

SUBMISSION

TO

THE AUSTRALIAN COMPETITION AND CONSUMER COMMISSION

**CONCERNING AN INVESTIGATION INTO THE CONDUCT OF THE
ASIA-AUSTRALIA DISCUSSION AGREEMENT (AADA)**

BY

**SHIPPING AUSTRALIA LIMITED ON BEHALF OF, AND AUTHORISED
BY, THE MEMBER LINES OF THE AADA**

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Attachments are provided in the accompanying excel file

1. Introduction

On 11th November 2003 the Australian Competition and Consumer Commission (ACCC) initiated an investigation into the conduct of parties to the Asia-Australia Discussion Agreement (AADA), a registered discussion agreement under Part X of the TPA. The purpose of the investigation is to report to the Australian Government Minister for Transport and Regional Services whether or not there are sufficient grounds in relation to section 10.45 (1) (a) (viii) to recommend de-registration of the AADA.

The Minister shall not give a direction under subsection 10.44 (1) (to cancel the registration of the agreement in its entirety or partly) in relation to a registered conference agreement unless:

The Minister is satisfied of the following matters pursuant to subsection 10.45 (1) (a) (viii):

- (a) *that the agreement includes a provision that has the purpose of, or has or is likely to have the effect, of substantially lessening competition (within the meaning of section 45); and*
- (b) *the parties to an agreement have engaged in conduct, or propose to engage in conduct, to give effect to or apply the provision; and*
- (c) *that 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 that: has resulted, or is likely to result, from the conduct; or would result, or be likely to result, if the proposed conduct were engaged in; and*
- (d) *there are exceptional circumstances that warrant the giving of a direction under section 10.44 (1).*

Exceptional circumstances are defined in the revised explanatory memorandum given by the Minister when introducing the *International Liner Shipping Cargo Bill (TPA amendment 2000)* into the Parliament.¹

These circumstances would cover situations where an agreement:

- (i) *covers a substantial majority of shipping lines and capacity in a trade; and*
- (ii) *where the conduct of those shipping lines has led to, or is likely to lead to, an unreasonable increase in freight rates: and / or*
- (iii) *unreasonable reduction in services;*
- (iv) *with the result that the public benefit from the operation of the agreement is outweighed by the an anti-competitive detriment.*

This submission will prove that the conduct of the AADA has been entirely consistent with its obligations under Part X.

¹ The Parliament of Australia (Senate), *Trade Practices Amendment (International Liner Cargo Shipping) Bill 2000* Revised Explanatory Memorandum p 6.

2. Background

The registration of the AADA under Part X of the TFA occurred on 30th November 2000. Its membership then of 15 lines comprised, as now, a mix of previously Independent carriers and members of the Australian and New Zealand/Eastern Shipping Conference (ANZESC). Since that time two more lines joined the AADA, China Shipping Container Lines in 2001 and HSDG in 2003. One member, Yangming, resigned co-inciding with its withdrawal from the trade in 2002.

The current membership of 16 lines is:

ANL Container Line Pty Limited*
China Shipping Container Lines Co Ltd (CSCL)
COSCON
FESCO
Evergreen Marine Corporation
Hamburg Sudamerikanische Dampschiffahrts – Gesellschaft KG (HSDG)
Hanjin Shipping Co Ltd
Hyundai Merchant Marine, Seoul (HMM)
Kawasaki Kisen Kaisha Ltd (K Line)*
Maersk Sealand
Mitsui OSK Lines Ltd (MOL)*
Mediterranean Shipping Company S.A. (MSC)
NYK Line*
Orient Overseas Container Line Ltd (OOCL)*
P&O Swire Containers Ltd*
Zim Israel Navigation Co Ltd*

* = ANZESC member

Full details of member's services and consortia are provided in a separate response to the ACCC's Questionnaire.

It should be noted that from the registration of the AADA and up to the initiation of the ACCC investigation, Hanjin Shipping Co. Ltd and Evergreen Marine Corporation have elected not to participate in any AADA correspondence, nor attend any meetings or financially contributed to its administration. As such, the conduct of those members should be regarded as conduct not resulting from their participation in the AADA.

3. Comments on the Complaints received

The ACCC has received information from Importers that freight rate increases that were implemented on 1st July 2003 were succeeding in unreasonably raising average freight rates from North East Asia. Complaints had also been received over the magnitude and frequency of such rate increases and also the application of a Peak Season Surcharge (PSS).

It is testimony to the contestability of the market that despite the AADA having announced cumulative freight rate increases of US\$900/teu from 1st July 2001 to 1st July 2003, the average market freight rate is estimated as having actually increased by about US\$250/teu. Such outcome also provides evidence of the non-binding basis

upon which its members observe decisions reached within the AADA. Indeed, it should be highlighted that in monetary terms the average freight rate today for imports from China is probably close to that of 1999 and about 30% less than that 10 years ago, in 1993.

It is irrefutable that importers have enjoyed a prolonged period of cheap freight costs which lines have always maintained were unsustainable, the more so recently as a result of the added hardship associated with the decline in export volumes and the collapse of Northbound freight rates. Furthermore, such a scenario tends to demonstrate that the presence of a Discussion Agreement whose members cover a substantial majority of shipping lines and capacity in a trade lane, does not by itself, affect the ultimate market influences of supply and demand but there are other benefits from such agreements referred to below. **The question posed here however is whether the AADA's conduct has led to, or is likely to lead to, an unreasonable increase in freight rates. This submission will demonstrate that this is not the case.**

When focusing on the scale of increase actually experienced by importers rather than that advertised, lines firmly believe their conduct has not been unreasonable but simply represents an effort to obtain a commercially fair price for services rendered. In this regard, importers continue to enjoy value for money from the services provided by the AADA. For example, importers have never before had such a choice of operators nor had access to more modern tonnage offering faster more frequent and reliable schedules that meet international benchmarks. With freight rates that existed a decade ago, lines certainly believe the public benefits derived from the operation of the AADA far outweigh any perceived anti-competitive detriment.

The AADA has received complaints directly from the Importers Association of Australia (IAA) concerning the frequency of freight rate increases. Whilst lines have attempted to explain the circumstances giving rise to such actions it should be stressed that at no time has the IAA requested a formal negotiation with the AADA under Part X of the TPA to address its concerns. Consequently, it is surprising and disappointing that the IAA should have complained to the ACCC about this particular issue without first having exercised its rights under Part X; notwithstanding the fact that such rights extend only to arrangements affecting eligible Australian contracts.

This situation highlights a number of long held concerns to lines. It has always been the contention of lines that the amendments to Part X in 2001, in particular those relating to its exemptions being extended to cover inwards liner shipping, would prove ineffective and give rise to possible jurisdictional conflict with foreign Governments. Clearly, the vast majority of contracts relative to inward shipments are entered into at place of origin and are subject to the application of local legal regimes. For an Australian Government instrumentality such as the ACCC to seek to intercede in the determination of whether the conduct of the AADA does or does not meet the public benefit test in Australia, is not beyond contention in terms of the international regulation of inward liner shipping. We find the following advice from Professor James Crawford, the Whewell Professor of International Law at the University of Cambridge, very instructive:

Quote

Australian law and policy has traditionally distinguished between inwards and outwards trades, and for good reason. First of all, in the way that international trade is actually carried out, the shipper is almost invariably the exporter (properly speaking the shipper is the original party to the contract of carriage. In international trading practice this means that the shipper is almost always the exporter, even where the carriage is on f.o.b terms. A good illustration of the reluctance of the courts to hold otherwise is provided by The Tromp (1921) p 337. See also Heskell v Continental Express Ltd (1950) 1 All ER, 1033,1038.

Secondly, Australia's interests in regulating trade are focused on its export trade. It is difficult to see how in practical terms an Australian Designated Shipper Body can have a major say in negotiations in relation to the terms of inward shipping. Either the DSB system has to be watered down in relation to outwards shipping, to a point that it would be practical and legitimate to apply the system equally to both inwards and outwards, or a distinction between the two has to be recognised.

Unquote

It is for this latter reason that, that the Government in the last amendments to Part X, restricted the negotiating power of the IAA to eligible Australian contracts. However, the points raised in Professor Crawford's advice also need to be recognised and taken into account in this review and could well have a bearing on some of the conclusions reached.

It is important to note that the conduct of the AADA in seeking to restore rates of freight during 2003 has been consistent with the local customs and notification requirements of the North East Asian countries served by the AADA. Indeed, it should be observed the Shipper bodies that exist in such countries, which, as mentioned above, represent the vast majority of the payers of freight on exports to Australia, have chosen not to conduct any formal negotiations with the AADA.

Therefore, it is the AADA's firm opinion that it's conduct has been entirely consistent with its obligations under Part X of the TPA and in fulfilling responsibilities with Shipper bodies in North East Asia.

4. Freight Rates

An area of conduct that is relevant to the ACCC's investigation concerns the coordinated setting of freight rates by the parties to the AADA. In particular, questions have been posed in respect of:

Discounting of freight rates by individual member lines of the AADA

Co-ordinated increases in freight rates by parties to the AADA

Imposition of Peak season Surcharges

Stability of freight rates

Firstly, there is a need to dispel any notion that the AADA has a co-ordinated tariff or publish any common set of rates of freight. In reality lines determine their own freighting policies for different types and volumes of cargo having regard for their specific customer requirements and a variety of other cost related factors, which differ

between lines according to their individual global logistical operations. As such, it is suggested the area of conduct, which the ACCC seeks to enquire into, should be directed to the co-ordinated setting of the quantum by which lines freight rates are sought to be adjusted. On this basis, the following comments are offered in respect of the questions raised:

Discounting of freight rates by individual member lines of the AADA

Q. Have rates announced by the AADA been undercut by any of the member lines? Is there evidence of pressure on members to adhere to published rates?

A. The quantum of rate increases announced has been deviated from as a result of private commercial negotiations entered into between lines and their customers. All decisions taken by lines to announce a rate increase have been reached on a non-binding consensus basis and as such lines are not obliged to adhere to same and any departure from such arrangements is done so without fear of retribution. Nevertheless, there prevails a common intent to aim at achieving the objectives announced.

Q. Is there evidence of AADA members discounting from rates published by the AADA?

A. Ample evidence exists of instances where customers have not been required to pay the full extent of the published rate increases affected since 1st July 2002. It is suggested the ACCC might care to canvas importers in this regard but otherwise should refer to Table 1 under item 6 of the Issues Paper, which indicates the average movement in base freight rates ex China since December quarter 2001 to June quarter 2003 has only increased by between US\$75 – US\$100 per teu compared a with cumulative rate increase of US\$400 per teu that was published during such period.

Q. Can shippers procure new contracts with AADA lines at rates discounted below those that have been announced?

A. Shippers have the ability to freely negotiate contractual arrangements with their preferred service providers on a commercially private basis and without any inhibiting influences of third parties, including decisions reached on a non-binding basis within the AADA.

Q. Were rates internationally competitive 3 years ago? Are current rates internationally competitive now? Have rates from NE Asia to Australia risen sharply relative to rates from NE Asia to other destinations?

A. The following estimate of average freight rates should serve to demonstrate that the rate from China to Australia was internationally competitive three years ago and remain so today. Also, the suggestion of there having been sharp increases in rates to Australia or indeed to the other destinations used for this example can be taken as being misplaced:

	Asia to USA US\$/teu	Asia to Europe US\$/teu	China to Australia US\$/teu
October 2000	1950	1600	750
October 2003	1995	1670	750

Effects of Increased Freight Rates on Importers

Q. What effect have the AADA's recent rate increases had on importers?

A. There have been media reports (refer the "Age" 4/12/03) on the possible impact with complaints reported by Harvey Norman and Austrim's Nylex consumer division. However, the reports fail to recognise the advantageous nature of the appreciation of the Australian dollar against the American dollar in recent months. In Harvey Norman's case, a forty foot container of Video Players are likely to have an f.o.b. value of around US\$200,000 (there are at least 2400 such units in an FEU). Five months ago in Australian dollars Harvey Norman would have paid around A\$364,000 (A\$0.55 to US\$1) and now that same shipment would cost around A\$285,000 (A\$0.70 to US\$1). This compares with a rise in the freight rate of say US\$1300 (which was the upper limit quoted by Nylex), which would now equate to around A\$1850 cf, a saving of around A\$79,000 per container! Whilst on a smaller scale, the proportional savings for Nylex are the same.

Whilst it may have been fortuitous, the exchange rate savings have had a favourable impact as far as importers are concerned.

Q. For importers, how has the current increase in rates affected your business? Can you increase your prices and pass on the rate increase or do you have to absorb the increase? Can you change your sources of supply away from North East Asia at short notice in response to the rise in rates?

A. Lines would contend that shippers have the opportunity to try to anticipate the likely trend in forward freight rates and as a normal business practise should routinely confer with their service providers to determine a budget for such factors. Indeed, this practise was recently commented upon by the Managing Director of Gluck Forwarding Systems (LLDCN 11th November 2003), a high profile Australian-owned company responsible for 15,000 teu in the Asian trade, who said in the context of 2004, that Gluck were forecasting three rate increases amounting to a total of about US\$450/teu plus an increased Peak Season Surcharge and observed that "These suggested rate increases are based on our discussions with lines and a collation of their responses over the last few weeks" and added "If demand significantly decreases or a new or existing shipping line significantly increases capacity these mooted increases may not transpire". The important issue here is seen as the need for shippers to be aware of potential rate increases and their possible impact they might have on their business.

It is also worth mentioning that when using the above circumstances relating to Harvey Norman's consignment of video machines, the recent freight increases per 20ft container would have amounted to only US\$0.21 cents per video when allowing for a rate increase of US\$250, or just US\$0.75 cents per video if the absolute worst case scenario of an increase of US\$900 applied. Such an insignificant increase is considered unlikely to have affected the business activities of such importer.

Q. Has the supply/demand picture changed in the world market for liner shipping services in the late 1990s and what effect would these changes be expected to have on freight rates to Australian importers, which source goods from North East Asia? How have these changes affected demand?

A. Global supply/demand factors have changed since the late 1990's. The most recent and relevant phenomenon is the shifting of the manufacturing base within Asia. This has created a situation where many Australian imports traditionally sourced from places such as Taiwan, are now obtained from markets providing a cheaper manufacturing economy, namely the People's Republic of China (PRC). Together with its recent admission into the WTO, exports from the PRC have boomed creating increased demand, most noticeably during the peak season, which in turn has placed pressure on rates of freight.

Imposition of Peak Season Surcharges

Q. Shipping lines have adopted the practice of implementing Peak Season Surcharges in addition to the freight rate for the duration of the high import season. What is the purpose of these charges?

A. In order to make space and containers available and arrange empty re-positioning of Dry surplus containers back to Asia, then carriers need to be compensated for this seasonal influx of cargo.

The Peak Season Surcharge was introduced in the AADA trade during 2001 at a time when the imbalance of the trade (Southbound vs Northbound) had grown to approx. 100,000 Teus. The imbalance has continued to widen and in 2002 grew to 130,800 Teus and is expected to reach 288,800 Teus for the 2003 season (source: Port statistics).

The cost of evacuating these surplus units varies from line to line, all depending on individual contracts with the stevedoring companies and the desired locations in Asia for these empty containers to be positioned to. An estimate of US\$ 170/Teu (US\$ 340/40') has been made and this would equal a yearly extra cost of US\$ 156/Teu for the 2003 season or US\$ 311/Teu for the second half of 2003, given that this is a seasonal charge). The current AADA Peak Season Surcharge is US\$ 200/Teu and expected to increase to US\$ 300/Teu for the 2004 season. Furthermore, to meet cargo demand requirements the positioning of additional equipment requires to be undertaken without any kind of compensation, although there clearly is a cost element involved.

Q. Do importers receive any benefits in return for these surcharges and / or do these cover any additional costs due to the peak season?

The cost structure has been clarified in the paragraph above.

The benefit to the importers is that lines are able to accommodate most of the volumes during the peak season, including giving preferential "treatment" to AADA importers versus relay cargo (Europe/Middle East/Americas), which currently does not attract a Peak Season Surcharge. One could state that if importers would ship their volumes in even quarters, i.e. 25 % in Quarter 1/25 % in Quarter 2 etc. etc. that the Peak Season Surcharge could then be withdrawn.

Q. Are decisions concerning the imposition and removal of peak season surcharges subject to negotiation between the AADA and the Importers Association of Australia?

A. Yes, the IAA does have the capability under Part X to require the AADA to negotiate the application of the peak season surcharge but only so far as it affects eligible Australian contracts.

The IAA has chosen not to exercise this facility.

Q. What factors are behind decisions to withdraw peak season surcharges and when in the peak season are these decisions taken?

A. On a voluntary and non-binding consensus basis, lines constantly review their lifting's and utilizations and assess when it is expected that space will free up, due to the seasonal influx being over. Once this is determined, AADA then makes an announcement to the trade (with one months notice) that the Peak Season Surcharge will be withdrawn.

Stability of freight rates

Stability of freight rates is claimed to be a generic public benefit of the operation of a registered agreement such as the AADA.

Q. Has the operation of the AADA contributed to stability in freight rate setting for liner cargoes from North East Asia since April 2000? If so is this likely to continue in the future?

A. The AADA has certainly facilitated a structured approach being taken to the ebb and flow characteristics of the trade since 2000. This is particularly apparent in the context of freight rate adjustments. The AADA, which represents a major influence in the North East Asia market, has served to synchronize rate variations, which allows the trade a degree of stability relative to the validity of freighting arrangements that would not otherwise exist. Although, lines intend to affect further rate adjustments during the course of 2004, such action will be taken having full regard to not only the AADA's obligations under Part X but also to the commercial implications for their customers.

Q. Does the AADA have a greater influence on stability of freight rates in a market where there is excessive demand or excessive supply of liner services?

A. The AADA has a greater influence on the stability of freight rates in a market where there is excess demand. At times of excess supply of liner services, regardless of the existence of a Discussion Agreement in the trade, exporters from North East Asia will optimise such favourable circumstances in a manner typical of that prevailing in any buyers market.

Q. If the AADA did not exist would there be more or less stability in the pattern of freight rates for imports from North East Asia observed in the market? Given that the current market is one of high demand, in which freight rates in a competitive market would be expected to increase do you believe that freight rates would have risen as quickly or by the same magnitude if there were no AADA?

A. Even without the existence of the AADA and by virtue of the current high market demand, it is felt freight rates would have increased but we can only guess at the timing and magnitude. However, the implementation of such action would have been less structured leading to greater instability in the market place.

5. Decision Making Regarding Freight Rates

The Commission seeks to understand how freight rates are individually negotiated between importers and the shipping lines. In particular it seeks to understand the extent of the involvement by overseas “Principals” in decisions concerning freight rate setting for imports from North East Asia and how this may affect the market.

Q. To what extent are overseas principals currently involved in setting freight rates for Australian importers for imports sourced from China, Taiwan and Hong Kong? Has this changed recently?

A. Lines principals who reside overseas are invariably involved directly in establishing and monitoring their company’s internal pricing guidelines/objectives in Australia. This is not a new phenomenon.

Q. If overseas principals do have a significant role in determining freight rates does this-

- *enhance or inhibit the competitive environment of inward liner cargo shipping services?*
- *enhance or inhibit the potential for importers to obtain competitive rates for inward cargo?*
- *represent a restriction on ocean carriers taking part in negotiations?*

A. The physical location of lines principals has no effect, neither adverse nor beneficial, upon any of these scenarios since Lines’ Australian representatives are sufficiently empowered to undertake negotiations for eligible Australian contracts in accordance with their companies internal pricing guidelines/objectives.

6. Service Standards Provided by the AADA.

Have service levels changed since the registration of the AADA in April 2000?

Q. Does the AADA contribute to the provision of stable liner services from North East Asia? Please comment.

A. The practice of AADA lines reviewing vessel capacities, utilisations and cargo demand on a collective basis provides a valuable means by which overall service requirements can be determined which in turn enhances the prospect of lines maintaining stable and adequate services.

Without such broad based intelligence, there would exist more likelihood of importers requirements being under estimated.

Q. Would the provision of liner services be as stable or as adequate to the needs of importers if there were no AADA, but ANZESC and the other consortia agreements remained?

A. It is considered the provision of stable or adequate services would not be enhanced through the de-registration of the AADA. Indeed, there is reason to believe an uncoordinated approach to service requirements based on market intelligence gathered by individual consortia would have a detrimental effect on such provision.

Q. To what extent do Australian importers currently have continued access to inward liner cargo shipping services of adequate frequency and reliability?

A. The extent of such services are no less than that stipulated in the Minimum Level of Service associated with the AADA's registered agreement under Part X of the TPA.

Q. To what extent has the involvement of overseas management in the decision making on Australia/NE Asian freight movement affected the quality and provision of inward liner cargo shipping services?

A. Whether Lines management happens to be located in Australia or overseas has no bearing upon the quality and provision of its services.

7. Investment in new tonnage

The Commission seeks to understand how the parties to the AADA have managed the supply of liner shipping services in a period of increasing demand. What is the general impact upon shippers?

Increases in demand and adequacy of liner services

Q. In your opinion is the current increase in demand for imports from China, Taiwan and Hong Kong temporary? Are demand levels for imports expected to remain above those achieved in the recent past?

A. The recent increase in demand for imports from China, Taiwan and Hong Kong is not considered to be temporary. Estimates suggest that imports from China in 2004 will increase by between 10-15% compared to a growth of 35% experienced in 2003. Taiwan and Hong Kong markets are forecast to grow marginally in 2004, by say around 5%.

Q. Is the current level of liner services offered by the parties to the AADA adequate to the current needs of Australian importers for this liner trade?

A. Services provided by the parties to the AADA exceed its minimum level of service. Whilst there have been occasions recently where shipments have required to be rolled back to following sailings owing to extra-ordinary demand levels, all means available to overcome such circumstances are pursued by members. A case in point being the current decision of one member to temporarily, at least, replace its existing tonnage with larger capacity vessels, which will help alleviate such pressure. Indeed,

such a measure provides a ready example of AADA lines preparedness to inject additional capacity to meet extra-ordinary demand whenever circumstances render such action possible.

Investment in new capacity by shipping lines in response to rising demand

Q. If there is increasing demand for imports from North East Asia relative to liner supply resulting in upward pressure on freight rates, in your opinion have the members of the AADA increased or tried to increase capacity to cope with the higher levels of demand?

A. The answer to the previous question appears to cover this point.

Q. Is there evidence of new investment in shipping capacity by competitors to the AADA?

A. The AADA has no knowledge of its competitor's intentions regarding investment in new tonnage.

Q. If the AADA members have not alleviated demand pressure by chartering in new tonnage into the trade, how attributable is this to the AADA? What is the role of the parties to the other registered agreements such as the Australian New Zealand Eastern Shipping Conference (ANZESC) in determining new investment in tonnage for the trade?

A. Decisions relating to the chartering of tonnage or the investment in new tonnage are taken within Consortia or by individual members. Neither the AADA nor ANZESC has a role in the determination of such matters.

Costs of increasing capacity and availability of suitable shipping

Q. What economic factors would contribute to the introduction of greater capacity on this liner trade in response to the increasing demand? In general what is the response time to introduce a new vessel into the liner trade?

A. All Operators would certainly view the complete round trip trade as a package i.e. lines would take into consideration both Northbound and Southbound volumes and revenues to determine whether to increase capacity. The response time to introduce a new vessel would vary according to the individual situation of the line involved. For example, a line may have surplus tonnage from another trade which it may redeploy into the Australian trade, another line may have ordered new vessels from shipbuilders (lead time here is currently between 2 and 3 years as most shipbuilding yards have full order books) or lastly a line may chose to go to the charter market and vessels of the most suitable size for the Australian trade (2000 - 3000 teus) are in extremely short supply and are not readily available.

Furthermore, the chartering of additional or introduction of larger capacity vessels must be economically viable. For this to be achieved, Southbound demand and freight rate levels in combination with Northbound demand and freight rates, must provide a return to lines that can sustain such investment. The current cost of operating additional capacity exceeds the revenue presently being achieved. Consequently, for lines to be able to position additional capacity on a long-term basis, freight rate increases need to be pursued.

Q. Have the costs of chartering new tonnage into the liner trade increased appreciably since January 2003? Has this contributed significantly to the perceived lag between rising demand and a supply response?

A. The attached table of average charter rates, sourced from Clarkson Research Studies, and accompanying chart, clearly illustrate the dramatic escalation in charter rates this year.

Q. What is the current general availability of suitable vessels for chartering into the North East Asia – Australia liner trades?

A. As mentioned above, there is a scarcity of suitable sized vessels at present and the market rates reflect this situation

Q. To what extent is the decreased vessel utilisation of northbound liner trades which would result from the chartering of more vessels a factor in delaying the supply response?

A. It is not only a matter of poor northbound utilisations, but also the virtual collapse in Northbound rates which would influence any decision to deploy additional tonnages. The trade has transformed due to circumstances beyond lines control into a virtual one-way trade and all investment decisions by definition need to be based on the current Southbound lifting's and revenue, coupled with the costs associated with Northbound cargo movement and repatriation of empty containers back to Asia.

Q. If there was no AADA would there be a greater supply response to the current condition of excess demand by the parties to the various agreements such as ANZESC?

A. Consistent with previous comments, the AADA and ANZESC do not figure in decisions relative to the provision of tonnage. Therefore, the de-registration of either or both registered agreements would have no affect upon such issue.

8. Negotiation Processes

Part X provides for negotiations between the shipping line parties to the registered agreements, such as the AADA and the designated peak (such as the Importers Association of Australia) and secondary bodies (such as the Australian Federation of International Forwarders), which act on behalf of importers.

Q. What is the nature of the negotiation process involving AADA member lines and shippers?

A. Notwithstanding the AADA's preparedness to enter into negotiations with the IAA or any secondary body, in relation to eligible Australian contracts, to date such importer organisations have chosen not to seek such discussions.

Individual importers have similarly not sought to negotiate their eligible Australian contracts with the AADA.

Q. Are the operations of the shipping lines structured in a way that is conducive to negotiations?

A. Taking the parties to the AADA as an example, lines are equally geared to meeting the trades collective requirements, through say the IAA, or through the process of privately negotiating commercial arrangements with their individual customers.

Q. Have some importers preferred to negotiate individually rather than adopt a collective negotiation stance as envisaged in Part X? What effects has this had on outcomes?

A. As mentioned above, importers have opted not to negotiate collectively with the AADA in relation to arrangements affecting eligible Australian contracts. Instead, importers have elected to negotiate privately with their preferred service suppliers.

Q. To what extent does the involvement of overseas management to decision making concerning NE Asian – Australian freight rate setting affected the negotiation process?

A. The physical location of lines management has no affect upon their negotiation of eligible contracts in Australia.

9. Access to Import Markets

One of the objectives of Part X is to ensure that importers in all States and Territories have stable access to import markets.

Q. Have the actions of shipping lines allowed importers to have stable access to import markets in North East Asia?

A. Apart from the effects of the recent extra-ordinary demands on capacity, which the parties to the AADA are currently attempting to address, within the prevailing financial and physical limitations, the services provided by the AADA can be said to have allowed importers stable access to North East Asia markets.

Q. Are there specific cases to demonstrate that the AADA has affected the scale of shipment of inward cargo from NE Asia since 2000?

A. Despite the unsatisfactory levels of revenue achieved by lines, the AADA has consistently fulfilled its minimum levels of service.

10. Competition and Trade Agreements on the NE Asian Trade Route

Under Part X, liner operators have registered a wide variety of agreements ranging from full conferences to non-binding discussion agreements, as well as technical agreements covering slot swapping and rationalisation of sailings.

Discussion agreements involve both conference members and independent operators on a particular trade route discussing matters of mutual interest, typically including

freight rates. Consequently, discussion agreements have the potential to limit choices for shippers on a particular route and generally raise the potential for anti-competitive behaviour.

Q. Is there competition for inward cargo (a) between conferences and independents within AADA? and (b) between the AADA (including independents) and non-AADA members?

A. In the absence of any common freight tariff, and recognising that any decisions reached within the AADA are based on a non-binding consensus, competition prevails amongst all members and non-members of the AADA.

Q. Is there any evidence of price competition to the AADA offered by non-AADA slot charter services such as Gold Star Line and APL which use AADA vessels?

A. The independent pricing policies on non-AADA lines are best determined directly from such parties.

Q. Are there any examples that demonstrate that the conduct of shipping lines has changed materially since the formation of the AADA?

A. There are none that can be readily suggested.

Q. To what extent have discussion agreements hindered or enhanced competition for inward liner cargo shipping services on the NE Asian- Australian liner trade route?

A. The existence of the AADA has neither hindered nor enhanced competition on the North East Asia trade route. The AADA's presence does not pose an obstacle to entering the trade since it operates on a non-binding consensus basis and does not exhibit any prohibitive conditions barring entry to membership or lay claim to any exclusive rights to cargoes.

Q. Do the AADA members offer a significantly superior service to alternatives, such as the break bulk service offered by Project Asia Service or transshipment services through Singapore? To what extent do you consider these alternatives to be viable substitutes?

A. Although AADA members offer direct services with superior frequency and transit times to break bulk and transshipments operators, such attributes are not necessarily viewed as being priorities for all exporters or importers. Additionally, in order to compensate for such shortcomings, transshipment operators tend to offer shippers lower freight rates. Consequently, the use of such alternative services does pose a real option to the trade albeit limited by its capacity at this point in time.

11. Ease of entry by shipping companies into the North East Asia-Australia Liner Trade

The Commission seeks views on the likelihood of new entry into the North East Asia-Australia liner trade and the effect that this may have on freight rate rises.

Q. Are there any significant regulatory or other cost barriers to new entrants contributing new services and tonnage to the southbound liner trade?

A. There are none.

Q. If not why has there been no entry on a significant scale in response to the current demand increase? Given that there are sixteen major shipping lines operating in the AADA, are there suitable new entrants that could enter the trade in the near future? Could it be expected that lines that have recently vacated this trade could rejoin in the near future?

A. It could be speculated that when compared with opportunities that exist on other international trade lanes, the relatively poor returns being achieved on the round voyage trade between North East Asia and Australia, render entry into this trade an unattractive proposition.

However, the possibility certainly exists for new lines, or lines that previously withdrew from the service, entering the trade in the near future.

Q. Do the parties of the AADA and other interested parties expect a significant entrant into the North East Asia-Australia liner trade in the near future? Does this affect any plans to further increase freight rates?

A. There is currently no expectation of a significant entrant into the trade in the near future.

Q. Do you believe that the parties to the AADA have significant incumbency advantages over new entrants in the form of market presence, customer loyalty, market knowledge, lower costs and better service?

A. As with any market, the incumbent supplier of services would expect a reasonable degree of incumbency advantage in the areas listed. Nevertheless, new entrants have the ability to nullify to a large extent such benefits through the offering of aggressive market share driven pricing policies.

Q. Recent experience suggests that new entrants to the trade have joined the AADA soon after entry. What are the reasons for this?

A. Membership of the AADA holds the attraction of gaining a broad understanding of the market place including overall supply/demand factors and freight rate trends. Such knowledge has the benefit of providing a more stable operating environment to the mutual advantage of the new entrant and trade as a whole.

12. Regulatory Jurisdictional Issues

The parties to the Asia-Australia Discussion Agreement are not only subject to Australian competition law through Part X of the TPA, but may also be subject to the jurisdiction of competition laws of other nations, namely in this case the Peoples Republic of China (PRC), Hong Kong, Taiwan, Japan and Korea. The Commission

seeks to understand if the compliance of the parties to the AADA to the competition laws of these three countries affects the ability of the parties to the AADA to comply with Part X of the TPA.

Q. Can you give a brief description of the main elements of Government regulation governing competition in export liner trades for the countries of PRC, Hong Kong and Taiwan?

A. (a) PRC

The PRC regulations governing competition in export liner trades may be described as follows: -

Article 27 of “Regulations of the People’s Republic of China on International Maritime Transportation” regulates that : none of the following acts may be committed in the operation of international shipping services or non-vessel-operating services: -

- (1) providing service at lower freight rates than normal and reasonable ones, thereby prejudicing fair competition;
- (2) offering secret rebates to shippers, not being reflected in the book-keeping, for the purpose of soliciting cargoes;
- (3) arbitrarily taking advantage of its dominant position to impose discriminatory freight rates or other restrictive terms detrimental to the other party of the transaction;
- or
- (4) committing any other acts detrimental to the other party of the transaction or the order of international shipping market.

Article 35 regulates that the Ministry of Communications of PRC may, upon the request of the interested parties or at its own discretion, conduct investigations into any act as specified in Article 27 of these regulations.

Regulations of the People’s Republic of China on International Maritime Transportation does not concern whether lines may meet and discuss rates in PRC.

(b) Hong Kong

There is no legislation and there are no regulations in Hong Kong governing competition in export liner trades for Hong Kong. That means liner operators, terminal operators and shippers are free to make arrangements amongst themselves, which may restrict competition. As between the parties to such an agreement; common rules with regard to enforceability of such agreement may apply, but the Governments will take no part in any dispute.

(c) Taiwan

The applicable laws pertaining to competition and relevant to the shipping industry are the Fair Trade Act (FTA) and the Shipping enterprise Act (SEA). However, since the TFA and the SEA are relatively new, both the laws and their enforcement rules are not comprehensive, with scarce precedent or authority to rely on for statutory interpretation. In the event a question of interpretation or any other problems arise, the relevant authority often look to the legislation, practice and precedent of developed nations, mostly that of the USA, European Union, Canada and Japan. Sometimes they

would refer to the precedents and legislation of Korea, it being a country that is in many ways similar to Taiwan.

Fair Trade Act

Article 14

This law is enacted for the purpose of maintaining trading order, protecting consumers' interest, ensuring fair competition, and promoting economic stability and prosperity. Unless otherwise provided for in this Law the provisions of other relevant laws shall apply.

Article 14

No enterprise shall have any concerted action; unless the concerted action that meets one of the following requirements is beneficial to the economy as a whole and in the public interest, and the application with the central competent authority for such concerted action has been approved;

1. unifying the specifications or models of goods for the purpose of reducing costs, improving quality, or increasing efficiency;
2. joint research and development on goods or market for the purpose upgrading technology, improving quality, reducing costs, or increasing efficiency; each developing a separate and specialized area for the purpose of rationalizing operations;
3. entering into agreements concerning solely the competition in foreign markets for the purpose of securing or promoting exports;
4. joint acts in regards to the importation of foreign goods for the purpose of strengthening trades.
5. joint acts limiting the quantity of production and sales, equipments, or prices for the purpose of meeting the demand orderly, while in economic downturn, the market price of products is lower than the average production costs so that the enterprises in a particular industry have difficulty to maintain their business or encounter a situation of overproduction; or
6. joint acts for the purpose of improving operational efficiency or strengthening the competitiveness of small-medium enterprise.

Prior to the 1999 amendment to the FTA the activities of the shipping industry were monitored and regulated primarily by the Ministry of Transportation and Communications (MOTC), assisted by its local shipping administration authority (i.e. the local harbour bureau; in particular the Keelung Harbour Bureau). The relevant provision of the FTA prior to the 1999 amendment reads:

“Article 46. Where the conducts of enterprises comply with any other law, such other law shall govern and this Act shall not apply”

The general practice of the MOTC has been to treat discussion agreements and conferences between carrier groups as “International Joint Service Organisations “ (“IJSO”) which are defined by the SEA as:

“Article 2(11) “International Joint Service Organisations” means the organization set up by vessel carriers under an agreement, wherein the member carriers discuss matters relating to the operation in the international routes, such as sea freight rates, passenger ticket fees, volume of carriage and charter space”

Traditionally, the MOTC is inclined to interpret the definition section broadly so as to cover loosely organised groups and agreements. The SEA does not directly regulate

the freight conferences or discussion agreements, but simply treated them as IJSO. The SEA requires IJSOs to have filed their tariffs with the MOTC and be subject to correction orders by the MOTC under Article 40, thereby effectively excluding the application of the FTA. This Article provides:

“Article 39. ROC and foreign vessel carriers engaging in ROC commerce while joining an international joint service organization shall file the name, agreement and the register of members of the organization with the local shipping administration authority for ratifying to submit to MOTC for filing and inspection. If the organization referred to hereinbefore is organized primarily for discussion of freight rates and charges and ticket fares, the tariff of member carriers may be filed by the organization instead.”

“Article 40. If the agreement of the organization mentioned in the preceding Article impedes the ROC order of shipping or commerce development, the shipping administration authority may order to make correction within a definite period. Refusal to correct or failure to improve may cause the shipping administration authority to impose on all or part of its member carriers the punishment of prohibition against or restriction of commercial activities in the ROC territory.”

Q. By complying with the provisions of the competition law regimes of these three countries, does the parties to the AADA experience any difficulty in complying with the new provisions of Part X in relation to inbound liner trades? Please explain.

A. (a) PRC

Article 22 of the Regulations regulates that photocopies of liner conference agreements, service operation agreements and freight rate agreements concluded between international shipping operators engaged in international liner services in which Chinese ports are involved shall be submitted to the Ministry of Communications within 15 days from the date of conclusion of such agreements. So it needs to file the liner conference agreements, service operation and freight rate agreements though the Regulations do not say what minimum level of service shall be filed in the above-mentioned agreements. The minimum level of service in the Regulations seems less clear and less restrictive than that of Australia.

(b) Hong Kong

As there are no rules to comply with in Hong Kong, there are no impediments or restrictions on complying with the laws of Australia with regard to competition in inbound liner trades.

(c) Taiwan

Given that the applicability of FTA to exports liner trades is still unclear at the present time, the SEA is the pertinent competition law of Taiwan for the present case. And given that under SEA, International Joint Service Organisations (“IJSOs”), of which AADA should fall under, are in general permissible, parties to the AADA should not experience any difficulty in complying with the new provision of Part X by complying with the SEA of Taiwan.

Q. By complying with the provisions of the new provisions of Part X relating to inbound liner trades, does this create problems for the AADA in complying with the provisions of the competition laws of any of the above three countries? Please explain.

A. (a) PRC

Article 20 of the Regulations regulates that the freight rates of international shipping service operators and non-vessel-operating common carriers engaged in the business of international liner services shall be filed in specified format with the Ministry of Communications. The Ministry of Communications shall designate a special body for handling the filing of freight rates. The freight rates submitted for the filing shall include tariff rates and negotiated rates. Tariff rates refer to the freight rates shown in the tariff of international liner service operators and non-vessel-operating common carriers; while negotiated rates refer to the freight rates agreed upon between international liner service operators and shippers or non-vessel-operating common carriers. The tariff shall come into effect 30 days after the day upon which the tariff rates have been accepted for the filing by the Ministry of Communications. The negotiated rates shall come into effect 24 hours after acceptance for the filing by the Ministry of Communications. International liner service operators and non-vessel-operating common carriers shall implement the effective tariff rates that have been submitted for the filing. It has to be pointed out that this Article is not yet implemented because the Ministry of Communications have not yet established the detailed rules relating to the tariff rate and negotiated rate filing.

(b) Hong Kong

Compliance with the laws of Australia with regard to competition on inbound liner trades will not create a problem for a party in complying with Hong Kong law (as there are no competition laws to comply with).

(c) Taiwan

Given that SEA is the pertinent competition law of Taiwan at the present time, and that Part X contains more restrictions on AADA than SEA does, compliance with the new provisions of Part X relating to inbound liner trades should not create any problem for the AADA in complying with SEA of Taiwan.

Q. By complying with the provisions of the competition laws of the above three countries does this create problems for the parties to the AADA in cooperating fully in this Part X investigation? If so please explain.

(a) PRC

Compliance with the provisions of the competition laws of PRC is not expected to create problems for the parties to the AADA in cooperating fully in this Part X investigation.

(b) Hong Kong

There are no restrictions under Hong Kong law, which prevent a part to the AADA from cooperating with the relevant authorities in Australia with regard to an investigation regarding compliance with Australian competition law with respect to inbound liner trades.

(c) Taiwan

Given that SEA is the pertinent competition law of Taiwan at the present time, compliance with SEA of Taiwan should not create any problem for the parties to the AADA in cooperating fully in the Part X investigation.

The above circumstances clearly support the long held belief of the AADA lines and Professor James Crawford, that **ultimately the local regulations affecting outward liner shipping should be taken as being paramount so as to avoid conflicts arising from overlapping jurisdictions.**