



July 2014

## **Australian Competition Policy Review-Part X of the Australian Competition and Consumer Act 2010**

### **Submission by the Global Shippers' Forum to the Review Panel (The Harper Review)**

This submission relates specifically to clause 3.3.5. concerning immunities to providers of liner shipping services as referenced in Part X of the Australian Competition & Consumer Legislation of 2010 (formerly the Trade Practices Act 1974).

#### **Introduction**

The Global Shippers Forum welcomes the opportunity of commenting on the “Root and Branch Review” of Part X of the Australian Competition & Consumer Legislation of 2010. We respectfully offer these comments from a wider international shipper perspective which we trust will be of assistance to the Review Panel in its investigations into the review, in particular, into clause 3.3.5 of Part X of the Australian Competition & Consumer Act of 2010.

In addition to providing a wider international shipper perspective and input into the Review, this submission fully endorses the submission by the Australian Peak Shippers Association to the policy review and the Review Panel. In this respect, the GSF in particular supports the removal of antitrust immunity for all price fixing and discussion agreements. As the representative global organisation of customers of international shipping services, the GSF stresses that customers receive no benefits from such price fixing and discussion agreements. Moreover, recent analysis of the EU repeal of the EU liner conference block exemption in 2006 by, for example, the U.S. Federal Maritime Commission has found that withdrawal of antitrust immunity has produced no negative implications for trade or the liner container shipping industry. As set out in this submission, following the 2002 OECD report which recommended review and repeal of antitrust exemption for liner conference and discussion agreements, the international trend is now firmly to apply the normal application of competition rules to the liner shipping industry.

APSA is a member of the GSF and as such plays a key role in the development of GSF policies, including the GSF's international policy approach concerning the regulation of liner shipping and the application of antitrust laws to the liner shipping industry at an international level.

#### **Global Shippers' Forum**

The GSF was formally incorporated and registered as a non-governmental organisation in the United Kingdom in June 2011. The GSF was created in 2006 as a successor to the informal Tripartite Shippers' Group established in 1994. The GSF is the international shippers' organisation that represents thousands of shippers internationally through GSF member associations in Asia, Africa, Europe and North and South America. The main focus of the GSF is to promote the interests of shippers as users on international transportation services across a broad spectrum of issues, including policy, commercial and technical matters. In pursuance of these issues, the GSF consults and engages in dialogue with a wide range of key national and international organisations

and institutions, including APEC, the European Union, World Customs Organization, U.S. Federal Maritime Organization, International Civil Aviation Organization, and other national and UN and international agencies that regulate or formulate policies that impact international freight transportation markets and the users of international freight transport services.

The GSF welcomes the opportunity to comment on the review of clause 3.3.5 relating to the immunities given to providers of shipping services under part X of the Australian Consumer & Act of 2010. The GSF, and its national and regional association members, have been closely involved in the development of maritime competition policy at a national, regional and international level. The GSF's predecessor organisation, the Tripartite Shippers' Group, played a pivotal and influential role in representing international shippers' interests in the 2000-2002 OECD inquiry into liner shipping conferences which directly led to the EU review of the liner shipping conferences exemption and the subsequent repeal of the EU liner conference block exemption (EC Regulation 4056/86) in 2006.

In North America, GSF and its member associations the U.S. National Industrial Transportation League (NITL) and the Freight Management Association of Canada have been key instigators in shipping policy reforms. In the United States the NITL was the main driver behind the U.S. Ocean Shipping Reform Act (OSRA) of 1998 which established individual confidential contracts, and the FMCA promoted similar reforms to the Shipping Conferences Exemption Act (SCEA) in Canada.

In Asia/Asia-Pacific, the GSF and its members have been contributors to the wider international policy debate regarding antitrust treatment of liner shipping agreements, including the current New Zealand proposals to repeal antitrust immunity for shipping agreements. In addition, the GSF was invited to participate in the review of non-rate making agreements by APEC leading to the adoption of non-binding guidelines recommended for use in Asia-Pacific shipping trades.

In Europe, shippers have played the pivotal role in the removal of the liner conference block exemption which entered into effect in October 2008 and in framing of the current EU consortia block exemption regulation. Following repeal of the liner conference block exemption, the GSF has continued to monitor carrier agreements and behaviour, most notably recently with regard to alleged price signalling in the Asia-European liner trade which is currently the subject of EU legal proceedings<sup>1</sup>, and more recently in tabling a series of questions concerning the potential market impact of global carriers alliances such as the proposed P3 Global Alliance with competition authorities and regulators in Washington DC, Brussels and Beijing. The proposed P3 Alliance was recently blocked by the Chinese competition and regulatory authorities.

## **Review of Part X of Competition and Consumer Act 2010**

The GSF recognises that the review into the Part X of the Competition and Consumer Act of 2010 forms the basis of a broader horizontal assessment of competition law provisions in Australia. For the reasons stated above it will be obvious that the comments made in this submission focuses on the competition law treatment of container shipping markets, especially ratemaking agreements such as conferences and discussion agreements which have ability to influence rates and openly purport to promote price stability<sup>2</sup>.

The GSF appreciates there is currently broad regulatory agreement on the treatment of traditional shipping operational arrangements, such as consortia, alliances and vessels sharing agreements (frequently referred to as non-rate making agreements in the Asia-Pacific context). The GSF recognises that these forms of carrier agreement can provide benefits to shippers and carriers in the form of reduced costs and enhanced services, provided that those benefits are shared with

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<sup>1</sup> The European Commission has recently indicated to the GSF that the 14 lines involved in the case have agreed to resolve the Commission's competition concerns via a "commitments procedure" under which they must put forward binding commitments to rectify their behaviour.

<sup>2</sup> See Transpacific Stabilization Agreement website: [http://www.tsacarriers.org/pr\\_031809.html](http://www.tsacarriers.org/pr_031809.html)

shippers and consumers. However, as indicated above the market power and concentration issues raised by the proposed P3 Global Alliance has raised new issues for regulators. These concerns were sufficient for the Chinese authorities to block the proposed P3 Alliance, and for the U.S. FMC to demand unprecedented monitoring requirements over the potential impact on services and price competition. This submission deals with these aspects in more detail below, but in broad terms-as set out in APSA's submission-shippers internationally are opposed to conferences, discussion agreements and ratemaking agreements whose object or effect is to eliminate or restrict competition to the disadvantage of shippers and consumers.

### **Important Changes in the Global Regulatory Framework**

The global regulatory framework relating to maritime antitrust immunity has witnessed significant changes in recent years. In 2006 the EU abolished the liner conference block exemption. The EU repeal was significant in that the then 25 member states of the European Union unanimously adopted the repeal which could have been vetoed by any member state, including those EU member states with significant shipping interests, including Denmark, France, Germany and Greece, as well as island nations with strong maritime interests and traditions such as the United Kingdom, Ireland, Cyprus and Malta. The unanimous repeal decision was based on a detailed three-year review conducted by the European Commission<sup>3</sup> and the recommendations of the 2002 OECD report into the liner conference system<sup>4</sup>.

In addition, an increasing number of countries around the world have either never exempted shipping services from competition laws or have recently repealed antitrust exemptions. These include major trading nations such as Brazil, Russia, India, South Africa (i.e. four of the five BRICS countries), and Norway, Iceland, Malaysia and Israel. In 2012 the European Commission estimated that the EU alone accounted for 44% of the world's non-exemption trade in terms of deployed TEU capacity based on 2010 data. Today, with further countries removing historic antitrust exemptions the GSF estimates that over 50 per cent of world trade by TEU deployed operates within normal competition law frameworks.

This trend is to be further consolidated when New Zealand repeals antitrust exemption for maritime pricing and discussion agreements following a detailed two-year inquiry. Amendments to the New Zealand Commerce Bill are presently awaiting enactment by the New Zealand parliament.

### **The impact of the anti-trust liner exemption**

As set out above, recent detailed economic and legal analysis has conclusively shown that liner shipping is not sufficiently different from other industry sectors to warrant antitrust exemption. Moreover, in its investigation into EU repeal the European Commission found that there was no evidence to support the shipping industry's claims that exemption was necessary to deal with the cyclical nature of the industry (indeed most industries are cyclical), to provide long-term investment and capacity for customers, and to manage market changes and seasonal peaks in supply and demand. These claims were also recently dismissed by the New Zealand Productivity Committee inquiry in its antitrust exemption review in New Zealand. The New Zealand assessment is significant in a geographical context to the Australian review. The New Zealand reviews found no compelling arguments to support claims that New Zealand's relatively isolated geographical position would be undermined by removal of antitrust immunity. On the contrary, it concluded that antitrust immunity provided disadvantages to the competitiveness of New Zealand products on world markets and was a factor affecting the relative efficiency of logistics services for New Zealand industry.

Since repeal of the EU liner conference block exemption there have been no adverse consequences for shippers and carriers. In examining the impacts of the 2006 EU repeal the

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<sup>3</sup> See [http://europa.eu/competition/sectors/transport/legislation\\_maritime\\_archive.html](http://europa.eu/competition/sectors/transport/legislation_maritime_archive.html).

<sup>4</sup> See <http://www.oecd.org/dataoecd/13/46/2553902.pdf>.

European Commission in 2012 stated that it has not been able to identify any detrimental effects on EU trades in terms of all-in prices and service quality, notwithstanding the effects of the global economic crisis which coincided with the repeal.

Similarly, The U.S. Federal Maritime Commission carried out a detailed study into the impact of the EU repeal. The main findings of the FMC study confirmed that the repeal had no significant impact on Asia-Europe prices compared to Asia-U.S. prices<sup>5</sup>. The study also said that “the repeal of the [EU] block exemption does not appear to have resulted in any negative impact on U.S liner trades”. The FMC study however suggests that some further analysis was needed in regard to discussion agreements. The study noted that in relation to carrier discussion agreements in U.S. trades (they are unlawful in EU liner trades) that they did not appear to have increased average rates or revenues relative to EU trades, but they “may have contributed modestly to reduced rate volatility” which suggests as previously argued by the GSF that rate discussion agreements have a negative impact on trade and shippers as they are capable of distorting competition. The GSF considers the FMC study to be a very positive assessment of the impact of the EU repeal and a vindication of GSF’s position that carrier pricing and discussion agreements provide no benefits to shippers but provide the opportunity for such shipping line agreements to distort or eliminate effective competition. However, significantly, the FMC and EU assessments demonstrate that the removal of antitrust exemption for carrier price and discussion agreements has also had no serious or damaging impacts for the shipping industry.

The GSF therefore supports the Australian Peak Shippers Association proposed amendments to Part X of the Australian Competition Act 2010, namely that the fixing, setting or discussion of freight rates and freight surcharges by conferences of carrier discussion agreements should no longer benefit from exemption under Australian competition law.

For the reasons set out in this submission, the GSF also strongly supports APSA’s proposal to remove antitrust exemption for discussion agreements. In this respect, the GSF notes that the shipping industry regularly portrays these agreements as a benign form of carrier agreement equivalent or synonymous with consortia or vessel sharing agreements. There is a clear distinction between these two forms of agreement. The latter are supported by GSF and shippers, subject to appropriate regulatory oversight, as they potentially provide benefits to shippers in the form of improved services and reduced costs. Discussion agreements, however, which afford the parties to discuss costs, prices and future business strategies are a hardcore competition restriction, and provide no countervailing benefits to shippers or consumers in the form of reduced costs or service improvements and thus should be subject to the full application of competition law.

### **Part X-regulatory oversight of maritime agreements under the Competition and Consumer Act 2010**

As a fundamentally shipper nation dependent on competitive ocean shipping markets for its international trade, it is evident that Australian shippers’ have long benefited from regulatory framework which has provided effective oversight of the liner shipping industry in trades to and from Australia. We therefore support APSA’s recommendations to retain those aspects of Part X which will enable appropriate cooperation on non-pricing issues such as consortia and VSA’s, while as recommended by APSA the removal of antitrust immunity for all hard core restrictions including rate fixing conference agreements and discussion agreements on prices, surcharges and costs which afford the opportunity or potential for carriers to distort or eliminate effective competition in Australia’s import and export trades.

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<sup>5</sup> [www.fmc.gov/assets/1/documents/FMC\\_EU\\_study.pdf](http://www.fmc.gov/assets/1/documents/FMC_EU_study.pdf).

The approach by APSA is consistent with the general international trend in dealing with antitrust application to the shipping industry. With regard to shipping consortia and vessel sharing agreements, as set out above, there is at present broad international consensus that this form of cooperation can potentially provide benefits to shippers and consumers in terms of improved services and reduced costs. In essence, these cooperation arrangements are no different from cooperation agreements entered into by suppliers and producers in the wider economy. It is however recognised that these agreements require constant oversight, either through guidelines under horizontal competition laws or through appropriate regulatory oversight or regulation such as the EU consortia regulation which provides a limited exemption for agreements with market shares of up to 30%.

It should be stressed however, that the European Commission's treatment of shipping consortia agreements does not imply support for antitrust exemption or limited antitrust immunity. The Commission, as does the GSF, draws a clear distinction as set out above between hardcore pricing agreements and non-pricing agreements such as consortia and VSA's.

In summary, GSF welcomes the review of Part X of the Competition and Consumers Act 2010. The review presents an opportunity to reform Part X by removing antitrust immunity for outdated unacceptable price setting conference agreements and discussion agreements which provide no benefits to Australian Shippers other than the probability of higher prices above the level that would be achieved in a competitive market. In this respect the GSF maintains that as a general proposition, there is no benefit to shippers and consumers of stable prices which substantially exceed the competitive level as result of liner shipping cartel pricing agreements.

The provision and maintenance of stable and efficient liner shipping services sufficient to meet the needs of Australian importers and exporters can however be achieved through appropriate cooperation within shipping consortia and vessel sharing agreements provided such agreements provide shippers with a share in the benefits in terms of improved services and reduced shipping costs.

We very much hope that the Review Panel finds these comments of help to its inquiry. The GSF remains at the disposal of the Panel to answer any questions relating to this submission and to provide additional information as may be required.

Yours faithfully

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