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SHIPPING AUSTRALIA LTD'S (SAL) RESPONSE TO

THE COMPETITION POLICY REVIEW DRAFT REPORT SEPTEMBER 2014

Comments on Draft Recommendation 4 (Part X of the CCA) and related matters

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

1.2 **The draft report's recommendation to abolish Part X will:**

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

1.3 These impacts will be disruptive and destructive at a time of forecast unprecedented growth in Australia's container trade in the medium to long term. The draft report states "the importance of international trade to Australia's economy and the prospects for stronger economic growth in trade as Asia develops focus attention on the need for efficient and competitive marine transportation". Shipping Australia agrees, however the Panel does not seem to have reviewed the operation of the current situation as there is no acknowledgement that Part X's light-handed and

low cost regulatory regime and the serious obligations it places on parties to such agreements already successfully delivers these outcomes. The report makes recommendations for change but does not provide any evidence or even describe the problem that needs to be solved; neither does it make any detailed assessment of how the recommended action would improve shipping services.

1.4 SAL's comprehensive submission specifically addressing the points raised in the issues paper appears to have been largely ignored and the draft report does not address most of these matters. Whilst the Panel had "close to 100 numerous meetings with stakeholders", there were no meetings with SAL or importantly, the peak shipper bodies designated under Part X: the Australian Peak Shippers' Association, and the Importers' Association of Australia. **This can only be described as a critical failure in of review process and shows that the operation of Part X, and whether it meets Australia's national interests, was not given proper consideration.**

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

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

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

1.7 Whilst the panel accepts that international liner shipping requires special treatment, it provides this in the form of a so-called new 'safe harbour' block exemption which **should** be granted by the ACCC, but may not be as the ACCC retains this discretion. This introduces a high level of unnecessary uncertainty into the regulatory environment whereas Part X is clear and transparent. How a 'block exemption' would differ from the current approach in Part X is not explained! Any shipping Line falling outside these unknown limits of a block exemption will then require the full ACCC authorisation process which even the panel agrees, "might lead to unnecessary compliance costs." **Importantly, "under the self-assessment model there will be some carrier co-operative arrangements - arrangements that provide market efficiencies and tangible benefits to exporters and importers – that will be foregone because carriers would not be willing to accept the legal risk that an arrangement will be challenged in the future."**[1]

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

[1] World Shipping Council, the European Community Shipowners' Associations and the International Chamber of Shipping submission to the EU Commission review of Regulation (EC) no 906/2009 which provides a block exemption for consortia. June 2013. Pages 14 and 15

1.9 **In falling for the hypnotic appeal of recommending the repeal of Part X as promoted by the Australian Competition and Consumer Commission (ACCC), the Panel has ignored, overlooked or in some cases misrepresented important facts, which indicates a lack of due diligence to this component of the review. Illustrative examples of this follow:**

- **any thorough investigation of the operation of Part X would have revealed that it is pro-competitive**. It minimises barriers to entry to the Australian trade and ensures a high level of contestability from both direct new entrants and transhipment operators with individual shipping Lines competing fiercely for market share. This is evidenced by the fact that current freight rates in our Asian container trades are less than a third of what they were in monetary terms thirty years ago (less than one sixth in real terms). Global consolidation of container shipping Lines, more efficient consortia arrangements and the adoption of new technology have all combined to assist the Lines in meeting the challenges of persistent low returns in the Australian international liner trades.

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

- The draft report states with reference to the ACCC submission that "much of the liner shipping to and from Australia is organised along conference lines, though this is becoming less common." **The norm now is the Discussion Agreement which does not pool revenues as stated in the draft report nor fix prices in the way the old Conference system did**. As pointed out in the SAL submission, there are no public tariffs as the vast majority of freight rates are subject to strict individual and confidential service contracts and any agreement on surcharges, for example, is by consensus, without any compulsion to collectively apply.

- Reference is made to the 2005 review by the Productivity Commission (PC) that recommended repeal of Part X contrary to the 1999 PC review which concluded that Part X served Australia's national interest. The Government did not accept the 2005 recommendation but did propose amendments to Part X to improve its operation which have not been implemented. **The report states that Part X does not require an assessment of the anti-competitive effects of the Agreement. This is completely wrong.** The objects of Part X (2(a)for example) should be achieved "by permitting continued conference operations while enhancing the competitive environment for international liner cargo shipping services through the provision of adequate and appropriate safeguards against abuse of conference power" and the Minister may exercise his powers in relation to an Agreement "if the conduct or proposed conduct has not resulted in, or is unlikely to result in, a benefit to the public that outweighs the detriment to the public constituted by any

lessening of competition." There are many references to competition that require consideration and assessment by the Registrar of Liner Shipping.

- The report states that no other industry enjoys legislative exemption from Australia's competition laws and suggests other industries have similar economic characteristics to the liner shipping industry, particularly the international airline industry. **This is misleading without reference to the Government's bilateral air service agreements as most air freight is carried in the belly holds of passenger aircraft.** The majority of capacity for airfreight is thus strictly regulated. The Australian Government has negotiated 90 bilateral air service agreements and associated arrangements and international aviation is regulated by a complex web of over 3000 interlocking bilateral air service agreements. Governments must continually negotiate new treaties to allow international aviation to grow and to expand their carriers' access to new and emerging markets.[2] Whilst the panel considers that air service agreements should not be used to protect Australian carriers from competition and Australia's policy on such agreements should be to aim to ensure there is sufficient capacity on all routes to allow for growth, international liner shipping suffers from chronic excess capacity and there is no international regulation governing access to individual trades. There are no other industries with very similar economic characteristics to the international liner shipping industry!

- **The wrong impression is given by the comment that over the last two decades other jurisdictions have moved to more competitive regimes and this has not led to excessive instability or 'destructive competition'.** As pointed out in the SAL submission, whilst retaining the block exemption for consortia, the EU did remove the block exemption for Liner Conferences in 2008 and expected other countries to follow suit but this did not eventuate. "As identified by recent government reports in the United States[3] and Japan, numerous structural problems exist in the European trade, including prolonged freight rate volatility, newer and higher surcharges, and a number of service issues, including overall service reductions and a lack of available vessel capacity to meet the basic needs of importers and exporters. These types of structural problems as experienced in the EU have not been experienced in other trade lanes like the Transpacific or Intra-Asia, where competition law exemptions for carriers' agreements still exist."[4] There continues to be a clear exemption in many of Australia's major trading partners (including China, Japan, Republic of Korea and the USA) and many others, following reviews in the last five years, have decided to introduce or maintain the exemption. It is important to note that no country in the world has removed the exemption for consortia! **In fact the EU has recently renewed its separate block exemption for consortia for a further five years following a thorough review of its benefits but this has not been mentioned in the draft report!**

- **The statements referring to the US approach are misleading.** The report states "the effect of the requirements that carrier agreements cannot prohibit or limit confidential Individual Service Contracts (ISC's) is that US shipping regulation still creates competition between

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

[3] Refer www.fmc.gov/assets/1/Documents/FMC_EU_Study.pdf

[4] Paragraph 24 of the submission to the Competition Policy Review in Australia by the International Container Lines Committee (New Zealand)

shipping carriers, as agreements on pricing are effectively non-binding and the terms of ISC's that deviate from the conference tariff are not observable."[5] Leaving aside the fact that there are no conference tariffs, as such, in the Australian trades, **this is how Part X operates today**. ISC's are already treated confidentially, however it should be noted that SAL supported the proposed reform in 2006 that Part X be amended to ensure that ISC's be kept strictly confidential. Collective pricing under Discussion Agreements under Part X is non-binding as noted above.

1.10 The panel states that it has not received any information to cast doubt on the conclusion of the 2005 PC report to repeal Part X, (yet it does not address the reasons that the government did not accept that recommendation). The majority of submissions to the review that addressed Part X supported its continuation in one form or the other. It appears that all these submissions have been overlooked. If the SAL submission had not been largely ignored and SAL been given the opportunity to answer the questions that are obviously in the minds of the panel members, the panel would not have made this comment. There is no discussion of why the then

1.11 On page 129 of the draft report, the panel's view in relation to consumer access to data to improve communication was that "markets work best when consumers are engaged, empowering them to make informed decisions."[6] Part X ensures that data is provided to shipper bodies in relation to collective decisions taken under registered Agreements so that they can make informed decisions and this has worked very well since Part X was enacted in 1966.

1.12 The submission by the ACCC for this review mentions that "the increase of non-conference shipping services over time has resulted in Australian shippers having access to vessel capacity and competitive freight rates outside of the shipping services covered by registered Part X agreements."[7] **This comment is factually incorrect.** Firstly, as mentioned above, Discussion Agreements have replaced the old Conference type Agreement which had a public tariff and collective decisions being binding on the parties to the Agreement. Secondly, there is no distinction in Part X between a Discussion Agreement (which can collectively agree pricing on a non-binding basis) and a consortia Agreement which primarily is an operational Agreement. There are very few operators in Australia's international liner trades who would not be party to one or other or both of these types of Agreements.

1.13 The Panel's views and recommendations regarding Part X appear to have been unduly influenced by the ACCC without serious consideration being given to other submissions despite the factually flawed statements by the ACCC regarding Part X as pointed out in this submission. It is disturbing to read that the Chairman of the ACCC, Mr Rod Sims, in a speech at the University of Adelaide on 10 October this year said in relation to this report that "for example, the shipping reforms are low-hanging fruit that can be quickly implemented."[8] Clearly he has been blinded by ideological bias and not made a proper assessment of the actual operation and impact of Part X on our national interests and our international competitiveness. The ACCC did not submit any

[5] Part 4-Competition laws. Third last paragraph of page 239
[6] Part 3-Competition Policy. The Panel's view, page 129.
[7] Third last paragraph of the ACCC submission page 49
[8] Internet accessed 10 October, 2014. Refer the Introduction. http://accc.gov.au/speech/university-of-south-australia-workshop-regulator-update

evidence or case study to support its recommendation to repeal Part X. **SAL would be particularly interested to see any evidence or case studies which led to the Panel to conclude that Part X somehow inhibits competition and works against the public interest. As this conclusion is inconsistent with the facts, we suspect there are none.**

1.14 As noted above, the draft report refers to the fact that the Australian Government's proposed amendments to Part X arising from the PC review in 2005 have not been implemented and if they had, Part X's operation would have been more closely aligned with the pro-competitive regulatory regimes operating out of Europe and the United States. This is not true, it would be impossible to align with both as they differ significantly. The EU at the time had block exemptions in separate exemption regulations governing the operations of Conferences and those of operational Consortia (the latter exemption having been recently renewed until 2020) whereas the USA has a strict regulatory regime under the supervision of a separate agency, the Federal Maritime Commission.

1.15 The draft report has not given due consideration to the operation of Part X or properly considered the potential negative consequences of its recommendations on Australia's trade. It appears that the panel has made a recommendation to remove it without ever putting in the effort to properly understand it. A proper and considered review of Part X would have made recommendations to improve the operation of Part X to meet the interests of both shipowners and shippers. It would not have recommended repeal which will introduce a much higher degree of uncertainty in regulating an international liner shipping market already facing serious challenges of falling returns, shipping capacity outstripping demand, increasing costs particularly in Australia, meeting the demand for specialised (e.g. refrigerated) containers and handling the high level of empty containers as a result of imbalances in trade flows and seasonal peaks.

1.16 SAL requests to be given the opportunity to address the Panel in order to answer any questions the panel may have on this response to the draft report and/or the original SAL submission, to elaborate on members' concerns and discuss possible amendments to Part X.

Comments on Draft Recommendation 5 (Coastal Shipping) and related matters

2.1 SAL notes the comment in the ACCC submission that, "Like other areas of the Australian economy, coastal shipping should be exposed to international competition."[9] SAL has been significantly engaged in the current review by the Federal Government of Australia's coastal shipping legislation and policy. SAL supports the Panel's recommendation in the draft report that "cabotage restrictions should be removed, unless they can be shown to be in the public interest and there is no other means by which public interest objectives can be achieved."[10] The panel also considered that reform of coastal shipping regulation should be a priority and SAL would agree with that approach. It is noted that considerably more submissions addressed this issue compared to those that addressed or also addressed Part X.

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[9] Page 16, section 3 of the ACCC submission
[10] Part 2-Findings and draft recommendations of the report, page 29.