge the Panel not to achieve this goal on a trans-Tasman basis by finding favour with the Cartels Bill regime.

10. Via this Bill, the New Zealand Government proposes draconian changes to shipping competition law in New Zealand, in conjunction with amendments to criminalise cartel conduct. A two-year transition period for shipping is anticipated. Shipping lines may be able to engage with the competition authority before 2015 to establish the extent to which non-rate making agreements may be permitted.

11. A key mitigation claimed by New Zealand's regulatory authorities for the far-reaching changes to be introduced is that shipping lines will be able to "self-assess" whether vessel sharing agreements comply with competition law.

12. Shipping lines will either have to be confident their arrangements meet cartels criteria (with obvious risks of incorrect assessment) or they can seek an authorisation for such arrangements from the competition authority. That process (necessarily involving

professional advisors) is likely to take between 4-8 months. Authorisations may only be available for new, rather than existing, arrangements. The competition authority will not have the power to provide a class exemption for a standard agreement.

13. No other international jurisdiction provides a self-assessment regime where the container lines have the choice between taking a risk that their vessel sharing agreement is legally robust (with the consequential liabilities of hefty fines or imprisonment), or to seek a clearance under the equivalent of New Zealand's Commerce Act thereby incurring compliance costs and process delays which will inevitably be felt by exporters and importers alike.

14. The prudential risks associated with a self-assessment regime contemplated by the Cartels Bill are even more unmanageable when it is considered that vessel sharing agreements are very dynamic documents that can often change several times in just a few months. We simply cannot see how prudent and risk-averse shipping companies can have the level of assurance and commercial certainty required, and still maintain an efficient service if the Cartels Bill is passed into law.

15. If the Cartels Bill is passed into law, the absence of a clear competition law exemption would have a chilling effect on carrier agreements currently serving New Zealand trades. There will be some agreements that will be foregone because carriers will not be willing to accept the legal risk in serving a small country like New Zealand on the possibility (however remote) that the arrangement might be challenged at some point in the future.

16. The ICLC will continue to resist the passage of the Cartels Bill in the belief that lawmakers will eventually see that New Zealand's attempt to lead the world in regulatory reform for shipping competition is demonstrably so far out of step with international practice as to lead to a serious problem for shippers both in terms of available capacity and costs of shipping. Although exports and imports are hugely important to New Zealand we nevertheless command less than one percent of world shipping trade.

17. By contrast, our major trading partners (including Australia), all of which have been closely analysed by our international shipping law advisors, have opted for transparency and disclosure of agreements as their preferred method of regulatory oversight, while providing a general exemption under competition law.

Why Regulatory Frameworks must be viewed in an international context

18. It is worth revisiting why the shipping sector is different to other industries. Historically, industry co-operation was necessary because of the basic characteristics of operating large freight vessels across vast distances to collect uncertain volumes. Liner operators have to operate an almost common-carriage service where ships must sail at set times irrespective of whether they are full or empty. Failure to provide a regular service would undermine the value provided to the shippers. Regular and frequent services are particularly important to New Zealand and Australian exporters who have forward looking commitments to have their products arrive on time in foreign markets. In order to

provide these scheduled services at a variety of ports and relatively frequent intervals, carriers must be able to operate multiple ships on any given trade route. That leads to high risk of over-capacity, and loss-making sailings.

19. Purchasing and operating large ships requires a substantial capital investment. Carriers face unbalanced trade flows in the New Zealand and Australian markets. The need to have sufficient capacity deployed to meet peak or dominant export flow (head-haul) means capacity will often be far in excess of the amount needed for the return leg (back-haul). This is especially the case in New Zealand where, because of the imbalance of trade flow, export volumes hugely outweigh imports, to the point where one of New Zealand's largest "imports" is simply empty containers to keep the system in equilibrium.

20. The key benefits to be gained from allowing industry co-operation under operational agreements were, and still remain:

- Shippers can be assured that regular predictable and reliable services will always be available to transport their goods;
- Shippers can expect that sufficient capacity will be deployed to transport all of their goods;
- Forward planning of the logistics/supply line is possible on both demand and supply side;
- The avoidance of exaggerated rate fluctuations in the face of supply and demand imbalances, with less rate volatility overall;
- The encouragement of investment in new capital intensive vessels and technologies;
- The avoidance of destructive price and capacity volatility, leading to swings in profit and loss and to an ever-dwindling number of carriers, each with much greater potential for monopolistic behaviour[1].
- The continuation of viable shipping companies servicing the New Zealand exporter and importer needs.

21. Collaborative agreements in a cross-border, international law setting, are often protected from the normal competition scrutiny that countries apply to other domestic industries.

[1] Historically, when established carriers have exited the local market, 'new' carriers have entered the market to fill their place. While the new carrier may offer a discounted rate, history has shown that often the new carrier has found that providing services at such rates is unsustainable and has quickly exited the market, playing havoc with shippers' need for dependable forward planning.

Many governments around the world have historically exempted liner shipping collaboration from the full application of domestic competition laws, and continue to do so.

22. The basis for exemption includes recognition of the industry's special circumstances, respect for arrangements formed or determined on an international basis, and a judgment of net benefits to the country. Governments have judged that allowing liner collaboration is likely to deliver long term service benefits that are considered to be clear enough to justify a 'block exemption' for all collaboration of a certain type.

23. A number of governments have reviewed these competition law exemptions over the past decade or so. New Zealand's major trading partners have considered the arguments on all sides and opted to retain the immunity, in some cases with additional disclosure/registration processes. Most notably, Singapore, Japan, China, Australia, the USA and Canada have each evaluated the issues and decided to keep the exemption. Other important Asia-Pacific nations, such as South Korea, Malaysia and Taiwan, have not publicly run an investigation, but have a long-standing exemption that continues unquestioned. The only exception is the European Union's 2008 reform, to partially remove the exemption.

24. The repeal, which took place in October 2008, only related to liner conference agreements. The EU still has a partial competition law exemption for vessel sharing agreements and consortia agreements in place through 2015, at which time there will be another periodic review of this exemption. Moreover, the EU's repeal has not produced the benefits expected by the European Union and is not, in our view, an appropriate model for New Zealand or Australia to adopt. As identified by recent government reports in the United States 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 carrier agreements still exist.

Current Australian Shipping Competition Framework – Part X

25. The ICLC supports the position of its Australian counterparts in relation to the continuation of Part X of the CCA in its existing form. While Part X goes further than the requirements of the current Shipping Act in New Zealand in its regime for transparency and disclosure of agreements, ICLC's members who have an operational presence in Australia agree that it has shown its flexibility and resilience in meeting many of the challenges faced by the shipping industry in Australia.

26. ICLC agrees with Shipping Australia Ltd that there is a clear and detailed public benefit test contained in Part X if one examines the objectives and detailed obligations on parties to the publically registered Agreements, with the registration process itself providing for 30 days' notice after final registration before the exemptions come into effect to ensure all affected parties can review the provisions of new Agreements to ensure that they meet the public interest objectives specified in Part X. The ACCC has an investigative role if serious

complaints are brought to their notice and can make recommendations to the relevant Minister, if necessary, to rectify the problem. This legislation has been a relatively inexpensive but effective form of light-handed regulation.

27. As we have noted previously, international liner shipping has a set of characteristics that require a specialised regulatory regime that, in turn, provides some limited exemption for capacity sharing.

28. Part X achieves certainty in its application by being essentially an automatic authorisation process on the basis that ACCC investigation of any prohibited behaviour does not result in a withdrawal of that exemption. This regime is fundamentally different and facilitates an efficient shipping industry compared with that which would prevail in New Zealand if the Cartels Bill is passed into law.

29. While the ICLC will continue to work towards the removal of the shipping amendments contained within the Cartels Bill in the hope that common sense may prevail, we urge the Panel to retain its focus on the proven effectiveness of Part X and to concur with the views expressed by our Australian counterparts that the New Zealand reform is badly out of step with international practice and represents a serious threat to the efficiency of the shipping lines industry servicing New Zealand.

30. ICLC thanks the Competition Policy Review Panel for this opportunity to make a submission.